IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 325 of 2012

BETWEEN : **DILIP KUMAR** and **JYOTSNA KUMAR** both of Suva trading as 'Binaco Textiles'.

PLAINTIFFS

A N D : **PARSHOTAM LAWYERS (**formerly known as Parshotam & Co.), Barristers and Solicitors of Suva (a firm)

DEFENDANTS

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. John Connors with Mr. Vijay Maharaj for the Plaintiffs

: Mr. Devanesh Sharma with Mr. Vinit Singh for the Defendants

RULING

Introduction and Background

[1] This is an application made by the Defendants, by way of a Summons for Leave to Appeal and Stay Pending Appeal, against the Ruling made by this Court on 23 January 2017. The substantive action instituted by the Plaintiffs was by way of a Writ of Summons. The original Writ of Summons and Statement of Claim were filed on 12 December 2012.

[2] On 27 May 2014, Court granted the Plaintiffs leave to file an amended Statement of Claim, which was filed in Court on the same day. As per the said Amended Statement of Claim the Plaintiffs, inter alia, state as follows:

1. That the Defendants are and were at all material times a firm of Solicitors carrying on their practice at Level 2 Mid City Building, Waimanu Road, Suva.

2. At all material times the Plaintiffs were the tenants and occupiers of a bulk store situated at 49, Dabea Circle, Kalabo Subdivision and were owners of the goods stored therein.

3. On 10 September 1994, the Plaintiffs' warehouse was damaged by a fire in the circumstances that gave the Plaintiffs a right of compensation under the Fire Policy and/or right of action against their Insurance Company (The National Insurance Company of Fiji and now known as Tower Insurance).

4. On or about January 1995 the Plaintiffs instructed and retained the Defendants who agreed to act as Solicitors for the Plaintiffs in making a claim and taking proceedings against the Insurance Company for compensation under the insurance policy.

5. It was an implied term of the said agreement and it was also the duty of the Defendants to exercise all due care, skill and diligence in and about the prosecution of the said claim and proceedings against the said Insurance Company.

6. In breach of the said term or the said duty or by reason of negligence on the part of the Defendants, their servants or agents, the Defendants failed to exercise any or any due skill or diligence in or about the prosecution of the said claim or proceedings.

7. The particulars of negligence has been described as failure to warn or advice the Plaintiffs that the limitation period in terms of the insurance

policy within which an action for prosecution of the right in relation to a claim for compensation pertaining to damages to the Plaintiffs' said property by fire was 12 months from the happening of the loss or damage, in this case from 10 September 1994; and failure to commence an action to prosecute the right within 12 months from the happening of the loss or damage, which was on or before 10 September 1995; and thereby causing or permitting the said claim of the Plaintiffs against the Insurance Company to become statute barred; and that the Defendants knew or ought to have known that the time within which the action should have been commenced was on or before 10 September 1995.

8. And accordingly the Plaintiffs claim damages, interest pursuant to the Law Reform Miscellaneous Provisions (Death and Interest) Act, Costs and such further and other reliefs that Court may grant in the circumstances of the case.

[3] The Defendants filed an Amended Statement of Defence and Amended Counterclaim on 10 December 2014. The Plaintiffs filed a Reply to the Amended Statement of Defence and Amended Defence to Amended Counterclaim on 19 December 2014.

[4] A Pre-Trial Conference had been held between the Solicitors for the Plaintiffs and the Defendants and the Minutes of the said Pre-Trial Conference have been filed in Court on 13 October 2015.

[5] On 2 February 2016, the Defendants filed a Summons to Strike Out this action. This was said to be in terms of Order 18, Rule 18 and Order 33, Rule 3 of the High Court Rules 1988 and Section 4 of the Limitation Act (Chapter 35 of the Laws of Fiji). The Summons is supported by an Affidavit deposed to by Subhas Chandra Parshotam, a Partner of the Defendants law firm.

[6] The basis on which the Defendants were moving for the action to be struck out and dismissed was that the action was instituted beyond the time permitted under the Limitation Act for the Plaintiffs to commence the said action.

[7] On 11 February 2016, the First Named Plaintiff, Dilip Kumar, filed an Affidavit opposing the Strike Out application. Subhas Chandra Parshotam filed an Affidavit in Reply, on 22 February 2016.

[8] The matter came up for hearing before me on 24 February 2016. On the said day the Counsel for the Plaintiff took up an objection that the latter Affidavit filed by Subhas Chandra Parshotam, raised several issues of fact and for that reason the Plaintiffs would require to cross examine him.

[9] However, this matter was subsequently resolved, with the Plaintiffs and the Defendants filing several further Affidavits in support of their respective legal positions.

[10] Subsequently, on the 19 April 2016, the Plaintiffs filed a Summons, and with the permission of Court an Amended Summons (on 29 April 2016), seeking leave to amend their Reply to Defendants Amended Statement of Defence and Counterclaim, filed on 19 December 2014. The said Amended Summons was filed pursuant to Order 20, Rule 5(1) of the High Court Rules.

[11] Thus when the matter came up before me for hearing on 13 May 2016, there were two pending interlocutory applications before Court.

(i) The Summons to Strike Out, which was filed by the Defendants on 2 February 2016; and

(ii) The Amended Summons to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim, which was filed by the Plaintiffs on 29 April 2016.

[12] The Counsel for the Plaintiffs submitted that the Amended Summons filed by the Plaintiffs should be taken up for hearing first, whereas the Counsel for the Defendants, disagreed and, submitted that the Summons to Strike Out filed by the Defendants should be taken up for hearing first.

[13] Since there was no agreement on this issue, Court called upon both Counsel for the Plaintiffs and the Defendants to satisfy Court as to whose application should be taken up for hearing first.

[14] On 17 June 2016, this Court made a Ruling that both pending interlocutory applications would be taken up for determination at one and the same hearing. The application filed by the Defendants for striking out would be taken up for hearing first. The Counsel for the Plaintiffs would be at liberty to make his submissions in response to the application for striking out and at the same time, support the Plaintiffs' application made by way of Amended Summons. The hearing would proceed in that order until its conclusion. At the end of this hearing the Court would make one Ruling covering both applications.

[15] Accordingly the hearing of both interlocutory applications was taken up for hearing before me on 18 July 2016.

[16] On 23 January 2017, I made the following Orders:

1. The Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules 1988, made by the Defendants is dismissed.
2. The Defendants shall pay the Plaintiffs costs summarily assessed at FJD $1,000.
3. The application made by the Plaintiffs to amend their Reply to Defendants Amended Statement of Defence and Counterclaim is allowed.
4. The Plaintiffs shall pay the Defendants costs summarily assessed at FJD $1000.
5. Since both the Plaintiffs and the Defendants have been ordered costs in the sum of FJD $1000 to be paid to each other, the said costs can be set off by the parties.

[17] Aggrieved by my above Orders, the Defendants filed this application by way of Summons for Leave to Appeal and Stay Pending Appeal. The said Summons was filed on 7 February 2017. The application is said to be made pursuant to Section 12 (2)(f) of the Court of Appeal Act (Chapter 12); Rule 26(3), Rule 27 & Rule 34(1) of the Court of Appeal Rules; and Order 3, Rule 4 of the High Court Rules 1988; and pursuant to the inherent jurisdiction of the High Court.

[18] The Summons was supported by an Affidavit sworn on the same day by Subhas Chandra Parshotam, a Partner of the Defendants law firm.

[19] The Second Named Plaintiff filed an Affidavit in Opposition, on 23 February 2017, while Mr. Subhas Chandra Parshotam, filed an Affidavit in Reply, on 30 March 2017.

[20] This matter was taken up for hearing before me on 31 March 2017. Both Counsel for Plaintiffs and Defendants were heard. The parties also filed detailed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

THE SUMMONS FOR LEAVE TO APPEAL AND STAY PENDING APPEAL

[21] As per the Summons Seeking Leave to Appeal the Interlocutory Ruling and Stay pending Appeal, the Defendants seek the following Orders:

A. The Defendants be granted Leave to Appeal to the Court of Appeal the decision of the Honourable Mr. Justice Hamza, delivered on 23 January 2017.

B. The time for filing and serving a Notice of Appeal be extended to 14 days from the granting of Leave to Appeal to the Court of Appeal in the event Leave is granted.

C. The proceedings in the High Court be stayed in the meantime in the event that such leave is granted until the delivery of the judgment of the Court of Appeal on any appeal brought in terms of such leave.

D. The time for service of this Summons be abridged.

THE PROPOSED GROUNDS OF APPEAL

[22] In the proposed Notice of Appeal and Grounds of Appeal annexed to the Affidavit in Support of this Summons, the Defendants have taken up the following grounds of appeal:

A. His Lordship erred in not finding the Plaintiffs' cause of action, if any, arose on 10 September 1995.

B. His Lordship erred in finding a separate cause of action existed which arose on 12 May 2012.

C. His Lordship erred by failing to find that the Plaintiff's claim was statute barred pursuant to Section 4 of the Limitation Act (Chapter 35).

D. His Lordship erred in failing in distinguish the decision in ***Hawkins v. Clayton*** (1987-1988) 164 CLR; on its facts against the facts of the present case.

E. His Lordship erred in not striking out the Plaintiffs' claim pursuant to Order 18, Rule 18(1) of the High Court Rules 1988.

F. His Lordship erred in permitting a Reply which would operate outside the ambit of Order 18, Rule 3 of the High Court Rules in so far as it raised a new cause not pleaded in the Amended Statement of Claim.

G. The proposed Amended Reply would be embarrassing to the Defendants and contrary to the decision of ***Williamson v. London and North Western Railway Company*** (1879 – 1880) 12 Ch D 787 at 793 (Referred to under Order 18, Rule 3 of the White Book).

LEGAL PROVISIONS AND ANALYSIS

[23] The Defendant has filed these Summons pursuant to Section 12 (2)(f) of the Court of Appeal Act (Chapter 12); Rule 26(3), Rule 27 & Rule 34(1) of the Court of Appeal Rules; and Order 3, Rule 4 of the High Court Rules 1988.

[24] Section 12 of the Court of Appeal Act has laid down the provisions applicable for "Appeals in civil cases." Section 12(2) (f) provides that:

> *"(2)* ***No appeal shall lie****-*
>
> …….
>
> *(f)* ***without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court****, except in the following cases, namely:-*
>
> *(i) where the liberty of the subject or the custody of infants is concerned;*
>
> *(ii) where an injunction or the appointment of a receiver is granted or refused;*
>
> *(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act (Cap. 247) in respect of misfeasance or otherwise;*
>
> *(iv) in the case of a decree nisi in a matrimonial cause or judgment or order in an Admiralty action determining liability;*
>
> *(v) in such other cases as may be prescribed by rules of Court.*
>
> [Emphasis is mine].

[25] Rule 26 of the Court of Appeal Rules states:

> *"26.-(1) Every application to a judge of the Court of Appeal shall be by summons in chambers, and the provisions of the High Court Rules shall apply thereto.*
>
> *(2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.*

(3) ***Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.****"*

[Emphasis is mine].

[26] Rule 27 of the Court of Appeal Rules sets out that "*Without prejudice to the power of the Court of Appeal, under the High Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period."*

[27] Rule 34(1) of the Court of Appeal Rules is reproduced below and reads:

"*34.- (1) Except so far as the court below or the Court of Appeal may otherwise direct-*

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal."

[28] Order 3, Rule 4 of the High Court Rules contains provisions in regard to applications for extension of time.

[29] At the very outset of the hearing in this matter, Counsel for the Plaintiffs objected to the Affidavit in Support, filed on 7 February 2017, by Mr. Subhas Chandra Parshotam. The basis for this objection was that the Affidavit (in particular paragraphs 7, 8 & 10 of the said Affidavit) is not filed in compliance with Order 41, Rule 5 of the High Court Rules. Accordingly, he moved that the Affidavit be struck out in terms of Order 41, Rule 6 of the High Court Rules, which provides that *"The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive."*

[30] Order 41, Rule 5 of the High Court Rules reads as follows:

"(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an

affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

[31] The Counsel for the Plaintiffs contended that paragraphs 7, 8 & 10 of the Affidavit in Support do not contain facts that the deponent is able on his own knowledge to prove. In support of this contention Counsel referred to the case of ***Tuinakelo v. Director of Lands*** [2003] FJHC 327; HBC0303.2002 (1 January 2003); where His Lordship Jiten Singh expressed the view:

".....I must say that the plaintiff's affidavit dated 14th day of 2002 has to a significant extent gone beyond outlining facts and has expressed opinions and statements of law. Affidavits must state facts only to comply with Order 41 Rule 5 of the High Court Rules."

[32] However, Court agrees with the contention of the Counsel for the Defendants, that the current proceedings being interlocutory in nature, there is room for more flexibility in the filing of Affidavits. Order 41, Rule 5(2) of the High Court Rules clearly provides that an Affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[33] Therefore, this Court accepts the Affidavit in Support of Mr. Subhas Chandra Parshotam, filed on 7 February 2017.

[34] During the course of the hearing, both Counsel for the Plaintiffs and Defendants addressed Court on the principles the Court should take into account in considering applications for leave to appeal against interlocutory decisions and rulings in the course of the trial process and also the factors that should be considered for granting of a stay pending appeal.

[35] In the case of ***The Public Service Commission v. Manunivavalagi Dalituicama Korovulavula*** [Unreported] Civil Appeal No. 11 of 1989 (23 June 1989); which was an

application for leave to appeal against an interlocutory order made by the High Court (Per Jesuratnam J); the Fiji Court of Appeal held:

> *".....I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It would therefore, not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the order intended to be appealed against.*
>
> *However, if prima facie, the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not."*

[36] In ***KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited*** [1994] FJCA 24; ABU 12e of 1994s (27 May 1994); the full bench of the Court of Appeal (Tikaram, Quillam and Savage JJ) upheld the decision of Thompson JA who had held:

> *"The granting of leave to appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law. The learned judge has given full reasons for the order he has made. There is no suggestion of impropriety in the appellant's affidavit. There is an allegation of misconception of the law, but if there was a misconception of the law, it is not a clear case of that. That matter can be made a ground of appeal in any appeal against the final judgment of the High Court, if the appellant is unsuccessful in the proceedings there."*

[37] In so doing Their Lordships said:

> *"We do not agree that the intended question for the Court of Appeal involves a point of law of any great significance. The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in* ***Ashmore v Corp of Lloyd's*** *[1992] 2 All E R 486 -*
>
> ***"Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."****"*

[38] Sir Moti Tikaram, then President Fiji Court of Appeal in ***Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited*** [1995] FJCA 15; ABU 34d of 1995s (18 July 1995) held;

> *"I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see **Hubball v Everitt and Sons (Limited)** [1900] 16 TLR 168).*
>
> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example **Ashmore v Corp of Lloyd's** [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords."*
>
> *……*
>
> *"If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore, no injustice can result from refusing leave to appeal.*
>
> *The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."*

[39] In *Kelton Investments Limited* (supra) His Lordship also relied upon a decision of the Supreme Court of Victoria in ***Niemann v. Electronic Industries Ltd*** (1978) VR 431; where Murphy J said (at page 441):

> *"Likewise in **Perry v Smith** (1901), 27 VLR 66 & **Darrel Lea Case** [1969] V.R. 401, the Full Court held that leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct, then it follows that substantial injustice could not follow. If the order is deemed to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.*

It appears to me that greater emphasis must lie on the issue of substantial injustice directly consequent on the order. Accordingly, if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may more easily be seen that leave to appeal should be given."

[40] Sir Moti Tikaram in ***Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers*** [Unreported] Civil Appeal No. 35 of 1996S (12 September 1996), at page 6 said:

"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances."

[41] These principles have been adopted by the Fiji Court of Appeal in ***Gosai v Nadi Town Council*** [2008] FJCA 1; ABU 116.2005 (22 February 2008).

[42] In ***Patel v Kant*** [2014] FJHC 252; HBC16.2011 (11 April 2014); it was held by the High Court of Fiji:

"*The defendant in leave to appeal application should satisfy court that;*

a. The decision was wrong, or at least attended with sufficient doubt to justify granting leave and;
b. Substantial injustice would be done if it's not reversed as held in.

Niemann –v- Electronic Industries Ltd*, 1978 VR 431 and also should satisfy court that there are arguable legal issues and the intended appeal has merit.* ***The Fiji Public Service Commission –v- Manunivavalagi Dalituicama Korovulavula*** *(unreported) FCA Civil Appeal No. 11 of 1989."*

[43] Furthermore, in ***Dinesh Shankar v. FNPF Investments Limited and Venture Capital Partners (Fiji) Limited*** [2017] FJCA 26; ABU32.2016 (24 February 2017); President Fiji Court of Appeal, His Lordship Justice Calanchini held:

"*The principles to be applied for granted leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory*

*decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only by shown to be wrong but it must also be shown that an injustice would flow if the impugned decision was allowed to stand (**Niemann –v- Electronic Industries Ltd** [1978] VR 431). See: **Hussein –v- National Bank of Fiji** [1995] 41 Fiji LR 130.*

[44] The principles relating to the granting of stay pending appeals was enunciated in the case of ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*** [2005] FJCA 13; ABU0011.2004S (18 March 2005); in the following form:

"The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):

*On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": **Duncan v Osborne Building Ltd** (1992) 6 PRNZ 85 (CA), at p 87.*

*The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd** (1999) 13 PRNZ 48, at p 50 and **Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission** (1993) 7 PRNZ 200:*

*(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd** [1977] 2 NZLR 41 (CA).*

(b) Whether the successful party will be injuriously affected by the stay.

(c) The bona fides of the applicants as to the prosecution of the appeal.

(d) The effect on third parties.

(e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience and the status quo."

[45] In ***Haroon Ali Shah v. Chief Registrar*** [2012] FJCA 101; ABU50.2012 (3 December 2012); His Lordship Justice Calanchini said:

> *"[14]. The approach that should be adopted by a court to the exercise of its discretion whether to grant a stay pending the determination of an appeal was discussed by Gates CJ sitting as a single judge of the Supreme Court in* ***Stephen Patrick Ward –v- Yogesh Chandra*** *(unreported civil appeal CBV 10 of 2010 delivered on 20 April 2010). The starting point in any stay application is to determine whether the Appellant's circumstances are sufficiently exceptional for the grant of stay relief pending appeal. In answering that question Gates CJ in the same decision (supra) stated that it was necessary to consider the principles discussed by the Court of Appeal in* ***Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd*** *(civil appeal ABU 11 of 2004 delivered 18 March 2005).*
>
> *[15]. In general terms, in so far as appeals involving tort or contract cases where a money judgment has resulted, there will be no stay except in special or exceptional circumstances. Even then, in the rare case when a stay may be allowed, a condition of the stay is usually imposed that the judgment amount should be brought into court.*
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> *[16]. In* ***Dorsami Naidu –v- The Chief Registrar*** *(unreported civil appeal ABU 38 of 2010 delivered 2 March 2011) Marshall JA in a single judge Ruling commented on the issue of the chances of success being a factor in considering a stay application. The learned judge concluded that strong grounds of appeal have no impact upon a stay being granted and that such a factor does not constitute a special circumstance. In reaching that conclusion, Marshall JA made reference to* ***Atkins –v- Great Western Railway*** *(1885 – 86) 2 Times Law Reports 400 and in particular to the observation of Lord Esher MR: "strong grounds of appeal is no reason for no one ought to appeal without strong grounds for doing so."*
>
> *[17]. The best that can be said about this factor is that when it has been established that there are exceptional chances of success, that matter may become a special circumstance which when considered with the other principles may justify the grant of a stay pending appeal."*

[46] These principles were further reiterated by the President of the Court of Appeal, His Lordship Justice Calanchini in ***New World Ltd v Vanualevu Hardware (Fiji) Ltd*** ABU0076.2015 (17 December 2015):

> *"The factors that should be exercised by this Court in an application such as is presently before Court were identified in* ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*** *[2005] FJCA 13; ABU0011.2004S (18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay."*

[47] Therefore, it is clear that leave to appeal against interlocutory decisions should only be granted in the most exceptional circumstances. Leave to appeal would not normally be granted unless substantial injustice would be caused to a party (in this instance to the Defendants). It is also incumbent on the Defendants to establish that there is a reasonable prospect that the appeal would succeed on the proposed grounds of appeal which they are relying upon if leave were to be granted. The same principles would apply to stay pending appeals as well.

[48] During the course of the hearing of this application, Counsel for the Defendants submitted that there was a serious error of law on the face of the record; and that substantial prejudice or injustice would be caused to the Defendants if leave to appeal was not granted. In his view, these were adequate exceptional circumstances for Court to grant leave to appeal.

[49] Reading through the proposed Grounds of Appeal, I find that the Defendants have formulated 7 Grounds of Appeal [From A – F]. The first 5 Grounds of Appeal relate to the dismissal of the Summons for Striking Out; and the latter 2 Grounds of Appeal relate to this Court permitting the Plaintiffs to amend their Reply.

[50] The primary basis on which the Defendants were seeking the striking out of this action was founded in the Affidavit (dated 2 February 2016) deposed to by Subhas Chandra Parshotam, in support of the Summons for Striking Out. Therein it is stated thus:

> "15. The said (instant) Action was commenced by the Plaintiffs on 12 December 2012.

16. The claim under the said Action is being defended by the Defendants.

17. I am advised by Counsel and verily believe that the Plaintiffs' cause of action against the Defendants did not accrue within six (6) years before the commencement of the said Action, namely 6 years from 10 September 1995. In other words, the date by which the Plaintiffs ought to have brought the said Action was 9 September 2001.

18. I verily believe that for the Plaintiffs to continue with the said Action without determination of the issue of limitation of proceedings would only put the parties to unnecessary cost and use of resources."

[51] The First Named Plaintiff, Dilip Kumar, filed an Affidavit (dated 11 February 2016) opposing the strike out application. The contents of the Affidavit were summarized by me as follows:

1. He submits that the Defendants were at all times prior to the 11 May 2012, acting on behalf of his wife (the Second Named Plaintiff) and himself.

2. The Defendants continually advised that they had a good chance of success in their action against the Insurers in the High Court and subsequent appeals to the Court of Appeal and Supreme Court.

3. It was not until after judgment was delivered by the Supreme Court that the Defendants advised the Plaintiffs to seek "alternative legal advice on this matter as we (the Defendants) perceive the possibility of a conflict of situation arising." This was said to be done by letter dated 11 May 2012. A copy of the said letter has been annexed marked "A".

4. He deposes that at no time was he advised that any action had to be commenced against the Defendants by 9 September 2001 and all times he relied on the advice given to him by the Defendants.

5. The delay in commencing action against the Defendants was due to their failure to give him advice at an earlier time that he should seek independent legal advice due to a possible conflict of interest.

6. Accordingly, First Named Plaintiff states that the cause of action against the Defendants arose only on 11 May 2012, and that the limitation period runs from that date.

7. He concludes his Affidavit by stating that it is unconscionable for the Defendants to seek to rely on their conduct to deny the Plaintiffs a right of action against them.

[52] Therefore, for the due adjudication of the striking out application, it was incumbent on me to decide as to when exactly the cause of action in this case arose.

[53] The Counsel for the Defendants contended that the parties are bound by their pleadings. I too fully agree with this contention.

[54] In support the Counsel referred to the following cases:

1. ***Carpenters (Fiji) Ltd v Karan*** [1997] FJHC 262; Hbc0247j.95s (10 December 1997);

2. ***Murgessa v Shell (Fiji) Ltd*** [2003] FJHC 259; HBC0065d.1997b (27 August 2003); and

3. ***Fiji Development Bank v Khan*** [2016] FJHC 321; HBC 06.2012 (25 April 2016).

[55] Having considered all the available material and the relevant case authorities, this Court came to a finding that the cause of action against the Defendants arose only on 11 May 2012, at the point of time when the Defendants advised the Plaintiffs to seek alternative legal advice on the matter. I concede that this position has not been specifically pleaded by the Plaintiffs in the Amended Statement of Claim or in their Reply.

[56] However, Court had also to adjudicate upon the Amended Summons filed by the Plaintiffs (on 29 April 2016), seeking leave to amend their Reply to Defendants Amended Statement of Defence and Counterclaim, filed on 19 December 2014. The said Amended Summons was filed pursuant to Order 20, Rule 5(1) of the High Court Rules.

[57] Order 20, Rule 5(1) of the High Court Rules, provides that:

> *"Subject to Order 15, Rules 6, 8 and 9 and the following provisions of this Rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his Writ, or any party to amend his pleading, on such terms as costs or otherwise may be just and in such manner (if any) as it may direct."*

[58] As per the Amended Summons the Plaintiffs were seeking leave to amend their Reply, by adding the following paragraph after paragraph 3 of the said Reply:

(4) In a specific reply to paragraph 7(b) of the Defendants amended Statement of Defence filed on 10 December 2014 the Plaintiffs say:

If which is denied, the Plaintiffs' claim is barred by Section 4 of the Limitation Act then it was due to the negligence on the part of the Defendants particulars of which are as follows:-

(i) Failure to advise the Plaintiffs that any action against them had to be taken within 6 (six) years computed from 10 September 1995;

(ii) Failure to advise the Plaintiffs to seek an independent legal advice before the expiration of the Limitation period with respect to any action against them.

[59] In the case *of* ***Fiji Electricity Authority v. Balram & Others*** (1972) FLR 18 (3 March 1972) it was held by the Supreme Court of Fiji that *"an amendment to pleadings may be permitted by the Court at any stage of the proceedings for the purpose of determining the real question in controversy and, if it can be made without injustice to the other party it should be allowed however late, and however negligent or careless may have been the first omission."*

[60] This Court also took into consideration the following cases adverted to by Learned Counsel for the Plaintiffs: ***Ambaram Narsey Properties Limited v. Mohammed Yakub Khan & Others*** (2001) 1 FLR, pg. 283; ***Rene Wurzel v. Minika Tappen Management Limited*** (2001) 1 FLR, pg. 275; ***Ahmed v. Ibrahim*** [2002] FJCA 74; ABU 0081U2000S (29 November 2002); ***Lami Investments Limited v. Kelton Investments Limited*** [2016] FJCA 10; ABU 60 of 2013 (26 February 2016) and ***Shiu Ram v Carpenters Fiji Limited*** [2015] FJHC 711; HBC 81 of 2004 (1 October 2015).

[61] Court also referred to the dicta in In ***Hari Prasad v. Muni Prasad and others*** [2005] FJCA 24; ABU 0053 of 2004S (15 July 2005), where it was held that "It is an established principle that if a pleading can be amended to meet a strike out application, then the discretionary power should not be exercised….."

[62] Having carefully considered all the above factors, this Court dismissed the Summons for strike out made by the Defendants, in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules. Court also permitted the application made by the Plaintiffs to amend their Reply to Defendants Amended Statement of Defence and Counterclaim.

[63] Therefore, it is my opinion that the Defendants have failed to establish any exceptional circumstances for the granting of leave to appeal or that substantial injustice would be caused to them if leave to appeal is refused. Further the Defendants have failed to establish that there is a reasonable prospect that the appeal would succeed on the proposed grounds of appeal which they are relying upon. For the same reasons, I am of the opinion that the Defendants have failed to establish any exceptional circumstances for the granting of a stay pending appeal.

CONCLUSION

[64] For all the aforesaid reasons, I am of the view that leave to appeal should not be granted in this case. Accordingly the application filed by the Defendants seeking leave to appeal is refused.

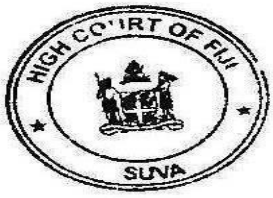
[65] For the same reasons, the application for the substantive matter in this case to be stayed is also refused.

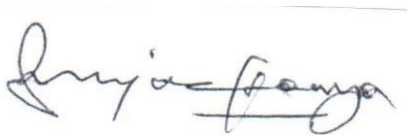
[66] Accordingly, I make the following Orders:

ORDERS

1. The Summons filed by the Defendants seeking Leave to Appeal the Interlocutory Ruling made by this Court on 23 January 2017, is struck out and Leave to Appeal is refused.
2. Stay Pending Appeal is also refused.
3. The Costs of this Application shall be costs in this cause.

Dated this 20th day of February 2019, at Suva.





Riyaz Hamza

JUDGE

HIGH COURT OF FIJI