IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CIVIL PETITION NO. CBV 0015 of 2020
[Court of Appeal No. ABU 0002 of 2018]

BETWEEN : **SABIR HUSSEIN**

Petitioner

AND : **GAYA PRASAD**

1st Respondent

PRAVEENA PRASAD

***2nd* Respondent**

Coram : **The Hon Mr. Justice Anthony Gates**
Judge of the Supreme Court

The Hon Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon Mr. Justice William Young
Judge of the Supreme Court

Counsel : **Mr. V. Kumar for the Petitioner**
: **Mr. S. Singh and Ms. K. Saumaki for the Respondents**

Date of Hearing : **7 April 2025**

Date of Judgment : **30 April 2025**

JUDGMENT

Gates, J:

[1] I agree with the following judgment of Keith J, its reasons and orders.

Keith, J:

Introduction

[2] It goes without saying that a defendant in a civil case must be informed of the date when the trial is due to take place. If the court fails to notify the defendant of the hearing date, and judgment is given against him, an application to set aside the judgment will almost certainly be allowed. But suppose the defendant has solicitors on record representing him. Suppose that they were informed of the date of the hearing but failed to notify the defendant of that. Suppose that the trial nevertheless proceeded with the defendant's solicitors present, but with the defendant not there. And suppose that with no evidence being called to contradict the evidence called on behalf of the plaintiff, judgment was given against the defendant. That is what is said to have happened in this case – at any rate as the case was originally formulated.

[3] The twist in the story is that the defendant did not apply to set aside the judgment. Instead with the benefit of new solicitors he decided to appeal. The further twist in the story is that he did not do so in time. He therefore applied for an extension of time in which to appeal. That application was refused by Guneratne JA, and the defendant now applies for leave to appeal to the Supreme Court. The final twist in the story is that since Guneratne JA's decision, it has emerged that the defendant is not merely saying that he was not informed by his solicitors of the date of the hearing, but that he did not know that proceedings had been issued against him at all.

[4] It is a little difficult at first blush to see how an issue relating to an extension of time for filing a notice of appeal could raise either a far-reaching question of law, or a matter of great general or public importance, or a matter which is otherwise of substantial general interest

to the administration of justice – which are, of course, the only three circumstances in which the Supreme Court can grant leave to appeal. I shall have to return to that later on, but some of the background needs to be mentioned, albeit only to the extent which is necessary to dispose of the appeal. I should add that there are references in what follows to an affidavit sworn by Aitul Bi Hussain on 1 October 2021. For reasons which will become apparent in due course, I had not read her affidavit before the hearing in the Supreme Court, even though it was in the Record of the Supreme Court. I have read it since then.

The action

[5] The plaintiffs in the action were Gaya Prasad and his wife Praveena. By an agreement dated 17 September 2012, they engaged Sabir Hussain to build a house for them in Nausori. The agreement described Sabir Hussain as trading as Sabir Builders, though it was his father Khalil Hussain who was responsible for supervising and carrying out the building works because Sabir had gone to live overseas. I shall refer to them as Sabir and Khalil respectively. Mr and Mrs Prasad both lived overseas as well.

[6] Mr and Mrs Prasad's case was that the agreement provided for stage payments for the payment of the construction costs which were agreed at $125,000. They required some additional work to be carried out, and Sabir's and Khalil's defence did not dispute that sums totaling $143,946.20 were paid.[1] In due course, they alleged that the construction of the building had not been completed, that the building had not been constructed in accordance with the plans, and that the work had been sub-standard.

[7] Mr and Mrs Prasad issued proceedings on 16 July 2014. The writ named both Sabir and Khalil as defendants, even though the construction agreement had only been with Sabir. Khalil engaged Mukesh Nand of Nands Law to act on their behalf.[2] He filed Sabir's and

[1] Sabir subsequently claimed that Mr and Mrs Prasad had only paid $107,011, and taking into account all the additional work which Mr and Mrs Prasad had required, Mr and Mrs Prasad owed him $62,989: see paras 32 and 33 of Aitul's affidavit.

[2] Mr Nand had been advising Sabir and Khalil while they were in dispute with the Prasads. Sabir was later to claim that Khalil had never engaged Mr Nand to represent Sabir on the claim brought by Mr and Mrs Prasad: see para 42 of Aitul's affidavit.

Khalil's defence[3] in which they denied that the work had been sub-standard. They alleged that to the extent that the construction had not accorded with the original plans, that had been because Mr and Mrs Prasad had required both additional and different works to be carried out. They claimed that their workers had been required to leave the site before the work had been completed.

[8] Mr Nand ceased to act for Sabir and Khalil on 8 May 2015 when Nemani Tuifagelele of Tuifagelele Legal became the solicitors on the record. In an affidavit filed in support of the application for an extension of time in which to appeal, Khalil claimed that he had kept in touch with Mr Tuifagelele in order to find out how the claim was progressing, and that at all times Mr Tuifagelele had told him that matters were "under control", and that he would be informed when the hearing date was "near".[4] Sabir said much the same thing.[5]

[9] The trial of the action was fixed for 9 November 2016. It was heard by Seneviratne J. Sabir and Khalil were represented by Mr Tuifagalele who cross-examined at least one of Mr and Mrs Prasad's witnesses. A later ruling made by the judge set out what happened during the first day of the trial after Mr and Mrs Prasad's case had been closed. Mr Tuifagelele asked for the trial to be adjourned so that "the defendant" could be called to give evidence. Mr Tuifagalele did not identify to which of the two defendants he was referring, but I assume that it was Khalil because it was he and the firm's workers who had actually been carrying out the work. Neither Sabir nor Khalil had been in the courtroom that day. Seneviratne J adjourned the trial to the following day.

[10] On the following day, Mr Tuifagelele closed the defence case without calling any evidence, and in due course, the judge handed down judgment. That was on 27 January 2017. Judgment was given for Mr and Mrs Prasad against Sabir, but not against Khalil (as the judge rightly said that there was no cause of action against him since the agreement had been with Sabir alone). The judge referred to the evidence of an engineer whose report had said that the construction had not been in accordance with the approved drawings (the steel supports

[3] Sabir was later to claim that Mr Nand never had any instructions from him to file a defence: see para 10.1(a) of Aitul's affidavit.
[4] Paras 7 and 8 of Khalil's affidavit sworn on 23 January 2018.
[5] Paras 19 and 20 of Sabir's affidavit sworn on 22 March 2018.

were said to be an example of that), and that the workmanship had been sub-standard (the report highlighted the weakness of the concrete). Neither the engineer's report nor his evidence had been challenged, and the judge said that there was no reason not to rely on that evidence. He concluded that Sabir had been in breach of the agreement. He ordered Sabir to repay the $143,946.20 which Mr and Mrs Prasad had paid, and awarded them an additional sum of $2,382.55 for electrical items which Mr and Mrs Prasad had paid for, and an additional sum of $3,570 as liquidated damages pursuant to a clause in the agreement relating to what would be payable if the work was not completed in time.

Subsequent events

[11] Subsequent events were set out in a series of affidavits sworn by Sabir and Khalil. Sabir swore four affidavits – on 22 March 2018 (that being the one to which I have already referred), 26 July 2018, 11 July 2020 and 13 August 2020. Khalil swore two affidavits – on 23 January 2018 (again, that being the one to which I have already referred) and 13 August 2020. All these affidavits were before the court when the application for the extension of time was considered. What follows is what those affidavits reveal.

[12] In Khalil's affidavit sworn on 23 January 2018, he claimed that he had not been notified by Mr Tuifagelele of the date of the hearing. He said that he had only got to know that judgment had been given against Sabir late in October 2017 when a new solicitor who he had instructed, Amrit Chand of Amrit Chand Lawyers, had told him that.[6] Sabir said much the same thing: Mr Tuifagelele had never told him the date of the hearing, and he had been unaware that judgment had been given against him.[7] Khalil's affidavits were silent as to any dealings he had had with Mr Tuifagelele in the nine months between the handing down of the judgment and his becoming aware of it, nor did he say why he had instructed new solicitors if he had had no reason to think that Mr Tuifagelele had not been acting in his best interests. Sabir's affidavits did not deal with the issue at all – no doubt because it had been his father who had been liaising with Mr Tuifagelele.

[6] Paras 9-11 of Khalil's affidavit sworn on 23 January 2018.
[7] Paras 23 and 24 of Sabir's affidavit sworn on 22 March 2018.

[13] It took some time for any steps to be taken by Sabir or Khalil to put things right. It was not until 25 January 2018 – almost three months after Khalil claims that he was first told about the judgment and almost a year after the judgment had been handed down – that their new solicitor filed a summons in the Court of Appeal applying for an extension of time in which to file a notice of appeal, and for a stay of the execution of the judgment in the meantime. Sabir did not explain that delay of three months, and all that Khalil said about it in his affidavit sworn on 23 January 2018 was that he had tried to contact his previous solicitor which was "futile", and that it took him time to recover from the shock of what Mr Chand had told him.[8] It was initially unclear what Khalil meant by "futile". Did he mean that he had not been able to contact Mr Tuifagelele at all? Or did he mean that he had been able to contact him, but that Mr Tuifagelele had declined to tell him what had happened? However, it is now clear that what he meant was that no-one answered his calls, nor was anyone in the office when he went there.[9]

[14] Khalil's reasons for this delay of almost three months do not sit easily with correspondence between Amrit Chand and Shelvin Singh, Mr and Mrs Prasad's solicitor, which was exhibited to another affidavit sworn by Khalil on 7 February 2018 in support (so far as I can tell) of the application for a stay of the judgment.[10] The correspondence suggests that the filing of the notice of appeal was being delayed while negotiations were taking place to settle the dispute by Sabir and Khalil purchasing the building from Mr and Mrs Prasad. Nothing came of those negotiations.

[15] By the time Sabir swore his later three affidavits, he had changed solicitors once again. His new solicitor was Abhay Singh of A K Singh Law. This was the fourth firm of solicitors to represent him. It was Mr Singh who prepared the submissions for the application for an extension of time for filing the notice of appeal, and who later filed the petition for leave to appeal to the Supreme Court on 7 October 2020. However, there came a time when a fifth firm of solicitors was instructed. That was the firm of Sunil Kumar, barristers and solicitors.

[8] Paras 12 and 13 of Khalil's affidavit sworn on 23 January 2018.
[9] See para 44 of Aitul's affidavit.
[10] This affidavit is not in the Record of the Supreme Court, but the relevant exhibit to it, exhibit KH 4, is at pages 430-439 in volume 2 of the Record of the Supreme Court.

They came on record on 18 February 2021. It was Mr Kumar who represented Sabir on the hearing of the current petition before the Supreme Court for leave to appeal against Guneratne JA's refusal to extend Sabir's time for appealing. We do not know why it took so long – about four and a half years – for the petition to be heard in the Supreme Court, but it is an example of the extraordinary delays which are a feature of Fiji's system of civil justice.

[16] Khalil died on 22 June 2021. Aitul was his daughter. She and Sabir went through Khalil's papers following his death. It was decided to file a further affidavit – this time sworn by Aitul in her capacity as the holder of a power of attorney for Sabir – setting out a number of facts said to be relevant to the issues arising on Sabir's petition. It was never explained why Sabir did not swear this affidavit, but it may have been because Aitul lived in Fiji and had the papers. This affidavit and its exhibits, of course, amounted to fresh evidence which had not been before Guneratne JA, and Mr and Mrs Prasad's solicitors objected to it. That issue was disposed of by an order of Temo P refusing Sabir leave to file Aitul's affidavit. For that reason, although the affidavit and its many exhibits remained in the Record of the Supreme Court, I did not read it before the hearing in the Supreme Court. Having said that, I have now read the affidavit and the exhibits to it in order to understand what Sabir's case really is.

An additional point

[17] In his affidavits, Sabir claimed that he had never been served with the writ. Indeed, he went further. As I have said, the writ was issued on 16 July 2014. It was in his second affidavit that Sabir had said that it had been on 24 February 2013 that he had left Fiji to live in New Zealand. He argued that since the writ was to be served out of the jurisdiction, the writ should not have been issued without the leave of the court as required by Ord 6 r 6 of the Rules of the High Court, and no such leave had been sought, let alone obtained. Neither of these points were made prior to the trial.

[18] For their part, Mr and Mrs Prasad say that Sabir *was* served with the writ – indeed, served with it within the jurisdiction. Whether he was living overseas from February 2013 or not,

they say that he was in Fiji on 16 July 2014[11] when he was served with the writ at the office of Mr Nand in Suva. They have exhibited the copy of the reverse of the writ which apparently shows Sabir's signature on it acknowledging service. They also exhibited the acknowledgment of service signed by Mr Nand which he subsequently filed and which recorded that *both* defendants were acknowledging service. Sabir's response was to deny that the signature on the reverse of the copy of the writ was his, and to assert that Mr Nand had acted without his instructions when he purported to acknowledge service *on him*.

Sabir's new case

[19] There was a surprising development in the course of the hearing in the Supreme Court. Mr Kumar told us that Sabir's instructions to him were not merely that he had been unaware of the hearing date for the trial, but that he had not even known about the proceedings at all: he had only known of the action brought by Mr and Mrs Prasad well after judgment had been given. Indeed, that was what Aitul had said in her affidavit, and what had been stated in the amended petition for leave to appeal to the Supreme Court filed on 26 February 2025. If that is true, it meant, not just that it had been Khalil alone who had been served with the writ and that it had been Khalil alone who had instructed Mr Nand and then Mr Tuifagelele, *but also that Khalil had never told Sabir about the action in which Sabir had been named as a defendant along with his father*.

[20] That would have been very surprising. Indeed, Khalil himself said that he had told Sabir that Mr and Mrs Prasad had commenced proceedings against them, and that Mr Tuifagelele's fees were paid from sums which Sabir had sent from overseas.[12] Moreover, there are two other things which are said to make Sabir's new instructions so implausible. First, on 18 June 2015 Sabir purported to swear an affidavit in support of an application that Mr and Mrs Prasad provide security for his and his father's legal costs.[13] Sabir was subsequently to deny that it was his signature on the affidavit. He claims that his father impersonated him, which

[11] Exhibit ABH 3 to Aitul's affidavit sets out Sabir's travel history according to the New Zealand Immigration Service. It shows that he arrived in Fiji on 14 June 2014 and left Fiji on 25 October 2014.
[12] See para 8 of Khalil's affidavit sworn on 13 August 2020.
[13] This affidavit is in exhibit ABH 6 to Aitul's affidavit.

means that his father must have showed the commissioner of oaths before whom the affidavit was sworn Sabir's identity documents and then forged Sabir's signature on the affidavit. Having said that, there is some support for what Sabir says. The affidavit purported to have been sworn in Suva, and yet Sabir's travel history according to New Zealand's Immigration Service shows him to have been in New Zealand between 15 and 30 June 2015.[14]

[21] Secondly, though, and much more significantly, Sabir himself accepted that he had known of the proceedings. In his affidavit of 22 March 2018 (which he did not deny was genuine but which he "has issues with"[15]), Sabir referred to the fact that he had been represented by Mr Tuifagelele in the proceedings, to whom he had paid "a huge sum" in legal fees. He added that he had "always tried to follow up on the matter with my solicitor". He went on to say that whenever his father *or him* spoke to Mr Tuifagelele about the case, Mr Tuifagelele would tell his father *or him* that the case was "under control". He also said that Mr Tuifagelele had told his father *and him* that he would obtain a report from an independent engineer. Indeed, the whole affidavit was predicated on the basis that the only thing which he had not been told about was the date fixed for the trial.[16]

[22] Mr Kumar acknowledged the inconsistency between Sabir's current instructions and the affidavits sworn by Khalil and Sabir, but he said that this was the consequence of "different solicitors telling different stories". At first blush it might be thought that whether Mr Kumar really meant that was questionable. If he did, it amounted to an accusation of highly disreputable professional conduct on the part of Sabir's and Khalil's previous solicitors – namely that Khalil's and Sabir's accounts had been suggested to them by their solicitors, and did not necessarily reflect what their instructions really were. But Aitul made the same point in para 10 of her affidavit, so it is plain that this is indeed the accusation being made. On the other hand, if it was Sabir who was changing his instructions rather than his various solicitors suggesting to him what his instructions to them should be, a cynic might say that he changed his instructions to support his case that he had never been served with the writ: he could well have thought his claim that he had never been served with the writ would have

[14] See exhibit ABH 3 to Aitul's affidavit.
[15] See para 10.5(a) of Aitul's affidavit.
[16] Paras 18-23 of Sabir's affidavit sworn on 22 March 2018.

a better chance of being believed if he were to say that he had never known about the action until after judgment had been given in it.

[23] These issues cannot be determined on paper. Where the outcome of an application to set aside a judgment is so dependent on facts which are in dispute, there would normally have to be a hearing with the relevant witnesses giving evidence (in this case, Sabir, Mr Nand and Mr Tuifagelele) and being cross-examined, so that the court could make proper findings of fact. Had all this been raised before the application for an extension of time was being considered, the appropriate course for Guneratne JA to have taken *may* have been to order such a *voir dire*, whether to be conducted by himself, or by a master or judger of the High Court. But Sabir's new case was not raised before Guneratne JA, and the question is therefore whether we should order such a *voir dire* now.

[24] I have no doubt that we should not. Even on his own account, Sabir got into this mess himself. As I have said, his affidavit of 22 March 2018 (which, I repeat, he accepts he signed) was completely inconsistent with his new claim that he knew nothing about the action until after judgment had been given. Sabir says (through Aitul in her affidavit) that his new solicitor, Mr Singh, was in effect repeating what his father had sworn in para 8 of his affidavit of 23 January 2018 drafted by Mr Tuifagelele[17], but if he is telling the truth now, he would have known that what his solicitor had drafted for him to sign was untrue. He should have refused to sign it. No ifs, no buts.

[25] In any event, in para 8 of Khalil's affidavit of 23 January 2018, Khalil merely said that he had always asked his solicitor when the case would be heard, and that he had been told that he would be informed when the trial date was near. That is to be contrasted with Sabir's affidavit of 22 March 2018 when he went into much greater detail of his and father's dealings with Mr Tuifagelele in the months and years before the action came on for trial. It is therefore implausible for Sabir to say that Mr Singh drafted Sabir's affidavit of 22 March 2018 on the basis of what Khalil had previously said. It is apparent that he can only have drafted it on the basis of Sabir's own instructions to him.

[17] See para 10.5(b) of Aitul's affidavit.

[26] For all these reasons, it is just not possible to take the new case advanced on Sabir's behalf seriously. We should, in my opinion, proceed on the basis of the case advanced when the application for an extension of time was first made and his case was originally formulated – that although he knew of the action he was not told of the date fixed for the trial.

Was appealing the judgment Sabir's appropriate course?

[27] If a judgment is entered against a litigant following a trial which the litigant did not attend because he was unaware of the trial date, one's immediate reaction is that the appropriate course for the litigant to take would be to apply for the judgment to be set aside. After all, the litigant would not be saying that the trial judge fell into error *on the evidence before the court*, which is what an appeal would usually address. The litigant would be saying that there should be a new trial because not all the relevant evidence had been before the court. That is why Ord 35 r 2(1) of the Rules of the High Court provides that any judgment given in the absence of a party may be set aside. Technically, Ord 35 r 2(1) might not have been available to Sabir because it applies only where "one party does not appear at the trial", and Sabir appeared by his solicitor. But Sabir says that he had never instructed Mr Tuifagelele to represent him at all, and Sabir could nevertheless have relied on the inherent jurisdiction of the court to put right any obvious injustice if Ord 35 r 2(1) was technically not available to him.

[28] I would not have refused Sabir's application to extend his time for appealing on the basis of his inappropriate choice of remedy. But rather than looking at the factors to be taken into account on an application for an extension of time for appealing, I would have looked at the factors to be taken into account when an application to set aside a judgment is made a long time after the trial. Those factors were set out by Leggatt LJ in the Court of Appeal in England and Wales in *Shocked v Goldschmidt* [1988] 1 All ER 372. These have often been applied in Fiji – see, for example, the judgments of Connors J in *Rosedale Ltd v Kelly* [2004] FJHC 429 and Inoke J in *Wati v Western Division Drainage Board* [2009] FJHC 165.

[29] The factors set out by Leggatt LJ at pagers 381f-j were as follows:

> *"(1) Where a party with notice of proceedings has disregarded the opportunity of appearing and participating in the trial, he will normally be bound by the decision.*
>
> *(2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*
>
> *(3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.*
>
> *(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.*
>
> *(5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.*
>
> *(6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.*
>
> *(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.*
>
> *(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."*

The judgment of Guneratne JA

[30] The hearing of the applications for an extension of time for appealing – along with the application for a stay of the judgment pending any appeal – was considered by Guneratne JA on 20 August 2020 – some two and a half years after the summons was issued. We do not know why it took so long.

[31] *The issue and service of the writ*. Guneratne JA gave four reasons for rejecting Sabir's contention that the judgment was of no effect on the ground that leave to issue the writ had not been obtained and that it had never been served. First, the contention had not been advanced prior to the trial. It had only been raised after judgment had been entered.

Secondly, Sabir could not rely on the failure of Mr Tuifagelele to take the point on his behalf. This was not simply a mistake on the part of a solicitor which might justify an extension of time. This was a "lapse" on the part of a solicitor which would not. Thirdly, Mr Nand had acknowledged service of the writ. Fourthly, the effect of Ord 2 r 1(1) of the Rules of the High Court was that the failure to apply for leave to issue the writ or any failure to serve it did not render the judgment a nullity.

[32] Guneratne JA's last reason was contrary to authority. In ***Lowing v Howell*** [2016] FJHC 578, Ajmeer J held that a failure to obtain leave to issue a writ which is to be served out of the jurisdiction could not be cured by Ord 2 r 1(1), even though the Court of Appeal in ***Wellington Newspapers v Rabuka*** [1994] FJCA 14, without reaching any final conclusion on the topic, was inclined to think otherwise. ***Lowing*** was followed by Kumar ACJ in ***Habib Bank Ltd v Raza*** [2020] FJHC 369, but he did not say why ***Lowing*** was right and why the instincts of the Court of Appeal in ***Wellington Newspapers*** were wrong.

[33] I do not propose to add to this debate, because I regard Guneratne JA's first reason as decisive. Even if Sabir had not been served with the writ, it had not put him at any disadvantage. He knew of the proceedings, he would have known from his father or his solicitors what the case was all about, he had decided to defend the action, and was liaising with his solicitors about it. Moreover, he would have known if he had not been served with the writ, and yet he either did not tell his solicitors about that, or he did tell them and failed to follow up with them whether they had done anything about it. The point was then taken for the first time in his affidavit of 11 July 2020 – almost three and a half years after judgment was given against him, and more than two and a half years after he first became aware of the judgment (assuming that his father told him about the judgment when his father was told of it by Mr Chand). There comes a time when it is just too late to wind the clock back.

[34] In any event, the fact that Mr and Mrs Prasad had not obtained leave to issue the writ is only relevant if it was to be served out of the jurisdiction. Mr and Mrs Prasad say that it was served within the jurisdiction. Whether it was served within the jurisdiction is a question of fact which we cannot determine, but you could be forgiven for being sceptical about Sabir's denial that it was served on him at the office of Mr Nand in Suva on 16 July 2014 as Mr and

Mrs Prasad say, especially as Mr Nand filed an acknowledgment of service. It would mean that someone had forged his signature on the reverse of the writ – possibly Mr Nand himself – and therefore that both Mr Nand initially and Mr Tuifagelele subsequently had at different times seriously let Sabir down.

[35] I also think that Guneratne JA was right to treat Mr Nand's acknowledgment of service of the writ as significant. It reinforced the claim that the writ had been served on Sabir personally.

[36] *The extension of time*. Guneratne JA determined the application for an extension of time by considering some of the factors identified in *Native Land Trust Board v Khan* [2013] FJSC 1. They were (a) the prejudice to Mr and Mrs Prasad if the appeal was allowed to proceed, (b) the prospect of the appeal being successful, and (c) the reason for Sabir's failure to comply with the time limit for filing a notice of appeal. I deal with each in turn.

[37] (a) *Prejudice*. The relevant prejudice is the further delay which would have been avoided if Sabir's notice of appeal had been filed in time, ie by 10 March 2017. Guneratne JA's ruling was handed down on 18 September 2020, so if Guneratne JA had extended time, the delay caused by the failure to comply with the time limit would have been three and half years. Guneratne JA merely said that Mr and Mrs Prasad had "been denied the enjoyment of the victory they achieved" since then. That was a questionable approach. Mr and Mrs Prasad's victory consisted in their entitlement to payment of a monetary sum, and any delay on Sabir's part in paying the sum due could have been compensated for by a suitable award of interest. So unless there were other factors to be taken into account, I would have thought that the prejudice to Sabir if his appeal was not allowed to proceed would have outweighed the prejudice to Mr and Mrs Prasad if the appeal had been allowed to proceed.

[38] Having said that, there was another factor to be taken in to account. The evidence before Guneratne JA was that Mr and Mrs Prasad were intending to demolish the building and use the judgment sum to have another property built. That would have been delayed by three and a half years if the appeal had been allowed to proceed. There was no evidence from Sabir before Guneratne JA disputing that. I do not know whether Guneratne JA took that

into account, but if he had, it would have been open to him to conclude that the prejudice to Mr and Mrs Prasad by the delay in applying for the extension of time was not insignificant.

[39] (b) *The merits of the appeal*. In *Khan* it was said that where there has been substantial delay (as there was in this case), the court should consider whether there was a ground of appeal which would "probably succeed". Guneratne JA said that he had "gone through" Seneviratne J's judgment and "could not see any flaw" in it. With respect to Guneratne JA, that was not the proper approach. If Sabir's appeal is allowed to proceed, the court will have to address three principal issues. The first will be whether the reason why no evidence was called on behalf of Sabir was because he had not been told about the date fixed for the trial. The second will be whether Sabir has "real prospects" (the words used by Leggatt LJ in *Shocked*) of successfully defending Mr and Mrs Prasad's claim in a new trial. The third arises even if the court finds the first two issues in favour of Sabir. That is whether it would be appropriate to order a new trial at which Sabir would be free to call the evidence in the particular circumstances of this case.

[40] On the first of these issues, it is not possible to predict with certainty what the court would do. It might decide that the only way to resolve the issue would be by requiring Sabir and Mr Tuifagelele to give oral evidence – whether before it or a master or a judge of the High Court. But whatever course it were to take, some things are clear. On the one hand, it would be surprising if Sabir and Khalil had known about the date fixed for the trial, but had chosen not to attend it. On the other hand, it would be surprising for Mr Tuifagelele to have deliberately withheld the date fixed for trial from both Sabir and Khalil. Mr Tuifagelele would have realised that one day Sabir and Khalil would have discovered that the trial had taken place, and that he would then be subject to serious criticism. In any event, Sabir would have to overcome the extent to which his credibility had been tainted by what we have to treat as his false claims that he had not been served with the writ and had known nothing about the action until after judgment had been given. In my opinion, it cannot be said that Sabir has *real* prospects of successfully asserting that he and his father had not known about the date fixed for the trial. That disposes of the third issue as well.

[41] It was for the purpose of determining whether Sabir has real prospects of defending Mr and Mr Prasad's claim in a new trial that I read Aitul's affidavit and the exhibits to it. There are clearly issues to be tried, and it is possible that Sabir would succeed. But that is as far as I can take it. Sabir's defence might succeed at trial. It might not. I cannot say that he has *real* prospects of succeeding in a new trial.

[42] However, even if Sabir had real prospects of success on these two issues, I do not believe that he has much hope of successfully persuading the Court of Appeal to order a new trial when:

(i) there has already been a trial in which the facts were investigated and findings of fact were made,

(ii) the issues between the parties will have to be investigated all over again (albeit this time with the benefit of the evidence which Sabir wishes to call),

(iii) there would be further prejudice to Mr and Mrs Prasad in having to put off yet again the construction of their new home,

(iv) it is arguable that where the court is having to decide which of the litigants should escape the consequences of the misconduct of one side's lawyers, it should be the innocent party who had not engaged them, and

(v) a litigant in Sabir's position should, as a matter of principle, rely on their remedies against their own lawyers[18] (imperfect though such remedies may often be) rather than push the boundaries of the limited circumstances in which a new trial should be ordered, thereby reflecting the important principle of bringing finality to litigation.

[43] (c) *The reasons for not complying with the time limit*. Guneratne JA did not address the question whether Sabir's claim that he had not known about the judgment until late October 2017 was true. Nor did he address whether the reasons given by Khalil for the delay between

[18] Sabir issued proceedings against Mr Nand, Mr Tuifagelele and others as long ago as 1 September 2021: see exhibit ABH 20 to Aitul's affidavit.

that discovery and the filing of the application for an extension of time on 25 January 2018 were justifiable. Instead, I take him to have assumed without deciding that what Sabir and Khalil were saying was true, and to have considered whether that would justify an extension of time. Guneratne JA thought not. Whatever the position may be when the deadline for filing a notice of appeal is missed due to a mistake on the part of a litigant's lawyers, there was an important distinction to be made between mistakes and what Guneratne JA called "lapses" on the part of a litigant's solicitors. He read the judgments of the Supreme Court in *Fiji Industries Ltd v National Union of Factory and Commercial Workers* [2017] FJSC 30 as holding that "'mistakes' on the part of lawyers should not visit upon litigants", but concluded in his own judgment in *Moti Chand and ors v iTaukei Lands Trust Board* (ABU 72/2017) that "'lapses' cannot be allowed to stand on the same footing". In fact, Guneratne JA's understanding of what the Supreme Court decided in *Fiji Industries* was wrong. What it decided was that the fact that the mistake was made by a lawyer was just one matter to be taken into account in the whole scheme of things.

[44] I do not propose to address this issue, important though it is, because it is not necessary to resolve that issue to dispose of this appeal. For the reasons I have already given, I do not believe that Guneratne JA's ultimate decision not to extend Sabir's time for filing his appeal was legally flawed to the extent that the Supreme Court should interfere.

Conclusion

[45] The issue as to whether there should be a distinction between a mistake on the part of a litigant's lawyers which resulted in them missing the deadline for filing a notice of appeal and what Guneratne JA called "lapses" on their part is a matter of substantial general interest to the administration of justice. But it does not arise for decision on this appeal because of the view I have taken on the other issues which the appeal raises. I would therefore refuse Sabir leave to appeal, and I would order him to pay $8,000 towards Mr and Mrs Prasad's legal costs of the appeal.

Young, J:

[46] I have read the judgment of Keith J in draft and agree with the orders he proposes and his reasons.

Orders:

(1) Leave to appeal refused.

(2) The petitioner must pay $8,000 towards the Respondents' legal costs of the appeal.

The Hon Mr. Justice Anthony Gates
Judge of the Supreme Court

The Hon Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon Mr. Justice William Young
Judge of the Supreme Court

Solicitors:

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