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THE COURT OF APPEAL OF SOLOMON ISLANDS

NATURE OF JURISDICTION:	Application for extension of time, for leave to appeal and appeal against order of the High Court of Solomon Islands (Muria CJ).
COURT FILE NO:	Civil Appeal No 4 of 1995
DATE OF HEARING:	23 January 1996
DATE OF JUDGMENT:	29 April 1996
THE COURT:	Kirby P; Kapi JA; Palmer AJA
PARTIES:	PRICE WATERHOUSE & ORS V REEF PACIFIC TRADING LIMITED & ANOR
Appellants	J Sullivan
Respondents	M J Campbell
KEY WORDS:	PRACTICE & PROCEDURE - summary dismissal - some facts not agreed - peremptory order that matter should proceed to trial - held: (1) Parties affected should have been heard; but (2) No substantive Injustice as order was obviously correct. *Stead v State Government Insurance Commission (1986)* 161 CLR 141 followed. NATURAL JUSTICE - procedural orders - summary dismissal - failure to hear applicant before ordering trial to proceed - held: Technical error as parties ought to have been heard but order confirmed as obviously correct - appeal dismissed. COSTS - overseas Counsel - limited circumstances for order - *Jordan v Edwards* [1979] PNGLR 420 followed.
EX TEMPORE / RESERVED:	Reserved
ALLOWED / DISMISSED:	Dismissed
PAGES:	13

IN THE COURT OF APPEAL
OF SOLOMON ISLANDS

Civil Appeal Case No 3 of 1995

BETWEEN: PRICE WATERHOUSE & OTHERS

Appellant

AND: REEF PACIFIC TRADING LIMITED AN ANOR

Respondent

CORAM: KIRBY P; KAPI JA; PALMER AJA
HEARING: TUESDAY 23 JANUARY 1996
JUDGMENT: MONDAY 29 APRIL 1996

PRACTICE & PROCEDURE - Court of Appeal (SI) - application for summary dismissal - primary judge (Muria CJ) directs parties to attempt agreement on facts - facts complex and some facts not agreed - primary judge orders that matter proceed to trial hearing - objection as to failure to hear applicant and failure to provide adequate reasons for order - application for extension of time and for leave to appeal heard with appeal on merits - held: (by the Court): (1) The application for extension of time and leave should be granted; (2) The reasons provided for the order challenged, although brief, were adequate and sufficiently clear; (3) The applicant ought to have been heard before the order was made. *Jones v National Coal Board* [1957] 2 QB 55 (CA) applied; (4) But the order made was obviously correct so that no substantive injustice was done and the appeal should be dismissed. *Stead v State Government Insurance Commission* [1986] 161 CLR 141 followed.

NATURAL JUSTICE - failure to hear party applicant - order made obviously correct - appeal dismissed.

COSTS - overseas Counsel -principles to be applied in ordering costs in Solomon Islands - held: (1) The courts of Solomon Islands should follow the principles established in *Jordan v Edwards* [1979] PNGLR 420. *D J Graphics Ltd v The Attorney-General and Solomon Islands Port Authority,* unreported, 15 June 1995 (Palmer J) approved; (2) The case, being a case involving no complex issues of law or fact, did not warrant certification for overseas Counsel. Certificate refused.

Court of Appeal Act 1978, s 11(2)(f); s 19(b).
Court of Appeal Rules Rule 10(2); R23(f).
High Court (Civil Procedure) Rule o 27 r 2; o 27 r 4.

ORDERS

1. **Application for extension of time within which to permit the applicants to file the application for leave to appeal granted;**

2. **Leave to appeal granted;**

3. **Appeal dismissed. The appellants to pay the respondents' costs; and**

4. **Respondents' application for certificate for overseas Counsel refused.**

23 January 1995

JUDGMENT OF THE COURT

On 14 June 1994 a writ of summons was issued by the respondents for damages against the appellants for fraud, breach of duties and negligence.

In July 1994, lawyers for the appellants filed a summons to strike out the statement of claim. This was an application under O 27 r 4 of the ***High Court (Civil Procedure) Rules*** (hereinafter referred to as "the ***Rules***").

When the summons came on for hearing before the Chief Justice on 24 October 1994, Counsel for the respondents submitted that the nature of the application raised various questions of law and suggested that the appropriate procedure for dealing with these issues would be to make an application under O 27 r 2 with notice to the respondents.

As to the application under O 27 r 4 which was already on foot, the Chief Justice directed that this should also be adjourned to be dealt with together with the application under O 27 r 2 of the ***Rules*** when it is filed on a date to be fixed.

In accordance with this direction, lawyers for the appellants filed an affidavit of P.A. Smith sworn on 13 March 1995 with a draft statement of facts attached to the affidavit.

On 23 May 1995, the Registrar of High Court attempted to facilitate a statement of agreed facts between the parties. Counsel for the respondents pointed out to the Registrar that their clients did not agree to the proposed statement of facts. However, it was subsequently agreed by lawyers for the parties that the Registrar should go through the proposed statement of facts prepared by lawyers for the appellants and delete any fact which was not admitted by the respondents. The Registrar carried out the exercise as agreed to by lawyers with the exception of paragraph 20 of the proposed statement of facts. The lawyers adjourned the matter to seek instructions from their respective clients in respect of this paragraph.

On 24 May 1995, as there was still no agreement about paragraph 20, it was deleted from the proposed statement of facts. The lawyers then signed the agreed statement of facts with a note that the facts agreed to was *"subject to the reservation by the Plaintiffs of the right to submit that they are not sufficient to determine the questions of law raised by the Defendants".*

The agreed statement of facts were brought to the attention of the Chief Justice on the same day by the Registrar and he ruled:

> *"Having directed the RHC on 22/2/95 to settle facts in this matter and that having been done with a reservation made by the Plaintiffs, I direct that this matter being listed for hearing at a date to be fixed."*

On 25 May 1995, lawyers for the appellants verbally requested the Registrar for reasons for decision by the Chief Justice.

On 5 June 1995, Mr Kama, town agents for lawyers for the appellants wrote to the Registrar again requesting reasons for decision.

In a letter dated 23 June 1995, the Registrar replied:

> *"The Chief Justice did not refuse to hear, as stated in your letter, he directed that the matter proceed to hearing in the normal course, that is by pleadings to close and listing. His note made on 24/5/95 is enclosed. It is sufficient for your intended appeal.*

This letter and the notes enclosed were intended to give reasons for decision for purposes of an appeal.

Unfortunately for the appellants, this letter was misplaced in Mr Kama's office and it did not come to his attention until 12 August 1995. By the time this letter was discovered, the time in which to file application for leave had expired.

The appellants then filed an application on 25 August 1995 for an extension of time in which to file an application for leave to appeal. On the same date they also filed two further documents; an application for leave to appeal in the event that an extension of time is granted; and a notice of appeal in the event that leave to appeal is granted.

The application for extension of time was initially brought before the President for hearing on 31 August 1995. The power to grant extension of time may be exercised by a single Judge of the Court of Appeal under s 19 (b) of the ***Act***. The President directed

that the matter of extension of time should be heard by the full Court of Appeal. Further, he directed that in the event that an extension is granted, the parties should be prepared to argue the grounds of appeal at the same hearing.

Therefore, before us, we have the following issues to determine:

1. Whether in the exercise of our discretion we should extend time in which to enable the appellants to file application for leave to appeal.

2. If such an extension is granted, whether there are good grounds for granting leave to appeal.

3. If leave to appeal is granted, whether the Chief Justice erred in the exercise of his discretion in directing that the matter should proceed in the normal manner by way of close pleadings and listing for hearing.

In light of the ultimate order which we favour, it would arguably be appropriate for the Court simply to refuse leave. It would then treat the application for an extension of time as unnecessary of resolution. However, in deference to the arguments which we have heard, we propose to deal with each of the foregoing issues in turn.

Extension of Time.

We start with the premise that there is no appeal on foot until an extension of time is granted to enable the appellants to properly institute an application for leave to appeal. The power to extend time is clearly given by s 19(b) of the ***Act***. This provision simply gives a very wide discretion to the Court. In exercising this discretion we bear in mind the following principles:

1. The discretion to extend time will not be granted as a matter of course.

2. An applicant whose right of appeal is extinguished by the expiration of time must show some good or acceptable reason why the time in which to file an appeal was allowed.

3. There must be some merit in the proposed grounds of application for leave or proposed grounds of appeal.

4. The onus is on the applicant to satisfy the Court.

5. Whether time is extended or not is always in the discretion of the Court.

The principal reason relied upon by the appellants for explaining the delay is set out in the affidavit of Mr Kama, the town agent for lawyers for the appellants. He deposed the following relevant facts; that the lawyers for the Appellant had intended to appeal the decision of the Chief Justice upon receiving the reasons for decision; that on 25 May 1995 the lawyer for the appellants verbally requested for reasons for decision but that the reasons for decision were not forthcoming immediately because the Chief Justice was going away; that in a letter dated 5 June, Mr Kama had further requested for reasons for decision. The Registrar's reply of 23 June 1995 which had enclosed some "reasons" for decision was misplaced by the staff and it did not come to his attention until 12 August 1995 by which time the time to file application for leave to appeal had expired.

Counsel for the appellants submitted that this was a reasonable explanation and that their clients were out of time by only 5 weeks which is not an unreasonable delay.

The Second consideration relied upon by Counsel for the appellants was that the appellants proposed grounds of application for leave and proposed grounds of appeal have merits. In determining this matter, the Court does not have to consider the grounds of appeal in such detail so as to decide the issues raised in the proposed grounds of appeal. That would result in determination of an appeal without an appeal ever being properly instituted. In our view, it would be sufficient for purposes of determining an application for extension of time to simply have regard to the proposed grounds of appeal and determine whether there is any merit in the proposed grounds of appeal. The question is: whether there are arguable grounds of appeal and not whether the grounds of appeal will succeed on appeal. The latter question will be determined at the hearing of the appeal.

We accept that a reasonable explanation has been given for the delay and that the proposed grounds for leave to appeal raise substantial issues with merit. Therefore, we would exercise our discretion to extend time in which to enable the appellants to file application for leave to appeal.

The appellants have already filed application for leave to appeal and proposed grounds of appeal on the same date as the application to extend time. It would be sufficient for purposes of properly instituting an appeal to simply order that the time is extended to

the time of the filing of the application for leave on 31 August 1995. We make such an order accordingly.

Grounds for Leave to appeal.

The Second issue for our consideration is: whether there are good grounds for leave to appeal. The grounds relied upon by the appellants are set out in the application for leave to appeal. We agree that the arguments set out therein constitute good grounds for leave. We set out these grounds:

1. The appeal raises questions of general public importance relating to the judicial duty to hear and determine interlocutory applications, including the right of parties to be heard on such applications.

2. The appeal raises questions of general public importance relating to the judicial duty to give proper reasons and adequate reasons for a determination upon interlocutory applications.

3. The appeal raises questions of importance relating to discretionary factors to be taken into consideration when determining interlocutory applications under Order 27 Rule 2 of the ***Rules***.

We are not aware that these issues have been decided authoritatively by this Court. We would grant leave to appeal.

Grounds of Appeal

The grounds of appeal relied upon by the appellants may be summarised as follows:

1. The Chief Justice failed to discharge his judicial duty in that he did not hear and determine the application made under O 27 r 2 of the *Rules*.

2. The Chief Justice erred in failing to hear the parties on the question of whether the application should be heard thereby denying the appellants natural justice.

3. In so far as the decision was based upon a reservation by the respondents that they intended to make submission that the agreed statement of facts was not sufficient

to determine the questions of law, the learned Chief Justice erred in accepting this submission without first giving the appellants an opportunity to make a submission to the contrary.

4. The learned Chief Justice in breach of his judicial duty failed to give any proper or any proper reasons for the said decision.

What did the learned Chief Justice decide? We have already set out the chronology of events leading up to the decision of the Chief Justice earlier in our judgment. It is clear from this that the Chief Justice had intended to hear submissions in respect of application under O 27 r 2 of the Rules. He had directed the parties to submit an agreed statement of facts in order to do this.

The critical question is: what did he do on 24 May 1995? His notes show that he examined the agreed statement of facts signed by the lawyers for the parties. Having noted the reservation expressed by the lawyers for the respondents, he directed that the matter be disposed of in the normal way.

We infer from all the facts that the learned Chief Justice decided in view of the reservation expressed by the respondents on the statement of agreed facts, that the issues of law raised should be dealt with in the normal way at the trial.

In our view he dealt with the application on the basis of the inadequacy of statement of facts. It follows from this that the grounds of appeal which are premised on the fact that the Chief Justice did not determine the application before him are misconceived and should be dismissed.

Furthermore, it would appear from the notes of ruling by the Chief Justice and the letter from the Registrar that there were sufficient reasons from which the appellants could draft an appropriate notice of appeal. The reasons for decision will become apparent when we deal with the next ground of appeal. The ground of appeal relating to adequacy of reasons for decision is without merit and therefore we would dismiss it.

In the circumstances, the relevant ground of appeal which we should consider is: whether the learned chief Justice erred in directing that the matter should be listed for hearing in the normal way on the basis that the respondents expressed a reservation that statement of facts was not sufficient without first giving the appellants an opportunity to make submissions to the contrary.

It is not disputed that the learned Chief Justice did not conduct a hearing on 24 May 1995 before making the ruling. The lawyers for the appellants were not heard on the question of whether the statement of facts were sufficient to raise the questions of law in issue.

The general principles of law applicable to the circumstances in this case can be found in the decision of English Court of Appeal in ***Jones v National Coal Board*** [1957] 2 Q.B. 55 at 67 in these terms:

> *"there is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge...No case is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."*

These principles are applicable in the Solomon Islands by virtue of Sch 3.2 (1) of the *Constitution of Solomon Islands* (see ***Cheung v Tanda*** (1984) SILR 108).

These principles were further qualified by the High Court of Australia in ***Stead v State Government Insurance Commission*** (1986) 161 CLR 141. At page 145 after setting out the same passage we have set out in ***Jones v National Coal Board*** (supra), the High Court went on to state:

> *"That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.*
>
> *For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.*

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact: Supreme Court Rules, 0.58, rr. 6 and 14. However, when the Full Court is invited by a Respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have no bearing on the out come of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial".

In view of Sch. 3.2 (4) of the ***Constitution of Solomon Islands,*** the decision of the High Court of Australia is not binding. This Court being the highest court in the land is free to develop the principles of common law in the manner it deems just having regard to the circumstances of Solomon Islands. In this regard the decisions of High Court of Australia or any decision of any other country after 7 July 1978 are not binding. They can only have persuasive value. In our considered opinion, the qualification of the relevant principles of common law by the High Court of Australia in ***Stead v State Government Insurance Commission*** (supra) is proper and a correct development of those principles. We would ourselves adopt those qualifications as part of the law of Solomon Islands. They are sensible and practical. They husband appellate resources. They focus the attention of the appellate court on the suggested error of the primary judge's orders rather than upon the reasons given for those orders. Often the orders will be clearly correct even where the reasons are defective or even wrong or the procedures followed open to criticism.

In applying these principles to the facts of this case, Counsel for the respondents has submitted that even if the lawyers for the appellants were heard in respect of the agreed statement of facts, the whole of the statement of claim would not have been struck out and that there were some claims in the Statement of Claim which would have been set

down for trial. In support of this submission, he referred to paragraph 22 of the Statement of Claim which alleges negligence on the part of the appellants.

Counsel for the appellants conceded that the issue of negligence raised in paragraph 22 of the Statement of Claim must go to trial. In view of the concession by Counsel (which in our view is a proper concession) representation by the appellants would not have made any difference to the order made in that the Chief Justice would have directed that the matter be listed for hearing at least in respect of paragraph 22 of the Statement of Claim.

In our view, the order made by the Chief Justice was the proper order in the circumstances. To allow a hearing of application under O 27 r 2 would be to allow a hearing additional to the trial of the matter which would have resulted in multiplicity of proceedings and therefore extra costs to the parties. In a developing country such as Solomon Islands, this Court ought not to encourage such a multiplicity of proceedings.

We would wish to point out that the learned Chief Justice did not deal with the issues of law raised in the application made under O 27 r 2 and consequently we have not dealt with those issues. The appellants may pursue these issues at the trial if they choose to do so.

In the end result we would dismiss the appeal with costs to the respondents.

Counsel for the respondents is an "overseas Counsel" and has applied for certification of "overseas Counsel". Counsel for the appellants who is a local practitioner did not object but he did not concede either. Jurisdiction to award costs is given by r 23 (f) of the ***Appeal Rules*** which provides:

> *"2.3. On the hearing of an appeal the Court may:-*
>
> .....
>
> *(f) make such order as to costs as it sees fit"*

There is no specific provision relating to certification of "overseas Counsel" in the ***Rules*** or ***Appeal Rules***. We would construe r 23 (f) of the ***Appeal Rules*** to include the power of the Court to certify for "overseas Counsel" in appropriate cases. We consider that the exercise of this discretion involves policy issues relating to practice of law before courts in this jurisdiction by "overseas Counsel". We would recommend that the criteria

for this should be clearly set out in legislation. This has been the subject of rules in a similar jurisdiction to Solomon Islands, Papua New Guinea. In fact in a High Court case, ***D. J. Graphics Limited v The Attorney General and Solomon Islands Ports Authority*** (Unreported judgment Civil case No. 40 of 1995, dated 15 June 1995) Palmer J. Adopted the general principles set out in the Papua New Guinea case of ***Jordan v Edwards*** [1979] PNGLR 420. The Supreme Court in this case discussed the general principles that should be applicable in a developing country with a small and a young legal profession. We consider that the circumstances in Solomon Islands are no different to Papua New Guinea and therefore we would adopt those general principles for the Solomon Islands. In particular we would adopt a statement of the principles by the Chief Justice of Papua New Guinea, Sir William Prentice which was also adopted by Palmer J:

> *"When considering whether an exception should be made in terms of the court's Rule - the court I believe, should take into account as the principal factors - the difficulty of the case in particular whether it involves complex matters of law); the nature and extent to the rights involved; the expertise reasonably required or the nature of the particular lis; whether the smallness of the employment of resident Counsel; and above all the necessity of keeping costs as low as possible and access to advice as wide and as even as possible".*

Applying these principles to the present case, we do not consider that this case involved complex issues of law or fact and therefore in the exercise of our discretion we would not certify for "overseas Counsel".

No question of cost was occasioned by the order of the Chief Justice on 24 May 1995. This ruling was given without the appearance of any of the parties and therefore the question of cost did not arise. Prior to this date however, there were hearings before the Chief Justice on 24 October 1994 and 22 February 1995 and on both occasions the question of cost was reserved. Parties also appeared before the Registrar on 23 and 24 May 1995. On 24 May 1995 the Registrar reserved the costs of appearance before him to be decided by the Chief Justice. The Chief Justice has not determined these issues and therefore cannot be the subject of review by us. They will become part of the costs of the cause.

We further direct that this matter should now be set down for trial.

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M. Kirby

President

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M. Kapi

Justice of Appeal

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R. Palmer

Justice of Appeal