

91

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 13 OF 1992

(High Court Civil Action No. 282 of 1990).

BETWEEN:

RAM PADARATH BROS. LIMITED

APPELLANT

-and-

THE ATTORNEY-GENERAL OF FIJI

RESPONDENT

Mr G P Shankar for the Appellant
Mr A Cope for the Respondent

DECISION

(In Chambers)

This is an application by the Respondent Attorney-General
(original Defendant) for an order -

(1) that leave be granted to him "to cross-appeal out of
time against the judgment" of Saunders J given at Lautoka on
15 August, 1991 and

(2) that if leave is granted then execution of the judgment
be stayed pending determination of the appeal and the cross-
appeal.

The proposed grounds of the 'Cross-Appeal' have been
filed and the application is supported by an affidavit sworn by
Sunil Kumar an Executive Officer (Litigation) based in the
Attorney-General's chambers.

The writ in this matter was issued against the Attorney-General in November 1990 claiming damages for breach of undertaking and negligence on the part of the Chief Registrar whereby he wrongly released the passport of one Mohammed Sikandar Buksh a debtor to the Plaintiff.

The Defendant failed to file a defence and the Plaintiff moved the Court for judgment under Order 77 Rule 6 of the High Court Rules.

The application was opposed and finally a hearing took place.

Items 5 and 6 of the agreed facts read as follows:

- 5. *That the Mohammed Sikandar Buksh paid off the plaintiff in Suva Magistrate's Court Action No. 2115 of 1981 prior to the release of his passport.*
- 6. *Passport of Mohammed Sikandar Buksh was released to him without enquiry being made as to whether High Court Action No. 449 of 1981 was settled or disposed of.*

On 15 August 1991 Saunders J gave judgment for the Plaintiff. The final paragraph of his judgment reads as follows:-

Lord Norris in WEST v. SHEPHARD (1964) AC. at 346 said "A money award can be calculated so as to make good a financial loss." The plaintiff has not suffered

a financial loss. He is not entitled to anything more than nominal damages for breach of contract, which I put at \$50. There will be judgment for plaintiff for \$50 and costs on the higher scale.

The judgment was not sealed by the Plaintiff until 12 March 1992.

On 26/3/92 the Plaintiff filed an appeal against the decision of Saunders J. The grounds of appeal allege, inter alia, that the trial judge erred in law and in fact in holding that there was no negligence and that the Plaintiff had not suffered any damages.

The Notice of Appeal was served on the Attorney-General by Registered mail on or about the beginning of May, 1992.

Security for costs was fixed on 6 August 1992.

On 8 September 1993 the present application to "cross appeal" out of time was filed. The Attorney-General had neither filed an appeal within 6 weeks from the date of sealing the judgment (see Rule 16(b)) nor had he served a Respondent's Notice within 21 days after the Service of the Notice of Appeal on him (see Rule 19(4)).

The Appellant has opposed the present application on a number of grounds. These may be summarised as follows :

- (1) *The supporting affidavit is defective in that the deponent Sunil Kumar does not disclose the source of his information.*
- (2) *In any case the enormous delay has not been satisfactorily explained.*
- (3) *There is no provision for filing a "Cross Appeal". There is only provision for a Respondent's Notice under Rule 19.*

The draft grounds of the "Cross-Appeal" are substantial and also several in number. They attack the very basis of the judgment. The very first ground states that "the judge erred in law in deciding the case upon an issue never pleaded by the Appellant". Indeed the Respondent proposes to ask that judgment be entered in his favour with costs.

There was nothing to stop the Attorney-General from sealing the judgment himself soon after its delivery and lodging an appeal within the allotted time. Now that the Plaintiff has filed and served a Notice of Appeal the Attorney-General has become the Respondent. He now wishes to have the judgment of the Court below completely overturned under the banner of a substantive Cross-Appeal. The combined effect of the proposed grounds is to virtually challenge the trial court's jurisdiction to do what it did.

The Court of Appeal is a creature of the statute. There is no specific provision in the Act or the Rules made thereunder for filing a Cross-Appeal after the other party has lodged its appeal

within time. There is however provision for serving a Respondent's Notice on the Appellant under Rule 19. The following provision of Rule 7(a) of the Court of Appeal Rules is also relevant :

7. Where no other provision is made by these Rules, or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised-
(a) in civil causes or matters, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Appeal in England.

Leaving aside for the time being the question of notice of cross-appeal there were 2 options open to the Attorney-General under Rule 19 of the Court of Appeal Rules namely either to serve a Respondent's Notice asking either (a) to vary the judgment of the Court below or (b) to affirm it. This Rule reads as follows :

- 19.-(1) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court shall be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court of Appeal to make, or to make in that event, as the case may be.*
- (2) A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than those relied upon by that Court shall give notice to that effect specifying the grounds of that contention.*
- (3) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of the*

appeal to contend that the decision of the Court below should be varied upon grounds not specified in a notice given under this rule, to apply for any relief not so specified or to support the decision of the Court below upon any grounds not relied upon by that Court or specified in such a notice.

(4) Any notice given by a respondent under this rule (in these Rules referred to as a "respondent's notice") shall be served on the appellant, and upon all parties to the proceedings in the Court below who are directly affected by the contentions of the respondent, and shall be served within 21 days after the service of the notice of appeal on the respondent.

(5) A party by whom a respondent's notice is given shall, within two days after service of the notice, furnish four copies of the notice to the Registrar of the Court of Appeal.

Until 1979 our Rule 19 and the provisions of Order 59, r.6 of the English Rules of the Supreme Court were virtually identical. Since then a few amendments were made to Rule 6 of Order 59 with the result that a 3rd arm was added to Rule 6 whereby a specific provision was made enabling a Respondent who had been served with a notice of appeal "to contend by way of cross-appeal that the decision of the court below was wrong in whole or part" (See Rule 6(1)(c). No such addition to Rule 19 has been made in Fiji. This means that there are now since 1979 3 kinds of notices that may be served in England by a Respondent.

These are -

- (1) a Respondent's notice by way of Cross Appeal (under r. 6(1)(c) which is a notice of a substantive cross appeal;

- (2) a Respondent's notice to vary, i.e. a notice asking that the decision of the Court below be varied (para (1)(a); or
- (3) a Respondent's notice to affirm, i.e. a notice asking that the order of the Court below be affirmed on grounds other than those relied upon by the Court (para (1)(b)). (See Notes on 59/6/1 at pages 968 and 969 of the Supreme Court Practice 1993).

However, prior to 1979 the English practice did recognise the Respondent's right to cross-appeal. The following notes on 59/6/1 at p. 836 of the 1973 White Book are pertinent:

Respondent's notice. - There are two kinds of notice that may be given by a respondent—one, a substantive, cross notice of appeal; the other, a notice under this rule, asking that the decision of the Court below should be varied (subr. (1)) or that it should be affirmed on grounds other than those relied upon by that Court (subr.(2)) A cross notice of appeal should be given where there are separate and distinct causes of action (whether both by the same party, or one by claim and another by counterclaim), and one party seeks to contest the decision upon one cause of action and another party upon another cause of action (*National Society for Distribution of Electricity v. Gibbs*, [1900] 2 Ch.280). So, too, where there are several parties, and a respondent seeks to vary the order of the Court on a point in which the appellant has no interest but other parties are interested (*Re Cavander's Trusts* (1881), 16 Ch. D. 270). Again, where the respondent intends to contest the jurisdiction of the Court below, he should serve a cross notice of appeal: a preliminary objection to the appeal is not appropriate (*Re Wilson*, [1916] 1 K.B.382, C.A., as reported in 89 L.J.K.B. 337). In other cases the notice to be given is a respondent's notice and it must be given whether the appellant has appealed from the whole of the judgment or only part (*Harris v. Aaron* (1877), 36 L.T. 43). But the only material difference,

under the present rule, between a cross notice of appeal and a respondent's notice appears to be in the time within which they are to be served: in the former case the time specified in r.4(1); in the latter case in r.6(4). In each case the grounds relied upon, and the precise form of order asked for, must be specified.

In his written submissions Counsel for the Respondent has submitted "that notwithstanding the lack of mention in the Court of Appeal Rules, at common law there is provision for cross-appeal - see Natural Society for Distribution of Electricity v Gibb [1900] 2 Ch. 280." He goes on to say - "If however the court rules against the Respondent on this, I would seek leave to amend the Respondent's summons and draft notice of cross appeal by substituting "respondent's notice" for "[notice of] cross-appeal".

By virtue of the provisions of Section 12 of the Court of Appeal Act an aggrieved party has a statutory right of appeal to the Court of Appeal in any cause or matter, not being a criminal proceeding, from a final decision of the High Court sitting in first instance.

A notice of appeal is required to be "filed and served" within 6 weeks after the final judgment or order of the Court below is signed entered, or otherwise perfected. (See paragraph 4 of Rule 15 and Rule 16(b)). In practice the 6-weeks period runs from the date of the sealing of the Order or Judgment.

This means that whichever party files and serves notice of appeal first becomes the Appellant. The other party then becomes the Respondent. But the Respondent is entitled as of right in my view, to file and serve a cross-notice of appeal within the 6 weeks period if he has a substantive ground of appeal. Otherwise he must have recourse to a Respondent's Notice as prescribed by Rule 16 of the Court of Appeal Rules.

If I am in error in holding the view that the Respondent has a statutory right then I am nevertheless of the opinion that it is open for the Fiji Court of Appeal to follow the English practice by allowing the Respondent to file and serve a cross-notice of appeal within the 6-weeks period. The 21 days allowed for under Rule 19 does not apply to a Respondent who wants to file a substantive appeal. It applies to a Respondent who not having appealed from the decision of the Court below wishes to merely contend that the Court's decision should be varied (Rule 19(1)) or it should be affirmed (Rule 19(2)) on grounds other than that relied on by that court.

In this particular case before me it is quite obvious that grounds of the proposed cross-appeal are quite inappropriate for serving a Respondent's Notice under Rule 19. The Respondent is seeking neither to vary the judgment nor to affirm it. He is

asking that it be completely set aside in his favour on a substantive ground (among others) which is separate and distinct from the Appellant's contention.

The first question that now arises for any determination is whether this court should allow the Respondent to serve a notice of cross-appeal out of time. The onus is on the Respondent to show good reasons why such an extension should be granted. A much more strict approach should in my view be adopted in the case of an application for extension of time for service of a notice of appeal (or cross-appeal) than to such an application relating to a Respondent's Notice to affirm the decision of the court below. In the latter case the notice merely adds further arguments to an existing appeal. A cross-appeal out of time on the other hand is an endeavour to vary the judgment in a way different from that for which the appellant is contending. In support of my view I rely, mutis mutandis, on the English approach as revealed in the following notes to 59/6/6 appearing at page 968 of the Supreme Court Practice, 1993 (Vol 1) -

The present practice is that where it is a respondent's notice to affirm (see para. 59/6/1) an extension of time will normally be granted, unless it can be shown that granting it will cause significant prejudice to the appellant. Where, however, it is a respondent's notice to vary or a respondent's notice by way of cross-appeal, an extension will only be granted if good reasons for doing so are shown (see generally Magmasters Ltd. v. V.C.S. Ltd. [1984] 1 W..L.R. 1208; [1984] 3 All E.R. 510, C.A.).

Once an appellant or cross appellant allows time for appealing to go by he loses his position to attack the judgment as of right. He becomes an applicant for a grant of indulgence by the Court.

I have examined the contents of Sunil Kumar's affidavit and I am satisfied that by virtue of his status in the Attorney-General's Office he was deposing to facts within his knowledge. Whilst I cannot rule out a certain amount of laxity I am persuaded that change of counsel and departure of one of them from Fiji after expiry of his contract contributed to the delay. But I must nevertheless take into account the delay factor and any possible prejudice that might be occasioned to the Appellant were I to allow the application sought. I do not see any injustice or prejudice being suffered by the Appellant but the Applicant should pay the Appellant's cost to date in any case. A date for hearing of the Appeal has not as yet been fixed. The granting of the leave sought will not delay the fixing of a hearing date. I note that the Appellant itself did not lodge an appeal until 7 months after the judgment was delivered although the Appellant was not in breach of any Rules. The grounds of cross-appeal far from being wholly unmeritorious appear to raise some substantive and interesting questions of law. Some of the issues raised by the Respondent in his proposed cross notice of appeal can be raised by the Court of Appeal itself by virtue of the powers vested in it by Rule 22(4) of the Court of Appeal

Rules, for the Court is interested in ensuring "the determination on the merits of the real question in controversy between the parties". If I grant the indulgence sought, the parties will come prepared to argue the issue clearly raised in advance. I have come to the conclusion, though somewhat reluctantly, that it will be in the interest of justice to allow the application. This course will enable the merits of the real controversy in law between the parties to be finally determined by the Appeal Court.

As far as the stay application is concerned I see no merit in it. No exceptional circumstances exist to grant the application sought. In the outcome therefore I make the following Orders:

- (i) *Application to cross-appeal out of time granted.*
- (ii) *Applicant to file and serve Notice of Cross-Appeal within 14 days.*
- (iii) *Application for an order to stay execution of judgment pending appeal is refused.*
- (iv) *Applicant to pay Appellant all costs to date in any case.*



Sir Moti Tikaram
Acting President, Fiji Court of Appeal