

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. ABUO092 OF 2004S
(High Court: Cr. Appeal NO. HBCO153/97L)

BETWEEN: YANUCA ISLAND RESORT LIMITED

APPELLANT

AND: FREDERICK WILLIAM EDWARD MARKHAM

RESPONDENT

Counsel: J. Apted for appellant
 A. Narayan for respondent

Hearing: 9 May 2005

Ruling: 13 May 2005

RULING

This is an application by the respondent that the appeal be dismissed on the ground that it is irregular having been filed without leave to appeal. The appeal is against an award of costs made by Byrne J on 4 November 2004.

The original claim was for damages for injuries sustained by the respondent at the appellant's resort in which the learned judge gave judgment to the respondent. He awarded damages but added a direction that he would hear counsel further on costs. The costs hearing took place on 13 and 20 September 2004 and judgment was reserved for an unspecified period.

Subsequently, on 15 October 2004, the appellants applied for leave to appeal the principal judgment out of time. I heard that application on 1 November 2004 and refused leave in a reserved ruling dated 5 November 2004.

In the meantime, Byrne J delivered his judgment on costs on 4 November 2004. There is an issue whether the court registry notified counsel of that date. Clearly Mr Narayan for the respondent was notified, at least orally, and attended. The evidence of the appellant's solicitors is that they were not notified and I accept that was the case. The costs judgment was sealed by the respondent 11 November 2004. No copy was served on the appellant and they were not aware of it until they conducted a search of the court on 7 December 2004.

By that time the trial judge had retired and left Fiji. Counsel for the appellant, although unsure whether the order for costs was interlocutory or final, decided it would be prudent to apply for leave to appeal. The application was filed a few days late, on 21 December 2004, and therefore also required leave to appeal out of time but Mr Narayan takes no issue on that. His objection is that this appeal needed leave and it has not been granted.

The appellant's affidavits show that the solicitors were conscious that rule 26(3) required such an application to be first made in the High Court but, as a result of the departure of the judge and in an abundance of caution, made arrangements to file the application in both courts.

Although I have no note of the matter, it appears I was asked by the registrar whether this was a final or an interlocutory matter and advised that it was final. As that would not require leave in normal cases, the solicitors for the appellant simply filed a notice of appeal.

Mr Narayan bases his objection on the terms of section 12(2) (e):

- "(2) no appeal shall lie -
- (c) without the leave of the Court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only;..."

The terms of that section, he suggests, require leave and application must first be made to the High Court. The trial judge has a wide discretion over costs and is better placed to decide if leave should be granted. In the present case, he conducted a lengthy hearing on the issue of costs having also, of course, heard the original action.

Mr Narayan acknowledges that, if I dismiss this appeal for want of proper form, the appellant can still apply for leave to appeal and leave to appeal out of time and suggests there will have been no prejudice suffered.

Mr Apted responds that the appellant's intention was to apply for leave but that application was not accepted by the Court registry on the ground that it was not necessary for an appeal from a final order. He further contends that, should application for leave be required, it is properly made in this Court and not in the High Court in this case. Section 12 (2) (e) provides that the application should be made to the judge making the order not simply to the court below as is stated in rule 26(3). Normally that would amount to the same thing but, in a case where the judge is no longer able to hear the application, it should properly be made to this Court first. If he is wrong on either of those points, he asks the Court, under section.17, to grant leave to appeal on the basis of this application.

The affidavits filed by the appellant show the steps taken by the appellant and the manner in which it was discovered the costs judgment had been delivered. Although this court has stated that it is good practice for the party sealing an order to serve it on his opponent especially where it is likely he will wish to appeal, there is no obligation on him to do so. It is the responsibility of the solicitors to keep in touch with the court registry. The current practice by many High Court judges is to reserve judgments sine die and the consequence is, all too often, very lengthy delays. Lawyers, therefore, are wise to check regularly. In the present case, the appellants had fallen foul of the same problem in relation to the principal judgment and so it would be reasonable to have expected them to be particularly cautious over the subsequent judgment.

Section 12(1) provides for the right to appeal but subsection (2) restricts that right by requiring leave for specified types of appeal. I accept Mr Narayan's submission that the terms of section 12(2) (e) clearly require leave for an appeal solely against an order for costs.

In considering an application for leave to appeal the Court will consider whether the grounds of appeal raise arguable issues. It is not a time to consider the actual merits; that is for the

full Court should leave be granted. The notice of appeal already filed in this case raises a number of arguable issues of some importance which I consider should be determined by the full Court. In those circumstances, I see little merit in allowing this application if the result will simply be to start the appeal process afresh. That does little more than waste time and costs. I also bear in mind the effect of the advice given to the appellant when he first attempted to file his application for leave.

In those circumstances, I give leave to appeal out of time and leave to appeal. I order that it proceed on the notice and grounds filed on 21 December 2004 and the timetable should follow that in Practice Direction 1 of 2004.



13TH MAY, 2005

**[GORDON WARD]
PRESIDENT
FIJI COURT OF APPEAL**