

IN THE COURT OF APPEAL

SUVA, FIJI ISLANDS

MISC. APPEAL ACTION NO. 5/2009
[On appeal from the Decision of the
Lautoka High Court in Civil Action
No.087 of 1995]

BETWEEN :

ATTORNEY GENERAL OF FIJI

APPELLANT

AND :

GRAHAM BURNETT of Nananu-I-Ra, Businessman,
Trading as **RA DIVERS**

RESPONDENT

JUSTICE OF APPEAL :

HON. JUSTICE J. BYRNE

COUNSEL :

J. LEWARAVU (FOR THE APPELLANT)

:

MS P. KENILOREA (FOR THE RESPONDENT)

DATES OF HEARINGS

AND SUBMISSIONS :

16th and 30th of JUNE 2009 , 13th JULY 2009

DATE OF RULING :

24th JULY 2009

AN APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

2.

1. On the 9th of December 2008, the High Court of Fiji in Lautoka awarded damages of \$100,000.00 to the Appellant.
2. On the 10th of December, 2008, the Trial Judge Mr Justice Finnigan read out an 11-page extempore judgment to the Court and a copy of this judgment was sent to the Appellant's Lautoka office on or about the 19th of December 2008. The judgment was sealed by the Respondent on 23rd December 2008.
3. The time for entering an appeal against the judgment expired on or about the 3rd of February 2009. No notice of appeal was filed by that date.

It would appear therefore that under the Court of Appeal rules the notice of Appeal was filed twenty two (22) days late.

4. **Rule 16 of the Court of Appeal rules states:**

"Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph four (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say-

- (a) in the case of an appeal from an interlocutory order, 21 days;
- (b) in any other case, 6 weeks."

5. Notice of Motion seeking leave to appeal out of time was filed on the 26th of February 2009.

The appellant submits that in all the circumstances surrounding this case I should exercise my discretion and extend the time in which the appellant should be given leave to appeal because it is claimed that a delay of 22 days is reasonable.

6. **THE HIGH COURT JUDGMENT**

The case in the High Court concerned a claim for damages against the Police for unlawful seizure of a boat owned by the Respondent.

7. In or about May 1994 the Respondent who conducts a diving business at Nananu-i-Ra and who is a qualified Barrister and Solicitor answered an advertisement for a boat for sale and met a man Joseph Ierna at Taveuni. He saw and tried the boat and then negotiated to buy it from Ierna. Finally a price of \$21,000.00 was agreed and the Judge found as a fact that it was not a hurried sale.
8. On 1st June 1994 the Respondent paid Ierna by bank order the \$21,000.00. He took the vessel to Nananu-i-Ra. There he had a boat builder modify it for diving use and fitted a self-draining floor at the back, platforms at the back for divers, strengthening the sides of the vessel for diving tanks and hand-holds on the cabin. These modifications were finished in mid-July 1994.
9. The Respondent had been overseas to a Diving Expo and had begun to take bookings. His first group was booked for early August 1994. In July 1994 he commenced operations with the vessel.
10. On 10th August 1994, the Police at Rakiraki in co-operation with the Taveuni Police obtained and executed a Search Warrant. They seized the boat. The Respondent protested strongly. They took the boat to Taveuni and moored it in front of the Police Station there. After sometime they gave it into the possession of a Misa Lesuma who was the 2nd Defendant in the subsequent High Court proceedings. On the 2nd of May 1995 the High Court at Lautoka issued a default judgment against Misa Lesuma directing that he "Do return the boat with improvements and/or its value at \$25,000.00".

11. Nothing happened. Eventually an Order was made in the Magistrates Court and in August 1995 the Respondent obtained possession of the boat. It had been sunk, it was damaged, and repairs were necessary.
12. After these repairs were effected the Respondent resumed his business but this was slow originally. He claimed in the High Court that for more than two years the credibility of his operation was almost entirely destroyed by the cancellation of all his forward bookings except the first in August 1994 which was in progress when the boat was seized and was finished with the help of other people. He began proceedings in the High Court in 1995 claiming compensation for all of the money lost which he expected from those forward bookings. He claimed the sum of \$81,576.00 for such bookings and supported it with individual nett expectations from each of the cancelled forward bookings.
13. The learned Judge recognized this as a claim for special damages which the Respondent had not pleaded and he therefore refused the claim as special damages but allowed the sum of \$85,000.00 as general damages. To that he added the sum of general damages of \$15,000.00 for travel to Taveuni to recover the boat, repairs to the boat and for missing equipment.
14. The Appellant claims the Judge was wrong in his assessment of damages at \$85,000 for loss of reputation and business and in holding that the Respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interest.

THE APPELLANT'S REASON FOR APPEALING OUT OF TIME

15. The reason given by the Appellant for not appealing in time was because the whole Western Division of Fiji was declared a State of Emergency for Natural Disaster for 30 days from the 11th of January 2009.

16. An Affidavit in support of the motion was sworn by Ajay Singh, the Litigation Officer in the Attorney-General's Chambers. He deposes that the resources of the Appellant's Lautoka Office including personnel and vehicle were deployed to assist the Commissioner Western's Office during the disaster period and this resulted in the Notice of Appeal not being filed in time.

THE RESPONDENT'S ARGUMENT

17. The Respondent opposes the application first on the ground that it ought to have been made in the first instance to the High Court and not the Court of Appeal. He relies on Section 26(1) and (3) of the Rules of the Court of Appeal which reads as follows:-

"26(1) Every application to a judge of the Court of Appeal shall be by summons in Chambers, and the provisions of the Supreme Court Rules shall apply thereto.

(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."

18. It is submitted that the word "shall" in Sub-section 3 means that applications to seek leave to appeal out of time can be made in the High Court and that the application should be made by a Summons in Chambers and not by motion as in the present case.

19. I cannot accept this submission. In *Goundar v. The Minister for Health, Civil Appeal No. ABU 0075/2006S* at paragraphs 37 and 38 on page 9 the Court noted:

"This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declarations of the Court needs leave to appeal to that ruling order or declaration". (emphasis mine).

20. The judgment of the Lautoka High Court dated the 10th of December 2008 was a final judgment of a Court with original jurisdiction and not an interlocutory ruling. In my view therefore an appeal to this Court can be made directly to the Court of Appeal. In this case, the appeal period has lapsed and the appellant is therefore not appealing the judgment as of right but seeking the discretion of the Court to extend the time to appeal. In my judgment also nothing hinges on the application being made by motion and not summons as provided in Rule 26. I regard this rule as purely directory.
21. The respondent then argues that no reason is given as to how many lawyers were deployed by the appellant in the flooding which only lasted some ten days. I consider this submission calls for the exercise of common sense. The fact is that the floods were serious and all the state's resources available were called in to meet the emergency. I therefore reject this submission.

THE PROPOSED GROUNDS OF APPEAL

22. I come now to the proposed grounds of appeal.

Ground 1 alleges that the Learned Judge erred in law and in fact in holding that the respondent was an innocent purchaser for value without notice constructive or otherwise of any competing interest. The Judge had no doubt that the respondent was such a purchaser but without the benefit of the court record it is impossible for me to say whether such a finding was justified on the evidence.

23. In the respondent's affidavit in opposition sworn on the 26th of April 2009 the respondent deposes as follows in paragraphs 24, 25 and 26 :

"24. My evidence was corroborated by the exhibits produced at trial.

25. To the best of my recollection the Appellant's witnesses were not able to rebut or controvert my evidence on these issues, nor was my evidence discredited on cross-examination.

26. The Appellant did not even call any witnesses who were present at the time of the purchase and/or negotiations to give evidence."

24. Again without the benefit of the Court record I am unable to say whether these allegations are borne out by the evidence. I note that the Judge does not make any comment on paragraph 26. It may well be as the respondent claims that the appellant did not call any witnesses who were present at the time of purchase or negotiations to give evidence. Whether or not this claim can be supported by the record remains to be seen. It may have been the subject of submissions to the Trial Judge but again, without the record I can neither confirm nor deny this.
25. I note that in paragraph 28 of his Affidavit the respondent states: "To the best of my recollection, the appellant did not call any witnesses who had knowledge of the same to rebut or controvert my evidence".
26. Again the record will be able to confirm or refute this claim.
27. I appreciate that, based as it was on an assessment of the credibility of witnesses, an appellate court would probably have much difficulty in reversing the trial judge's findings on this. I need not refer to the numerous cases on the subject.

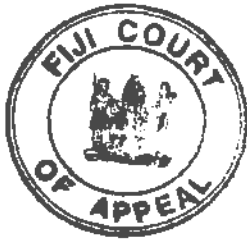
GROUND 2

28. On this ground the appellant submits that it least has an arguable case with reasonable prospects of success in having the quantum of general damages reduced on the basis that a significant portion of the award for general damages should have been in reality categorized as '*Special Damages*'.
29. The Learned Judge found correctly that as special damages has not been expressly pleaded he could not award them to the respondent. I consider it at least arguable that the Learned Judge erred by making an award of general damages representing what he termed the Plaintiff's "substantial losses".

30. In my judgment the appellant should be given the opportunity of submitting to the Court of Appeal that the award of general damages was excessive. Again to consider this question properly the Court must have the record of the High Court in front of it. When this is done it may well be that the Court will be satisfied that the Learned Judge committed no error but it would be wrong for me on the material I have to say whether the award was excessive or not. Only an examination of the record can help the Court on this question.
31. The respondent cited the case of **Fa v. Tradewinds Marine Ltd. and another** (unreported), **Fiji Court of Appeal, Civil Appeal No. ABU 0040 (1994)**. In that case the court held that a delay of only 4 days required satisfactory explanation before an extension of time could be properly given. In that case the applicant gave no explanation at all and consequently he was refused leave to appeal out of time.
32. In this case, however the appellant has given an explanation which I accept as reasonable.
33. The appellant submits that the case is of great public interest particularly in relation to the significance of documentary evidence when calculating damages.
34. In the absence of further and better particulars of this submission I cannot make any comment on it.
35. For the reasons I have given above, I am of the opinion that leave should be given to the Appellant to appeal out of time in this case. However I consider that such leave should be granted on the condition that the appellant pays the respondent through his Solicitors the sum of \$1500.00 costs of this application within 14 days of the delivery of this ruling. The respondent has made many cogent submissions and I consider that he should be compensated at least to some extent for the work involved by his Solicitors.

36. I direct that Notice of Appeal be filed in the Court within seven (7) days of the delivery of this ruling.

Dated this 24th day of July 2009.



A handwritten signature in black ink, which appears to read "John E. Byrne". The signature is written over a horizontal dotted line.

John E. Byrne

JUDGE OF APPEAL