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

CIVIL APPEAL ABU 4 of 2016
(High Court HBA 17 of 2013)

BETWEEN : **FIJI TEACHERS UNION**

Appellant

AND : **DOMINION INSURANCE LIMITED**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Chandra for the Appellant**
Ms S Narayan for the Respondent

Date of Hearing : **15 November 2016**

Date of Ruling : **2 December 2016**

RULING

[1] This is an application for an order that the time within which a notice of appeal may be filed and served be enlarged. The application is made pursuant to Rule 17(3) of the Court

of Appeal Rules (the Rules) as a result of non-compliance with Rules 17(1) and (2) of the Rules. The Appellant seeks leave to file a fresh notice of appeal against the decision of the High Court delivered on 6 November 2015. Pursuant to section 20(1) of the Court of Appeal Act Cap 12 (the Act) the jurisdiction of the Court of Appeal to hear and determine the application may be exercised by a judge of the Court.

[2] The Appellant also sought an order extending the time ordered by the Registrar for the payment of security for costs to prosecute the appeal. On the basis that there is no jurisdiction to make such an order under Rule 17, that application was withdrawn by Counsel for the Appellant.

[3] The application was made by summons filed on 22 April 2016 and was supported by an affidavit sworn by Anaseini Yalorarawa on a date unknown and filed on 22 April 2016. The application was opposed. The Respondent did not file an answering affidavit. Prior to the hearing both parties filed written submissions.

[4] The background facts may be stated briefly. The Appellant, Fiji Teachers Union (the Union), entered into a health insurance agreement with the Respondent (the insurance company) whereby the insurance company agreed to indemnify the medical expenses of the members of the Union. One of the members of the Union (Prasad) fell ill and was required to travel to Australia for urgent heart surgery. Prasad attempted to obtain consent from the insurance company to go to Australia for the surgery but was not successful. Due to the urgency of his situation Prasad travelled to Australia for the surgery and on his return made a claim that was rejected by the insurance company.

[5] The Union commenced proceedings in the Magistrates Court claiming $15,000.00 as damages under the Fair Trading Decree, general damages, interest and costs. The Magistrates Court ordered the insurance company to pay to the Union the sum of $15,000.00 with interest at the rate of 10.5% from the date of judgment until the entire sum is paid in full. It must immediately be stated that the order in relation to interest was made in contravention of section 4 of the Law Reform (Miscellaneous Provisions) (Death

and Interest) Act Cap 27 as amended by the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011 which limits post judgment interest to 4%.

[6] The insurance company proceeded to appeal the decision of the Magistrates Court on a number of grounds that are not relevant to the present application. In his judgment the learned High Court Judge referred to the terms of the contract of insurance. It was noted that the contract provided that overseas medical evacuation benefits must be recommended and certified by a medical practitioner stating that the insured person needs the treatment and a specialist appointed for the purpose by the insurance company must recommend such treatment. Once prior approval has been obtained from the insurance company, the insured may make his own arrangements for the appropriate overseas evacuation. The learned Judge found that the statement by the employee of the insurance company to the effect that it would take two to three weeks to process the request for overseas medical evacuation did not have the effect of granting permission and the contract of insurance did not make provision for such process. The learned Judge concluded that the parties cannot deviate from the terms of the contract of insurance and as a result allowed the appeal by the insurance company and set aside the decision of the Magistrates Court. The claim by the Union was dismissed with no orders as to costs.

[7] It was against that judgment that the union filed a timely appeal on 17 December 2015. However that appeal was deemed to have been abandoned on 12 January 2016 due to the failure of the union to appear on the return of the summons to fix security for costs. A fresh notice of appeal was filed on 14 January 2016 pursuant to Rule 17(2) of the Rules. However that appeal was also deemed to have been abandoned on 4 March 2016 due to the failure to pay the amount ordered as security for costs within the time ordered by the Registrar.

[8] Before proceeding further it is necessary to consider in greater detail the structure of Rule 17.

"17.-(1) The appellant must –

(a) Within 7 days after service of the notice of appeal –

(i) file a copy endorsed with a certificate of the date the notice was served; and

(ii) apply to the Registrar to fix the amount of the security to be given by the appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid;

(b) within such time as the Registrar directs, being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs.

(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of –

(a) in the case of an appeal from an interlocutory order – 21 days; or

(b) in any other case – 42 days,

calculated from the date the appeal is deemed to be abandoned.

(3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph(2)."

[9] Rule 17(3) provides that except with the leave to the Court of Appeal no appeal may be filed after the expiration of the time specified in Rule 17(2). Rule 17(2) provides that in the event that an appeal is deemed to have been abandoned for non-compliance with the requirements specified in Rule 17(1), a fresh notice of appeal may be filed before the expiration of the time limit for filing an appeal that is calculated from the date the appeal is deemed to have been abandoned.

[10] The effect of Rule 17 is that an appellant is given an opportunity as of right to file a fresh notice of appeal within either 42 days (for final judgments) or 21 days (for interlocutory judgments) from the date on which the appeal was deemed to have been abandoned for non-compliance with the various requirements specified in Rule 17(1). It is only if the Appellant fails to file a fresh notice of appeal within the required time that an application may be made for leave to appeal under Rule 17(3). However there is no right to apply for

leave under Rule 17(3) when there has been non-compliance with Rule 17(1) with respect to the fresh or second notice of appeal. Any other interpretation of Rule 17 would have the effect of allowing an appellant to seek leave to appeal after each failure to comply with Rule 17(1). The appeal process would be never ending. In my judgment Rule 17(1) & 17(2) give an appellant one chance to file a fresh notice of appeal either as of right if filed within time or with leave if filed out of time in the event that there has been non-compliance with Rule 17(1).

[11] It follows that the application by the Union is misconceived. The Union filed its fresh notice of appeal within time but failed to comply with the requirements of Rule 17(1) a second time. Under those circumstances there is no right to seek leave to appeal under Rule 17(3). The Court has no jurisdiction to determine the application under Rule 17(3).

[12] The union is left in the position that its application falls to be determined as an application for an enlargement of time for non-compliance with Rule 16 of the Rules. Under Rule 16 the union was required to file its notice of appeal within 42 days from the date of the judgment. The notice was required to be filed by 18 December 2015. Putting aside the two abandoned appeals, the present application was filed on 22 April 2016. The delay is just over 4 months. The present application comes before the court pursuant to section 13 of the Act invoking the power of the High Court to enlarge time.

[13] In determining an application for an enlargement of time the Court has a discretion that must be exercised judicially. In **NLTB (now TLTB) –v- Almed Khan and Another** (CBV 2 of 2013; 15 March 2013) the Supreme Court discussed five factors and are usually considered to ensure that the discretion is exercised in a principled manner. These factors are (a) the length of the delay, (b) the reason for the delay (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced. These are matters that go to

determining whether it would just in all the circumstances to grant or refuse the application.

[14] Notwithstanding the failed attempts to launch this appeal the delay must be considered as the period from 18 December 2015 to 22 April 2016 being a period of about 4 months.

[15] The reasons for the delay are set out in the supporting affidavit. In brief the explanation relates to the internal management of the firm of legal practitioners acting for the union and are of no consequence to either this Court or the insurance company. The explanations are wholly unsatisfactory.

[16] Although the delay may be described as substantial and the explanation unsatisfactory, the exercise of the discretion also depends upon whether there is a ground of appeal that will probably succeed. It is at this point necessary to recall that the appeal comes to this Court from the High Court in the exercise of its appellate jurisdiction under section 12(1)(c) of the Act. As a result the jurisdiction of this Court is restricted to grounds of appeal that involve errors of law only. As a result the union is required to establish that (1) the grounds of appeal involve errors of law only and (2) those grounds will probably succeed.

[17] In its supporting affidavit the Union has annexed a notice and grounds of appeal upon which it intends to rely in the event that an enlargement of time is granted. There are three grounds of appeal which all refer to errors of fact and law. At the hearing of the application Counsel for the union withdrew the first two grounds on the basis that they involved questions of mixed fact and law. Counsel sought leave to amend the third ground by deleting the words *"and in fact"* so that the remaining ground reads as follows:

> *"(3) The learned Judge erred in law when the policy contract was ambiguous and failed to specify specific procedures and time frame for evacuation of the insured and failed to apply the contra proferentem rule in*

favour of the Appellant to the interpretation of the policy instead applied the said principle against the insured."

[18] There are two observations to be made concerning this ground of appeal. The first is that I am not satisfied that the ground involves a question of law only. It seems to me that the ground is premised on a number of factual issues concerning the various requirements specified in the contract that must be satisfied before liability is incurred to indemnify the Union. The issue raised by the ground cannot be considered in isolation. It would be necessary to assess the evidence adduced at the trial in order to determine whether under the circumstances there was an ambiguity that activated the application of the contra proferentem rule.

[19] Secondly, I also have some reservations as to whether the contra proferentem rule has any application to the Union's ground of appeal. In general terms the rule provides that since the contract of insurance is framed by the insurer and since it is the language used by the insurer that is to bind the parties to the contract it is the obligation of the insurer to ensure that the contract is drafted with precision and clarity. Consequently any ambiguity is to be resolved by adopting a construction that is favourable to the insured. In **25 Halsburys (4th Ed) 231** it is stated that:

> *"The maxim, however, only becomes operative where the words are truly ambiguous, that is, speak with two voices; it is a rule for resolving ambiguity, for example, where two different meanings are equally possible and it is otherwise impossible to determine which is intended; ___"*

[20] In the present case the requirements for prior approval are quite clear. There is no ambiguity. The issue raised by the Union is that there is no provision in the policy for situations where the prior approval requirements (including the time for assessment by the insurance company) cannot be satisfied in urgent medical evacuation situations. However even that is not the real issue. The real issue was the claim by the Union that the insurance company was unwilling to demonstrate sufficient flexibility to assess the request for urgent medical evacuation in a timely manner. However these issues do not give use to an ambiguity that would require an application of the contra proferentum rule.

[21] As a result I am not satisfied that the appeal will probably succeed. The Union has not satisfied the requirements for an enlargement of time and as a result the application is dismissed. The Respondent is entitled to costs summarily fixed in the sum of $1,800.00 to be paid within 14 days from the date of this judgment.

<u>*Orders:*</u>

1. *Application for an enlargement of time to file and serve a notice of appeal is dismissed.*
2. *The Appellant is to pay costs of $1,800.00 to the Respondent within 14 days from the date of the Ruling.*

Hon. Mr. Justice W. D. Calanchini
<u>PRESIDENT, COURT OF APPEAL</u>