

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0100 OF 2018
[Lautoka Civil Action No. HBC 155 of 2009]

BETWEEN : **BRETT WHITTAKER and LOUISE WHITTAKER**
Appellants

AND : **BANK OF SOUTH PACIFIC**
Respondent

Coram : **Prematilaka, RJA**
Morgan, JA
Adrée Wiltens, JA

Counsel : **Mr. K. Patel for the Appellants**
: **Mr. J. Apted for the Respondent**

Date of Hearing : **06 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with the reasons and orders of Morgan, JA.

Morgan, JA

Introduction

[2] This is an appeal against (i) the Order of the Master of the High Court at Lautoka delivered on the 16th December, 2016 striking out the Plaintiff's claim for failure to

give inspection and/or (ii) a Ruling of the Honourable Mr. Justice Ajmeer in the same Court of the 28th February, 2018 refusing leave to appeal the said Master's decision out of time.

[3] Both parties filed written submissions and made oral submissions before this Court. It was agreed by Counsel for the Appellants during the hearing before this Court that this Court did not have the jurisdiction to consider the appeal against the Master set out in paragraph 2 (ii) above under Section 12 (2)(f) of the Court of Appeal Act 1949 ("the Act").

Background

[4] The background to the matter was succinctly set out by the Respondent in its written submissions as follows:-

- “7. *This appeal stems from the Appellants' civil action in the High Court that was commenced 16 years ago in 2009.*
8. *The Appellants claimed that by placing their properties on mortgagee sale, BSP breached the terms contained in a letter of offer for overdraft facilities entered into on or about 8 June 2005, now 20 years ago. BSP had moved to exercise its mortgagee's power of sale after the Appellants had continuously defaulted in their repayment obligations despite numerous demands and accommodations from BSP. The Appellants also claimed alleged duress by BSP in respect of the entry into those overdraft facilities, and that BSP engaged in unconscionable conduct under section 76 of the Commerce Decree (now the Fijian Competition and Consumer Commission Act 2010).*
9. *The Action was commenced on 27 August 2009 by a Writ of Summons accompanied by an application for interlocutory injunction. Although the Appellants succeeded in obtaining the injunction, this was later discharged when they refused to meet the condition to pay a sum of money into Court and instead applied to vary the condition. Thereafter, the Appellants made further unsuccessful attempts to restrain the sale by way of interlocutory applications between 2010 and 2013.*
10. *The properties have now been sold and the proceeds applied towards reduction of the monies advanced under the overdraft facilities. BSP now has a counterclaim for the amounts that remain outstanding.”*

[5] The Respondent submitted and the record confirmed that there had been a long history of delays by the Appellants in the Court below and in this Court. The Appellants did not dispute this before this Court.

- [6] The Respondent submitted and again the record confirmed that the essence of the Appellants' claim as set out in their pleadings was not based on the terms of documents but rather relied principally on various documented conversations and meetings that they allege took place with employees of the Respondent. The Respondent alleges that the Appellants failed to produce these documents during discovery exacerbating the delays in the matter and causing the Respondent to apply in January 2016 to strike out the action for the Appellants' failure to comply with discovery. Following a hearing the Master struck out the Action for the failure to comply with discovery. The Master found that the Appellants had deliberately suppressed documents which amounted to contumacious conduct and that counsel for the Appellants had misled the Court regarding discovery of the relevant documents.
- [7] The Appellants erroneously filed a Notice of Appeal against the Master's interlocutory decision in the High Court without the required leave which caused a delay of five and a half months before the Appellants made a proper application to the High Court for leave to appeal against the Master's Ruling and to do so out of time. The delay caused by the Appellants is significant as it is one of the reasons why Justice Ajmeer ("the Judge") refused leave to appeal out of time in his Ruling which the Appellants now appeal against.

The Ruling Appealed

- [8] The Judge refused the Appellants' application for an extension of time for Leave to Appeal. In doing so he set out the governing principles for the granting of leave to appeal out of time at paragraph [12] of his Ruling as follows:-

"[12] The governing principles for the granting of leave to appeal out of time are as follows:

- (i) Length of delay;*
- (ii) Reason for the delay;*
- (iii) Chance of appeal succeeding if time for appeal is extended; and*
- (iv) Degree of Prejudice to the Respondent if application is granted.*

(See, Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 020.2009 (3 February 2010), Kumar v Commissioner of Police, Fiji Court of Appeal Civil Appeal No. ABU 0059 of 2004 (10 March, 2006), Nair v Prakash [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013) & Tora v Housing Authority [2002] FJCA 16; ABU0036.2002S (15 November 2002))."

- [9] The Judge then considered the Appellants' application in terms of those principles.
- [10] With respect to limbs one and two of the principles the Judge found that the delay of 5½ months in seeking leave to appeal the ruling was substantial and that the Appellants had conceded that the delay was substantial. The Judge further found that the reason for the delay in blaming their solicitors for intentionally overlooking the clear requirement to apply for leave to appeal the Master's Ruling was unsatisfactory.
- [11] In relation to limb (iii) the Judge stated the following at paragraph [35] of his Judgment.

"[35] The function of this court is to consider whether any of the grounds of appeal has a chance of success and/or whether there are other compelling reasons for granting leave to appeal out of time. For this purpose, I am not going to set out the well-argued written submissions made on Mr Whittakers' behalf and in response on behalf BSP. Having gone through the proposed grounds of appeal, I could only say that the proposed grounds of appeal have no chance of success, if the time for appeal is extended, and I also find that there are no other compelling reasons involving the question of law or interpretation of any provision of the law."

- [12] With respect to the fourth limb the Judge found, accepting the Respondent's submissions, that the granting of time for leave to appeal would specifically prejudice the Respondent because the time that had passed would affect the availability of witnesses and impact witnesses' memories.

- [13] Finally the Judge held at paragraph [43] of his Ruling as follows:-

"[43] Having found that about 5 ½ month delay as substantial and having found that the reasons for the delay as unsatisfactory, I refuse to grant leave to appeal out of time the interlocutory order of 16 December 2016 delivered by the Master striking out the Whittakers' claim in whole. I would order the Whittakers to pay a sum of \$850.00 to the BSP for the costs of these proceedings."

- [14] The Appellants thereafter applied to this Court for leave to Appeal the Master's Ruling of 16 December 2016 and for an enlargement of time for leave to appeal the said ruling. Pending this application the Appellants applied to file a fresh summons to amend their original application against the Master's ruling by including the High Court Ruling of 28 February 2018 which was granted by Almeida Guneratne, JA on the 28th August 2020. This was apparently an attempt by the Appellants to overcome a contention raised by the Respondent that this Court did not have the jurisdiction to grant leave to appeal against the decision of a Master under Section 12(2)(f) of the

Act and the decision of this Court in **New India Assurance Company v Panach Investment Ltd** (2017) FJCA 46.

[15] In his ruling of the 28 August 2020 Guneratne JA noted at paragraph 9 of his Ruling that there was a “jurisdiction issue” as to whether this Court could entertain the application and at paragraph [12] he stated:-

“[12] Reflecting on the rival submissions, for my part, I could not see any conflict in regard to “the jurisdiction issue”, although much labour was spent on that. Even if it could be argued that there is a conflict, both decisions of Chandra J.A. and Calanchini, P. being rulings of a single Judge, it is a fit matter for the final Full Court to make a final determination on, for which reason alone I am inclined to grant leave to appeal.”

[16] Following the Ruling the Appellants filed a Notice of Appeal and Grounds of Appeal in this Court on the 03 September 2020 which were subsequently amended and the Amended Notice of Grounds of Appeal were filed on 02 September 2024.

[17] As stated in paragraph [2] above the appeal is against both the Master’s Ruling and the Judge’s Ruling and seeks to set aside both these Rulings.

[18] The Grounds of Appeal as amended are as follows:-

*“1. The Learned Judge erred in law and/or fact in failing to hold that the Learned Master was wrong to strikeout the Appellant’s claim under Order 24 Rule 16 of the High Court Rules 1988 (Rules) by relying on the following passage from the decision of Lord Justice Lloyd in **Landauer Ltd v Comins & Co. (a Firm)** (unreported but published in *The Times* on August 7, 1991) in so far as the passage was obiter dicta (emphasis added):*

“While it was accepted that the normal pre-requisite for the striking out of an action under Order 24 rule 16 of the rules of the Supreme Court for failure to comply with a requirement for discovery of documents was the existence of real or substantial or serious risk that a fair trial was no longer possible, it might be that cases of contumacious conduct, such as the deliberate suppression of a document, would justify striking out even if a fair trial were still possible”

and the learned judge’s reasons for decision in that case should have led the Learned Master to dismiss the application of the Respondent to strike out the Appellants’ claim, albeit with an order for costs against the Appellants.

*2. The Learned Judge erred in law and/or fact in failing to hold that the Learned Master had exercised his judicial discretion improperly, unfairly, and not in conformity with the principles established in the decision of Lord Justice Millet in **Logicrose Ltd v Southern United Football Club** (unreported but published in *The Times*, March 5 1988)*

cited with approval in *Landauer Ltd v Comins & Co.* in dismissing the Appellants' claim pursuant to Order 24 Rule 16 of the Rules.

3. *The Learned Judge erred in law and/or fact in failing to hold that the Learned Master at paragraph 15 of his decision was wrong:*
- (a) *in finding that the Appellants had deliberately suppressed the documents when:*
 - (i) *the missing documents, being the “Lowing Memo” and the “Khan notes” as referred to in the Master’s Ruling (**Missing Documents**), had been produced prior to the hearing of the Respondent’s application to strike-out under Order 24 Rule 16; and*
 - (ii) *the evidence before the Court was that those documents had been misplaced but were discovered after extensive searches by the Appellants;*
 - (b) *in finding that the Appellants had falsely and repeatedly misinformed the Court on 21 October 2015, 9 November 2015, 23 November 2015 and 7 December 2015 that they had produced all the documents to the Respondent when there was no evidence from the court records which supported that finding;*
 - (c) *in finding that the Appellants’ conduct was contumacious when that finding was based on the Learned Master’s erroneous finding that the Appellants had deliberately suppressed the Missing Documents;*
 - (d) *in failing to make a finding whether the alleged suppressed documents were material and relevant to the Respondent’s case and that despite the Missing Documents being produced there was an existence of a real or substantial or serious risk that a fair trial was no longer possible;*
 - (e) *when, even if the Learned Master was correct in finding that the Appellants had deliberately suppressed the documents (which is denied), the case of **Logicrose** and **Landauer** on which he relied did not support an exercise of his discretion to strike out the proceeding on that basis inter alia because they were distinguishable on their facts;*
 - (f) *when, even if the Learned Master was correct in finding that:*
 - (i) *there had been suppression of documents; and*
 - (ii) *the suppression amounted to contumacious conduct in the circumstances;*

(which is denied) by exercising his discretion to strike out the proceeding rather than refer the Appellants for contempt of court.

The Appeal

(A) Against the Master's Ruling

[19] I agree with the Respondent's Submission that the appeal against the Master's Ruling is misplaced. This Court lacks the jurisdiction to grant leave against the interlocutory order and rulings of a Master under Section 12(2)(f) of the Act. Section 12(2)(f) only allows this Court to grant leave to appeal against the interlocutory orders and rulings of a Judge of the High Court.

[20] In any event as stated above the Appellants conceded at the hearing before this Court that this Court did not have the jurisdiction to consider the appeal against the Master.

[21] For the reasons set out above the appeal against the Master's decision must fail.

[22] Further this Court indorses and affirms that the correct procedure to follow in cases where applications are made to this Court for leave to appeal pursuant to Section 12(2)(f) of the Act is as set out by Calanchini, P sitting as a single Judge of Appeal in **New India Assurance Company Limited v Panach Investment Limited** [supra].

(B) Against the Judge's Ruling

[23] The Respondent submits that the Amended Appeal against the Judge's Ruling must be dismissed as the grounds of appeal do not only raise question of law as required by Section 3(4) of the Act.

[24] As noted in paragraph 15 above Guneratne, JA in granting leave to appeal considered the issue of this Court's jurisdiction under Section 3(4) of the Act when considering appeals against a Judge's refusal to grant leave against a Master's Ruling was a matter for the full court to determine and on this basis alone granted leave. In regard to this issue, Calanchini, P, again sitting as a single Judge of Appeal, stated the following in **Morgan v Lal** (2018) FJCA 181.

*"[5] Being dissatisfied with the decision of the court below Morgan now appeals to this Court. In doing so he must satisfy two threshold requirements. First he must establish that his appeal involves a question of law only under section 3(4) of the Court of Appeal Act 1949 (the Act). Secondly he must obtain leave from the Court to appeal under section 12(2)(f) of the Act. In **Subindar Kaur -v- Baljeet Singh** [1999] FJCA 46; ABU 11 of 1998, 13 August 1999 this Court observed:*

“Section 12(1)(c) [now section 3(4)] of the Court of Appeal Act confers a right to appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only but the right is subject to subsection (2). Section 12(2)(f) provides that, subject to presently irrelevant exceptions, there shall be no appeal from an interlocutory order of the High Court except by leave.”

[6] *These requirements that arise under section 3(4) and section 12(2)(f) of the Act are consistent with section 99(3) of the Constitution.*

[7] *The effect of these two provisions is that there is no right of appeal against an interlocutory order or judgment of the High Court unless leave is granted and one of the matters that must be determined when considering whether to grant leave in the case of any judgment given by the High Court in the exercise of its appellate jurisdiction, is whether any ground of appeal involves a question of law only.”*

This Court confirms that the above paragraphs correctly set out this Court’s jurisdiction under Section 3(4) of the Act when considering appeals against a Judge’s refusal to grant leave against a Master’s Ruling.

[25] The Appellant’s grounds of appeal contain questions of mixed law and fact. Indeed each ground is prefaced with the contention that the Judge erred in “law and /or fact.”

[26] The Appellants did not in their amended Grounds of Appeal, their written submissions or in their oral submissions before this Court challenge whether the Judge had applied the correct test in refusing leave which would have been a question of law.

[27] The Appeal is an appeal against the Judge’s Ruling to refuse leave to appeal the Master’s Ruling out of time. However all the grounds of appeal and submissions address the Master’s Ruling and not the Judge’s Ruling and in particular the Judge’s reasons for arriving at the decision to refuse leave.

[28] Although the Appellants did not address the Judge’s Ruling on leave, I hold that the Judge applied the correct principles for granting leave to appeal out of time in paragraph 12 of his Ruling set out in para [8] above and that he properly recognised his function in paragraph 35 of his Ruling when he stated:-

“The function of this Court is to consider whether any of the ground of appeal has a chance of success and/or whether there are compelling reasons for granting leave to appeal out of time.”

[29] For the reasons stated above I find that the Appellants' appeal against the Judge's Ruling has no merit and I affirm the Judge's Ruling.

Conclusion

[30] The Appellants grounds of appeal have no merit and are refused. The Respondent has illustrated that there have been inordinate delays in this matter both in the High Court and in this Court caused by the Appellants. This was not disputed by the Appellants. The costs awarded below recognise those delays.

Andrée Wiltens, JA

[31] I agree with the decision and the reasons of Morgan, JA.

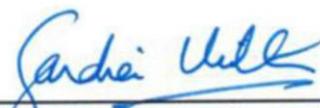
Orders of the Court

1. *The Appeal is dismissed.*
2. *The Appellants are to pay the Respondent's costs of this appeal in the sum of \$6,000.00 within 21 days of the date of this judgment.*




Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL


Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL


Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

Solicitors

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