IN THE HIGH COURT OF FIJI AT LAUTOKA
[CIVIL JURISDICTION]

CIVIL ACTION NO:174 OF 2011

BETWEEN : **OARSMAN BAY LODGE LIMITED,** a limited liability company,having its registered office at Neil Underhill & Associates, Chartered Accountants, Lot 25,Wailada Road, Lami.

DEFENDANT-APPLICANT

AND : **ANZ BANKING GROUP LIMITED,**a body corporate licensed as a financial institution under the Banking Act Cap. 212 and carrying on business at 378, Queen's Road, Nadi and elsewhere in Fiji.

PLAINTIFF-RESPONDENT

Counsel

Mr K Qoro for the Defendant-Applicant
Ms Vasantika Patel for the Plaintiff-Respondent

Date of Hearing : 08 March and 10 April 2013
Date of Ruling : 24 April 2013

R U L I N G

1. The defendant-applicant (the applicant), by its *inter-partes* summons dated 05 November 2012, seeks extension of time to appeal the learned Master's ruling dated 25 September 2012.

2. Learned Master, by his ruling,allowed the summons dated 21 June 2012 of the plaintiff-respondent (the respondent) for summary judgment under O 14 r 1 and O 3 r 4 of the High Court Rules, 1988 (the HC Rules) in the action on a writ to recover a sum of $ 55, 477.65 from the applicant. The sum was claimed to have been mistakenly paid to the cheque-account of the applicant by the respondent-bank.

3. The applicant's summons under O 59 r 10 (1) of the HC Ruleswas filed on 05 November 2012, twenty days after the statutorily prescribed appealable period[of twenty one days] under O 59 r 9 (a) of the HC Rules.

4. The summons is supported by a simultaneously filed affidavit dated 05 November 2012 from Mr EliaKase, the applicant's company secretary, together with annexes marked **EK1**-

EK3. The reasons adduced by the applicant for extension of time, as contained in the accompanying affidavit of Mr EliaKase, are that:

(i) He instructed Qoro/Legal to consider appealing the decision of the learned Master after 10 days from the date of the ruling; but, Mr Qoro could not attend to the appeal as he was busy before the Supreme Court in connection with *LTA v Milan Lal*CBV 0019/2008;

(ii) Mr Qoro undertook an extensive research on the issues of whether the common law defence of change of position and statutory defence under section 112 of the Property Law Act in relation to unjust enrichment; and, the appealable period of 21 days elapsed in the process;

(iii) The defendant, having received a series of periodic payments from the plaintiff for six months, had *bona fide* increased its level of business outgoings; and, has, therefore, changed its position;

(iv) By letter dated 15 May 2009, the plaintiff had notified the defendant of the mistaken payment of $ 55, 477.65 to the defendant; and,

(v) That there would be no prejudice to the plaintiff if an extension of time is granted.

5. The summons is opposed by the respondent. An affidavit dated 21 January 2013 from Mr Kaushik Kumar Chovhan, in his capacity as the Manager/Small Businesses at the Nadi Branch of the ANZ Banking Group Limited (the ANZ), has been filed together with annexes marked **KKC1**-**KKC2**. Mr Chovhan, in his opposition, specifically stated that:

(i) The applicant did still have time after conclusion of the hearing of the Supreme Court case on 12 October 2012 to prefer an appeal before 16 October 2012;

(ii) The applicant had not raised the defences either in the statement of defence dated 02 November 2011 to the writ or in the affidavit in opposition dated 27 July 2012 to the summons for summary judgment; and,

(iii) The applicant had, however, made comprehensive submissions at the inquiry into the summary judgment.

6. It is in light of the above assertions of the parties that court needs to consider the issue of extension of time to appeal.

7. Leave to appeal out of time could be granted at the discretion of court; and, such discretion being exercised judicially bearing in mind the well-recognized criteria as set-out by judicial precedents.In ***Safari Lodge Fiji Ltd v. Rosedale Ltd :CivilAction No. 319 of 1999***: [2008]FJHC 139: 5 February 2008, court considered the following criteria as being relevant for extension of time. They are:

    (i) Whether an applicant formed a bona fide intention to seek leave to appeal and conveyed that intention to the opposition party within the prescribed time;

    (ii) Whether counsel moved diligently;

    (iii) Whether a proper explanation for the delay has been offered;

    (iv) The extent of the delay;

    (v) Whether granting or denying the extension of time will unduly prejudice one or other of the parties; and,

    (vi) The merits of the application for leave to appeal.

(At paragraph 4.4)

8. In ***Mokosoi Products Fiji Ltd v Pure Fiji Exports Limited*** [2009] FJCA 32, the Fiji Court of Appeal held that:

> *What [court has] said so far, however, is not sufficient to dispose of the present application. I must now consider whether the applicant can bring itself within the factors which are normally taken into account in deciding whether to grant an extension of time.*
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> *In* ***Bahadur Ali and Ors v. IlaitiaBoila and Chirk Yam and Ors., Civil Appeal No. ABU 0030 of 2002,*** *then President of Court of Appeal, said at p7 [that]:*
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> *The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles (see Hart v Air Pacific Limited, Civil Appeal No. 23 of 1983).* ***The onus is on the [Applicant] to satisfy the Court, that in the circumstances, justice of the case requires that they be given the opportunity to attack the Order……***

and the judgment….. The following factors are normally taken into account in deciding whether to grant an extension of time

1. *The length of delay*
2. *Reasons for delay*
3. *The chances of the appeal succeeding if time is extended*
4. *Prejudice to the respondent.*

(At paragraph 14: My emphasis)

9. The applicant states that his solicitor, Mr Qoro, was heavily engaged before the Supreme Court and it [the applicant] was, therefore, unable to lodge the appeal within time as extensive research had to be undertaken for considerable time by the solicitor before lodging the appeal. This, in my view, is an absolutely untenable and implausible excuse for the failure to file an appeal within time as the engagement of the solicitor before the Supreme Court could not have prevented the applicant from lodging the appeal within time. In any event, no extensive research was required as a condition precedent for an appeal to be lodged. If such excuses are accepted and leave to appeal is granted, then the court would be abandoning its own rules so loosely resulting in inefficacious situations where rules of court are flagrantly disobeyed; and, any party could invoke court's jurisdiction for enlargement of the appealable period at a party's whim. This is something, which court should discourage; and, courts have always stood against fostering of such undesirable scenario.

10. In this regard, the observations made by the Fiji Court of Appeal in ***Pacific Agencies (Fiji) Ltd. v Spurling*** [2008] FJCA 49, at paragraphs 17-18 would be instructive. They read:

> *One can appreciate that in a fused profession, the practitioner with the carriage of a matter will, when appropriate, have the client depose to matters in an affidavit rather than the practitioner [himself]… When, however, there are factual and/or legal issues which are in dispute that are within the particular knowledge of the legal practitioner with the carriage of the matter, then no person other than that practitioner should be deposing to such matters in an affidavit. …*

There is no affidavit from Messrs Qoro/Legal to the effect that Mr Qoro or his associates were prevented from filing an appeal within time due to any conduct on their part to support the position of the applicant.

11. In this regard, it would be pertinent to reinforce the stringent approach as articulated by the Fiji Court of Appeal in V***imal Construction and Joinery Works Ltd v Vinod Patel and Company Ltd***. [2008] FJCA 98; 15 April 2008, where it was held at paragraph 15 that:

> *…[L]itigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence in the nature of flagrant or serious incompetence (R v Birks) [1990] NSWLR 677 is required.*

12. In the circumstances, I am unable to accept the reasons given by the applicant as reasonable for the delay.

13. Notwithstanding the absence of acceptable reasons for the delay, the law nevertheless requires court on a second threshold to consider whether there is merit in the proposed grounds of appeal to entertain the application.The grounds of appeal relied on by the applicant are:

> *(i) That the Master erred in law and in fact in entering summary judgment against the Appellant in the sum of $55,477.65 when the common law defence of change of position and statutory defence under section 112 of the Property Law Act (the Act)raised by the Defendant involved a triable issue or a difficult point of law;*
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> *(ii) That the Master erred in law and in fact in finding that the Appellant has not changed its position when the alleged mistaken payment which took the form of a series of periodical payments over 6 months established a general change of position in that the Appellant had increased their level of outgoing by reference to sums so paid;*
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> *(iii) That the Master erred in law and in fact in ordering the Appellant to restitute the sum of $55,477.65 without considering the relative fault of the parties;*

(iv) *That the Master erred in law and in fact in ordering the Appellant to repay the sum of $55,477.65 without considering that it would be unconscionable to grant such relief in the light of the reasonable expectation of the parties; and,*

(v) *That the Master erred in law and in fact in allowing the Respondent to recover the sum of $55,477.65 without considering that the Respondent had voluntarily paid the said sum to the Turtle Island Resort Fiji Limited as settlement of the claim.*

14. The grounds in (i) and (iii), in my view, constitute substantive matters of law pertaining to the defences available to a receiver of the money by mistaken payment, while the ground in (ii) constitutes an evidentiary matter, which needs be assessed after going through the evidence. The ground urged in (iv) is related to the issue of equity that is found in Section 112(1) of the Property Law Act (the Act), while ground (v), too, is closely connected to the provisions in Section 112 (1) of the Act.

15. Learned Master, in his ruling, addressed the issue of the common law defence of change of position, whichis statutorily enacted in Fiji under Section 112 of the Actsimilar to corresponding legislations in other jurisdictions. It, therefore, became incumbent upon the learned Master to deal with the issue in light of the respective pleadings had before him, both in the statement of defence and in the affidavit opposing the application for summary judgment.

16. The applicant in paragraphs 5, 11 and 13 of its statement of defence pleaded that:

> *In response to paragraph 4, the Defendant say[s] that, the Plaintiff, by its own admission, has committed a mistake, a negligent act, and it took inexcusably almost one (1) year for it (the Defendant) [sic] to establish that mistake and to take action towards rectification;*
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> *The Plaintiff has not disclosed the complete facts surrounding this case for fear that if does, it will reveal to the HonourableCourt the Plaintiff's own Gross Negligence and delays, business malpractices which infringes the Plaintiff's legal obligations and responsibilities under the Banking Act Cap 212 and other banking regulations applicable in this jurisdiction; and,*

The duration of time it took the Plaintiff to discover its negligence is unjustified. Good and accountable business practice dictates that the Plaintiff ought to have been vigilant in supervision of financial transactions and must act swiftly to avoid similar type of circumstances as it now currently claiming against the Defendant.

17. And, in paragraph 11 of the affidavit opposing summary judgment, the applicant pleaded that:

As for paragraph 6 of the said Affidavit, I admit that the Defendant was requested to repay the said sum to the Plaintiff. However, ANZ did not immediately advise or inform us that such various payments were mistakenly paid to the Defendant as when it happened. In any event, such payments were received by the Defendant in good faith and drawn cash against it to pay for its business operation. When the Bank advised the Defendant about the mistake on or about 15th May 2009, the funds were already been used.

18. The above assertions of facts, in my view, substantially encapsulated the defence of change of position contemplated under Section 112 of the Act, which reads:

112. (1). Relief, whether under section 111 or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

(2). Where the court makes an order for the repayment of any money paid under a mistake, the court may in that order direct that the repayment shall be by periodic payments or by installments, and may fix the amount or rate thereof, any may from time to time vary, suspend or discharge the order for cause shown, as the court thinks fit.

19. Learned Master, in paragraphs 24-38 of his ruling, dealt with the issue and ruled that there was no change of position. Learned masterformulated the essence of his conclusions as contained in paragraph 37 and 38 as follows:

> *In essence, the defendant who pleads change of position in defence must convince the court that he or she has acted to his detriment on the faith of receipt i.e. that he or she has spent the money on the belief that she was entitled to it. This simply means absence of notice of the mistake [ ] and so much of the discussion in paragraphs [28] and [29 above is relevant here.*
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> *It would be inequitable to grant relief only if [the applicant] has changed its position. Since I have not found that the [applicant] has changed its position, I need not say anymore on this point.*

20. Upon a careful analysis of Section 112 of the Act, it would appear that its provisions have been founded in such a way that relief [by way of restitution] should be mandatorily …*denied wholly or in part if the person had received the payment/s in good faith and has so altered his position in reliance of the validity of the payment* …

21. There was no dispute that the payments in the amount of $ [FJD] 55, 477.65, posted by the respondent from 15 April- October 2008, were received in good faith by the applicant as such payments could not be distinguished from other payments that the applicant used to get periodically in the course of its business operations. There was, admittedly, no noticeof the mistaken payments from the respondent, which is undoubtedly a leading banking institution in Fiji with ultra-modern facilities, technical know-how and obviously well-trained staff, even in 2008/09. Notice of mistaken payment was, nevertheless, given to the applicant only on15 May 2009, more than a year after the first mistaken payment, within which the applicant had used the money as deposed to in the affidavit opposing summary judgment.

22. Relief for a party, who has made a mistaken payment,could be considered under one of the three categoriesin terms of Section 112 of the Act. They are:'*under Section 111*' of the Act; or on the principles of'*equity*'; or '*otherwise'*. Relief under Section 111 of the Act is wholly inapplicable to the facts of this case. And, any court, which grants relief under Section 112, must, in my view, clearly identify the category under which it proceeds to grant relief.

23. While the category '*otherwise*' is wide open to embrace any possible situation in a given case, the principles of equity, in my view, nevertheless pervades through the entire gamut of the Section because a court of law has to ultimately consider in its opinion'…*whether it is*

inequitable to grant the relief, or to grant relief in full' 'having regard to all possible implications in respect of [third] parties' as well. It is, therefore, not unsafe to conclude that the Section,having employed negative phraseology,is founded on the principles of equity as it also provides for the quantum and the manner of repayment if court makes an order for restitution.

24. It appears that in light of the provisions of Section 112 of the Act, it was not open for the learned Master to rule in favour of the respondent and give summary judgment as the matters that he considered to be of essence (in paragraph 19 above) had constituted triable issues, which could and should have been dealt with only after hearing the evidence from each party. Learned Master, in the circumstances, could not have convinced himself to consider whether it was '*inequitable to grant the relief in full*' or in part without hearing fully the respective cases. A matter, which needs be disposed of on equitable considerations, not only of the applicant but also of any third parties involved under the Act, does not appear to be capable of being disposed of summarily under O 14 of the HC Rules.

25. Matters of equity, in my view, do not have appear to have been considered by the learned Master at all as he had failed to consider whether the respondent, in any event, was entitled to the relief '*in full*'within a short space of six months at substantial installments of $ 9,246.30 with 4% interest from 08 October 2008.

26. Learned Master, in my view,appears to be in error in coming to his conclusions in the ruling dated 25 September 2012 by way of a summary judgment, having misapplied the relevant principles of law relating to O 14 of the HC Rules.

27. The Fiji Court of Appeal in ***Kanakana v Attorney-General*** [2012] FJCA 24: 30 March 2012, held that:

> *Notwithstanding the length of the delay and the wholly unsatisfactory explanation put forward on behalf of the Applicants, the exercise of the discretion does, in this case, depend to some extent on the merits of the proposed appeal. As Thompson JA in the* ***TevitaFa*** *decision (supra) at page 3 stated:*
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> ***However as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.***

The extent to which I am required to assess the chances of success in considering whether to grant leave is similar to the assessment that is made when a stay of execution is sought. To that end it is useful to keep in mind the observation of Tikaram RJA in ***Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji****(1991) 3 FLR 73 at page 82:*

> ***It is not my function to assess the actual merits of the appeal but if prima facie it is obvious that the appeal is wholly unmeritorious or wholly unlikely to succeed then it would be appropriate for me to say so. - - - The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious.***

28. As held in the above case, I am satisfied that the grounds of appeal are not wholly unmeritorious or wholly unlikely to succeed. Instead, I hold that the matters raised in the summons to appeal out of time bear merit; and, they outweigh the delay with no prejudice to the respondent. I, accordingly allow the *inter partes* summons of the applicant for leave to appeal out of time in respect of the grounds of appeal contained therein. In view of the delay, which was held to be unacceptable, I order no costs.

Priyantha Nāwāna
Judge
High Court
Lautoka
Republic of Fiji Islands
24 April 2013