IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL APPELLATE JURISDICTION

CIVIL ACTION NO. HBM 8 of 2018
(Appeal from the Nadi Magistrates' Court Civil Action No. 16 of 2009)

BETWEEN : ARVIND KUMAR father's name Jai Ram now of 1175 Chasapaeke Drive, Pittsburg, CA 34565, United States of America.

APPELLANT/APPLICANT
ORIGINAL 2nd DEFENDANT

AND : SAM MANI father's name Ester Ram of Penrith, New South Wales, Australia, Managing Director.

1ST RESPONDENT
ORIGINAL PLAINTIFF

AND : CORAL COAST TOURS FIJI LIMITED a limited liability company having its registered office at Sigatoka, Fiji.

2nd RESPONDENT
ORIGINAL 1ST DEFENDANT

Counsel : **Mr. Jadhav Prashneel Prakashan for the Appellant - Applicant**
(Ms.) Arthi Bandhanna Swamy for the First Respondent
No appearance for the Second Respondent

Date of Hearing : **Friday , 27th July 2018**
Date of Ruling : **Friday, 12th October 2018**

RULING

(A) INTRODUCTION

(1) This is an application filed by the Appellant – Applicant – Original 2nd Defendant **(hereinafter referred to as 'the applicant')** seeking the following Orders;

a. *THAT the Applicant/Appellant (ARVIND KUMAR) be given leave to appeal against the decision of the then Resident Magistrate Mr U.L.Mohammed Azhar pronounced on the 1st day of February 2017.*

b. *THAT there be extension of time to appeal to file Notice and Grounds of Appeal to 21 days.*

c. *THAT all or any execution of the Judgment be stayed until the determination of this Appeal.*

d. *THAT cost of this application to be cause of the action.*

(2) The application is made by Summons dated 13th February 2018 and is supported by an affidavit sworn on 10th January 2018 by Arvind Kumar, the applicant.

(3) The application was vigorously opposed. An answering Affidavit sworn on 15th May 2018 by the First Respondent – the Original Plaintiff **(hereinafter referred to as the 'First Respondent')** was filed. The Second Respondent – Original First Defendant **(hereinafter referred to as the 'Second Respondent')** did not file any material in relation to the application.

(4) The First Respondent opposes the application on the following grounds; (Reference is made to paragraph four (4) of the First Respondent's written submissions)

i) *There has been substantial delay from the date of the final Judgment of the Magistrate Court till the date of the present application.*

ii) *If the stay is granted against the order the 1st Respondent is unfairly prejudiced as final judgment was granted on 01st February 2017.*

iii) *That it is an abuse of court process to delay the payment for the judgment sum.*

(B) BACKGROUND

(1) This is a twofold application, First **for extension of time to file Notice of Intention to Appeal,** and Secondly for **stay of the execution of the Judgment until the determination of the appeal.**

(2) This application is in relation to the Judgment of the Magistrates' Court at 'Nadi', delivered by the Resident Magistrate on the 01st day of February 2017.

(3) On the 06th day of March, 2009, the First Respondent issued the Writ in the action against the Second Respondent and the applicant in the Court below seeking the following reliefs;

(a) Judgment in the sum of $40,563.00
(b) Costs on client/solicitor indemnity basis
(c) Interest on any monetary award and
(d) Any other relief as the Court may seem fit.

(4) What are the background facts to the Judgment of the Magistrates' Court? I therefore turn to the facts of the Magistrate's Court case. I take them gratefully from the admirably clear and succinct statement to be found in paragraphs (2) and (3) of the Judgment.

> *Para 02* *The claim of the plaintiff, albeit brief, is that he lent and advanced a sum of $65,563 at the request of the 2nd Defendant on the promise that, the latter would transfer or allot the 60% of the shares of the 1st Defendant Company to the former. The said amount of money was given over a period of time whenever the necessity arose for the management of the 1st Defendant Company as pleaded by the plaintiff in his statement of claim. The 2nd Defendant thereafter failed and or refused to allot the shares as agreed and the plaintiff made several requests to refund the money so advance by him. However, a sum of $25,000.00 was paid by the 2nd Defendant leaving the balance of 40,563.00 and the plaintiff filed this action to recover the said balance.*
>
> *03* *Upon serving the writ on the defendants, the second defendant filed the statement of defence and moved to dismiss the claim of the plaintiff. The 2nd defendant denied entering any such agreement with the plaintiff and stated that, one Krishna Reddy of his own company was interested in buying the shares from the company and the plaintiff was the financial advisor to the said Reddy. The defendant also stated that, when the said Reddy failed to purchase those shares, he (the defendant) took back the control of the first defendant company. In answering the claim of the plaintiff that, the defendant paid $25,000.00, the defendant stated on his statement of defence that, it was a mistake of fact if any such amount was paid to the plaintiff. The defendant also*

stated in paragraph 8, though it is irrelevant to this claim, that he incurred loss of $68,000.00 due to the operation of the said Krishna Reddy. The plaintiff filing the reply to the defence, denied the allegation of the defendant and reiterated his claim against the defendant.

(5) Pre-Trial Conference Minutes

Agreed Facts

No agreed facts between parties.

Issues

1. *Whether the Plaintiff between sometime in November, 2004 to sometime in February 2005 lent and advanced the 1st Defendant the sum of $65,563.00 (Sixty Five Thousand, Five Hundred and Sixty Three Dollars), at the request of the 2nd Defendant.*

2. *Whether all payments were made by the Plaintiff to the Defendants and/or for an on behalf of the Defendants and whether there was an agreement or promise by the 2nd Defendant the Plaintiff that the said 2nd Defendant was organizing to transfer 60 per centum of the shares in the 1st Defendant to the Plaintiff.*

3. *Whether the 2nd Defendant used the said monies to purchase assets for the 1st Defendant namely Motor Vehicle Registration number (s) EQ 215 and EQ 216 from Palas Auto Services Limited, for the day to day running of the 1st Defendant and for also his personal use from Palas Auto Services Limited for the day to day running of the 1st Defendant and for also his personal use.*

4. *Whether the 2nd Defendant represented at all material times that he would transfer the shares as aforesaid and whether in reliance of those representations, the Plaintiff lent out more monies to the Defendants or not.*

5. *Whether the 2nd Defendant had paid the Plaintiff total sum of $25,000.00 (Twenty Five Thousand Dollars) as repayment for the monies lent and advanced.*

6. *Whether the 2nd Defendant owes the Plaintiff total sum of $40,563.00 (Forty Thousand Five Hundred and Sixty Three Dollars) being alleged to be balance monies lent and advanced.*

7. *Whether the Plaintiff was a financer for Krishna Reddy who has agreed to purchase 60% share in the 1st Defendants.*

8. *Whether the said Krishna Reddy had taken over the management and control as the 1st Defendant from sometime in November 2004 to February 2005 as the intended purchaser of majority shares in the 1st Defendant.*

9. *Whether the Plaintiff in November 2004 to February 2005 was a Fiji Citizen or held any permit/visa to reside in Fiji and operate a tourism related business.*

10. *Whether the Plaintiff has obtained relevant approvals and consents from the various governmental and statutory bodies namely the Fiji Trades and Investment Board and the Reserve Bank of Fiji of his alleged investment in Fiji for the purchase of 60% of shares in the 1st Defendant.*

11. *Whether there was any written or other agreement between the Plaintiff and the 2nd defendants for the purchase of share in the 1st Defendant by the Plaintiff or was the same with Krishna Reddy.*

12. *Whether the Plaintiff claim against the 2nd defendant is misconstrued and unlawful.*

13. *Costs and on what basis.*

6. The Court below decided the case in favour of the First Respondent and the Judgment was delivered by the learned Magistrate on 01st February 2017. The learned Magistrate ordered the applicant to refund the sum of $40,563.00 to the First Respondent.

7. The applicant challenges the Resident Magistrates' decision.

8. The grounds of appeal on which the applicant relies on are set out in great detail in annexure AK-2 of the Affidavit of 'Arvind Kumar' sworn on 10th January 2018. They are;

1. *THAT the Learned Resident Magistrates erred in law and in fact and/or misdirected himself in law and in fact in holding that the 1st Respondent/Plaintiff had proved his claim on a balance of probabilities.*

2. *THAT the Learned Magistrates erred in law and in fact and/or misdirected himself in law and in fact by falling to have regard to the Plaintiffs evidence:-*

   a. *That the moneys were paid by him to the 2nd Respondent Company for the purchase of the Appellants shares.*

   b. *Admission by the Plaintiff that the relevant statutory consents had not been obtained though he had started to participate in the operations of the 2nd Respondent Company.*

3. *THAT the Learned Magistrate erred in law and in fact in lifting and piercing the veil of incorporation:-*

   a. *Thereby finding the Appellant liable to Plaintiff when there was no fraud alleged against the Appellant.*

   b. *Nor was there any evidence by the 1st Respondent/Plaintiff to show that the Appellant was using the 1st Defendant Company (1st Respondent) as a façade.*

   c. *By holding the 1st Respondent to be a Creditor when he in fact was a foreigner investor who had sought to buy shares in 2nd Respondent Company.*

4. *THAT the Learned Trial Magistrates failed to have regard to admission by the Respondents that the payments by the 1st Respondent was for the 2nd Respondent Company.*

5. *THAT the Learned Trial Magistrate failed to give sufficient weight to the exhibit 2 wherein the 1st Respondent agreed that he was assisting on Bal Krishna Reddy with finance.*

6. *THAT the Learned Trial Magistrate failed to give weight to the contradictions in the evidence of the 1st Respondent.*

(C) JURISDICTION

(1) Statutory provision for time to file Notice of Intention to Appeal

It is **Order 37, Rule 1** of the Magistrates' Courts Rules which sets out the time within which **Notice of Intention to Appeal shall be given**. The Order reads as follows:

> 1. *Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:*

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced. (Substituted by Rules 29th November, 1946, and amended by Rules 6th November, 1950.)

This is a **mandatory rule** and it does not give the Magistrate power to extend time.

Had the legislature intended it could have specifically provided for application to extend time. It did not do so in **Order 37, R.1 but Order 37 R.4** which provides as follows, gave the Magistrates' Court power to extend time to file **grounds of appeal.**

> 4. *On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.*

(2) Order III, rule 8 of the Magistrates' Courts Rules provides;

> 8. *In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause, matter, case or event, the court and/or the clerk of the court and/or the parties shall be guided by any relevant provision contained in the Supreme Court Rules.*

(3) Therefore, I turn to the High Court Rules, 1988. **Order 59, rule 10 provides;**

> *(1) An application to enlarge the time period for filing and serving a notice of appeal or cross appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*

(2) *An application under paragraph (1) shall be made by way of inter-parte Summons supported by an affidavit."*

Putting the matter shortly at this stage, the Court can derive support for the jurisdiction to permit relaxation of the rules by virtue of the general provision contained in Order 3, rule 4 of the High Court Rules, 1988.

Only two authorities need be cited on this legal point. They are;

* **Costerfield Ltd v Denarau International Ltd & Others**
  Civil Action No.: 214 of 2012 (07-02-2018)

* **Veilave v Naicker**
  (2017) FJHC 131, HBC 159.2013

For the sake of completeness, Order 3, rule 4 is reproduced below in full.

Order 3, rule 4 of the High Court Rules, 1988 provides;

Extension, etc., of time (O.3, r.4)

4.(1). *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.*

(2). *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*

(3). *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.*

Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the

Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.

I will pause here to consider the principle underlying the exercise of the courts discretion when an extension of time is sought under Order 3, rule 4 (Order 3, rule 5 in U.K).

The following passage of "Bingham" M.R in **"Costellow v Somerset" (1993) (1) ALL.E.R. 952 at 960** is illuminating;

> *'We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary.* ***The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed.*** *The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The* ***second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.*** *This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.* ***Neither of these principles is absolute.*** *If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.* ***The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb.*** *A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the*

ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.'

(Emphasis added)

In "**Mortgage Corp Ltd v Sandres (1996) TLR 751**, the Court laid down the general guideline as follows;

'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'

As I understand the authorities, the grant of an extension of time under this rule is not automatic. The object of the rule is to (as I understand the rule), ensure that those rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties.

(D) PRINCIPLES TO BE APPLIED

Against that background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the order the applicant now seeks. As noted, this is an application to extend the time to file Notice of Intention to Appeal. Whether or not to extend the time is essentially discretionary. The discretion of the Court, as I conceive it, a perfectly free one, the only question is whether, upon the facts of the present case, whether the discretion should be exercised. The Court has to consider whether it is in the interest of justice, having regard to the whole history of the case, to extend the time. (**Avery v No.2 PSA Board (1973) NZLR 86, 91 (CA)**

Commenting on the discretion, Lord Donaldson of Lymington in **"Norwich and Peterborough Society v Steed" (1991) 2 All.E.R 880** said;

> *"Once the time for appealing has elapsed, the Respondent who was successful in the court below is entitled to regard the Judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would- be appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths L J in C M Van Stillevoldt BV V EL Carriers Inc (1983)(1)ALL.E.R 699, (1983) (I) W.L.R 207, which are set out in the Supreme Court Practice 1991 VOL 1, para 59/4/4 and are, as Mc-cowan LJ set them out, namely;*
>
> - *The length of the delay*
> - *The reasons for the delay*
> - *The chances of the appeal succeeding if an extension of time is granted*
> - *The degree of prejudice to the Respondent if the application is granted."*

The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in **NLTB** (now **iTLTB) –v-Ahmed Khan and Another (CBV 2 of 2013; 15 March 2013)**. In summary, the Court considers (a) the length of the delay, (b) the reasons 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? Apart from being exercised in a principled manner the discretion also should be exercised in a manner that re-inforces the

importance of compliance with the rules of Court and the need to bring finality to litigation (See ; **McCaig –v- Abhi Manu, CBV 2 of 2012; 24 April 2013**).

See * **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund**
[2010] FJCA 3

* **Kumar v Commissioner of Police**
Fiji Court of Appeal Civil Appeal No: ABU 0059 of 2014

* **Nair v Prakash**
(2013) FJCA 147

* **Tora v Housing Authority**
(2002) FJCA 16

* **A.G. v Sharma**

(ABU 0041 935) FJCA

(E) ANALYSIS

1. Before passing to the substance of the applicant's Summons for extension of time to file Notice of Intention to Appeal and Stay, let me record that Counsel for the applicant and the First Respondent in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

   I interpose to mention that I have given my mind to the written submissions and the judicial authorities referred to therein.

2. Now let me proceed to examine the applicant's Summons for extension of time to file Notice of Intention to Appeal.

   Moreover, the factors which are normally taken into account in deciding whether to grant an extension of time were conveniently discussed by Byrne JA in **Mokosoi Products Fiji Ltd –v- Pure Fiji Export Limited (unreported ABU 17/2008 delivered 7 September 2009)**. At page 06 of the unreported decision Byrne JA stated:

"In Bahadur Ali and Ors v. Ilaitia Boila and Chirk Yam and Ors, Civil Appeal No. ABU0030 of 2002 Reddy, P then President of Court of Appeal said at p7 –

> *"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 Appellants 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."*

More recently, this Court has taken a much stricter approach to applications for leave to extend the time to appeal. In Vimal Construction and Joinery Works Ltd v. Vinod Patel and Company Ltd (2008) FJCA 98; the Court of which I was a member said at paragraph 15, signaling the new stricter approach, at para [15]-

> *"[15] ...in 2008 litigants 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."*

Dealing first with the **length of the delay:**

(a) The Judgment in this case was delivered by the Resident Magistrate on 01st day of February 2017. Order 37, rule 1 of the Magistrate's Courts Rule is abundantly clear that *"every appellant shall within 07 days after the day on which the decision was given give notice in writing of intention to appeal".*

(b) The time for filing the 'Notice of Intention to Appeal' expired on 08th February 2017. The application for the grant of indulgence to enlarge time for lodging Notice of Intention to Appeal was sprung on the Respondents on 12th February 2018. His time for lodging Notice of Intention to Appeal had long expired.

(c) **Turning to the period of delay**, it is, at least twelve (12) months and 04 days, which, on any view of it is substantial. The length of the delay is very much long and is not excusable. I cannot shut my eyes to the fact that I am dealing with a matter of months and weeks, not days. The Court should not wear blinkers. These delays cause great hardships, amounting to very real injustice to the Respondents. Under the system that exists at the moment, how in the world could the Respondents know whether there is any possibility of an appeal? I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice.

3. Turning to the Second issue, that is **the reason for the failure to file within time,** the reasons for it are put forward in the Affidavit of Mr. Arvind Kumar, sworn in support of this application on 10th January 2018. He deposed;

> *a. That Judgment was delivered on the 1st day of February, 2017 but I have now migrated to the United States of America and now resides there and I own and drive semi-trailers interstate* ***my lawyers were unable to contact me at the time and inform me of the Judgment.***
>
> *b.* ***That I only came to know of the Judgment sometime in late April 2017*** *upon reading the judgment I am of the view that the decision of the learned Magistrate was wrong and that I need to Appeal the same and* ***I instructed my solicitor accordingly.***
>
> *c. This due to my being in the United States of America as time to Appeal had expired. I was advised by my solicitors that they will need to seek leave of the Honourable High Court and that I would need to depose an Affidavit.*
>
> (Emphasis Added)

(4) The important point which concerns me is whether there is a reasonable explanation as to why there has been the delay which necessitated this application?

(5) I confess to a feeling of some bewilderment at the applicant's explanation as to why there has been the delay which necessitated this application.

On a fair and a reasonable reading of the Affidavit of Mr. Arvind Kumar, it seems to me that the delay was not due to a case of mistake.

The applicant sought to explain his delay in lodging 'Notice of Intention to Appeal' by stating that *"my lawyers were unable to contact me at the time and inform me of the Judgment"*.

I am at a loss to conceive how such a state of things ever should have arisen, in the era of the advanced technology.

I cannot, for my part, understand, how in the world, a responsible firm of Solicitors failed to contact the client who was abroad?

The whole case is fraught with mystery.

(6) It would make a mockery of Order 3, rule 4 if, 12 months and 04 days after the time for lodging 'Notice of Intention to Appeal' has expired, the unsuccessful applicant could obtain an extension of time on the ground that *"my lawyers were unable to contact me at the time and inform me of the Judgment."*

It is a matter of contractual obligation between the Solicitors and their own clients and should be disregarded for the purpose of the exercise of the Court's discretion to extend time. It is not draconian an approach to refuse the applicant the opportunity of lodging Notice of Intention to Appeal. On the facts of this case it would be unreasonable to give the applicant an indulgence. With respect, there will be cases in which justice will be better served by allowing the consequences of the negligence of the solicitors to fall on their own heads rather than by allowing an extension of time at a very late stage.

"The rules governing the filing of documents relating to appeals were not set for perverse reasons but to enable the Court to manage its business properly" See; **Regina v Burtey, the Time Law Reports, November 08, 1994.**

7. In this case the delay which necessitated the application for extension of time for the lodging of Notice of Intention to Appeal is very much long and substantial. The reasons for the delay lacked candour. The explanation here remains unsatisfactory. In such circumstance, the balancing exercise would come down on the side of refusing an extension of time.

The obtaining of the grant of enlargement is not a mere administrative step. It is entirely a matter for the discretion of the Court. See; **Nestle v National Westminster Bank PLC (1990) Times, 23 March.**

Apart from hammering the Court that *"my lawyers were unable to contact me and inform me of the Judgment"* the applicant has not shown clear and cogent reasons to convince the Court to enable it to lean in the applicant's favour.

I spent considerable time trying to understand why the Solicitor was unable to communicate with the applicant who was abroad, in an era where technology is much advanced. I have found nothing in the material before me.

I have no hesitation in saying that the 'reason for the failure to file within time' lacks any merit and cannot be supported in law. The delay is substantial and the reasons for that delay are both unsatisfactory and unconvincing. Even if the reasons for the delay are not excusable, it has been the practice to grant leave if there are merits in the application when the grounds of appeal are considered.

There was unreasonable delay in bringing the present application before this Court and such delay has not been satisfactorily explained. In such a situation the applicant will carry a heavy burden to satisfy the Court that extension ought to be granted in the interest of justice.

Where the delay is slight, it is generally unnecessary to go into merits because the merits play little part but when the delay is very much longer, much more merit is required to overcome it. See; **Norwhich and Peterborough Building Society v Steed, (1991) 2 All E.R. 880.**

Thus, I am bound to consider the intended **grounds of appeal** urged on behalf of the applicant. See;

- **Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd (2008) FJCA 98.**
- **Maciu Tamani Palu aka Maciu Tamanibola Palu and Australia and New Zealand Bank , Misc. 19 of 2011, 8th February, 2013.**

This does not involve a detailed consideration of the intended grounds of appeal nor does it amount to an attempt at this stage to determine the appeal. However, it is necessary to assess the merits of the intended grounds of appeal in order to determine whether there is sufficient basis to excuse the substantial delay and to allow the appeal to proceed to the High Court.

I cannot help thinking that on every application to file the grant of indulgence to enlarge time, there is a pre-appeal hearing in order to consider the **prospects of success** of intended grounds of appeal.

8. I now then turn to the intended grounds of appeal. The intended grounds of appeal are that;

1. *THAT the Learned Resident Magistrates erred in law and in fact and/or misdirected himself in law and in fact in holding that the 1st Respondent/Plaintiff had proved his claim on a balance of probabilities.*

2. *THAT the Learned Magistrates erred in law and in fact and/or misdirected himself in law and in fact by falling to have regard to the Plaintiffs evidence:-*

   a. *That the moneys were paid by him to the 2nd Respondent Company for the purchase of the Appellants shares.*

   b. *Admission by the Plaintiff that the relevant statutory consents had not been obtained though he had started to participate in the operations of the 2nd Respondent Company.*

3. *THAT the Learned Magistrate erred in law and in fact in lifting and piercing the veil of incorporation:-*

   a. *Thereby finding the Appellant liable to Plaintiff when there was no fraud alleged against the Appellant.*

   b. *Nor was there any evidence by the 1st Respondent/Plaintiff to show that the Appellant was using the 1st Defendant Company (1st Respondent) as a façade.*

   c. *By holding the 1st Respondent to be a Creditor when he in fact was a foreigner investor who had sought to buy shares in 2nd Respondent Company.*

4. *THAT the Learned Trial Magistrate failed to have regard to admission by the Respondents that the payments by the 1st Respondent was for the 2nd Respondent Company.*

5. *THAT the Learned Trial Magistrate failed to give sufficient weight to the exhibit 2 wherein the 1st Respondent agreed that he was assisting on Bal Krishna Reddy with finance.*

6. *THAT the Learned Trial Magistrate failed to give weight to the contradictions in the evidence of the 1st Respondent.*

9. The main complaints of the applicant are obvious. They are contained in grounds (2) and (3) . The applicant's complaint seems to be two fold. The First complaint is that the First Respondent is not entitled to recover the earnest money because the purported transaction (*viz*, to transfer 60% of the shares of the Second Respondent Company to the First Respondent) is tainted with illegality because the **First Respondent was not a citizen of Fiji at that time and** was not allowed to buy shares without the proper sanction of the Reserve Bank of Fiji. **This is contained in intended ground of appeal No.2.** It is necessary to examine the ground in some detail to determine whether it is meritorious. I do not find it easy to form a view without detailed consideration of it. No court likes to shut the door on any appeal which arguably has reasonable prospect of success.

10. The First Respondent's evidence before the Magistrates Court is that;

- There was an oral agreement between him and the applicant **(the shareholder of the Second Respondent company)** to purchase 60% shares of the Second Respondent Company.

- In pursuance of the oral agreement between the parties the First Respondent has paid $65,563.00 (earnest money) to the applicant **(the shareholder of the Second Respondent company)** pending the approval of the Reserve Bank of Fiji.

The consent of the Reserve Bank of Fiji was admittedly not obtained prior to entering into the oral agreement, which thus becomes unlawful and acquires all the attributes of illegality.

The transaction was unlawful. As a result, the oral agreement which constituted the transaction and entered into between the parties was and remains null and void ***ab initio*** because no consent of the Reserve Bank of Fiji first had and obtained to the transaction as required under the statute.

11. That brings me to the real crux of this case.

The general principle of *'Ex turpi causa non oritur actio'* is founded on the public policy that any transaction tainted with illegality in which both parties are

equally involved, is beyond the pale of law and as such no person can claim any right or remedy whatsoever from such contract.

However, I cannot shut my eyes to the fact that the Second Respondent would be **unjustly enriched** if the sum paid was not returned.

On the other hand, if returned, the Court might be seen to be lending assistance to a party (the First Respondent) to an illegal contract.

In **Manohan Alumuniun & Glass (Fiji) Ltd v Fong Sun Development Ltd** [2018] FJCA 23; ABU0018.2015 (8 March 2018), the Fiji Court of Appeal discussed unjust enrichment thus:

> *Unjust enrichment has been described as follows:*
>
> > *"Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant". (Peter Berks, Unjust Enrichment, second ed. 2005).*
>
> *[34] Unjust enrichment has also been described as follows:*
>
> > *"The principle of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim". (Chitty on Contracts, Vol 1, para 29-018, Sweet & Maxwell, 2004).*
>
> *[35] The particular terms of the contract may sometimes make it difficult to ascertain the extent of their enrichment.*
>
> > *"Services may take many forms and while some result in an indirect accretion to the defendant's wealth, for instance by improving his property, other 'pure' services do not. (Chitty on Contracts, Vol.1, para 29-021, (supra).*
>
> *[36] The second witness for the Plaintiff was Samuto Chang, from View Tech the company that had given the quotation for the replacement of the windows. He said that since the installed windows were of residential quality, and were improperly designed, the company was not prepared to risk attempting repair. He thus recommended a total removal of the existing windows and replacement with windows suitable for the 'environment'. In view of this, it also included the*

price of scaffolding. It quoted a sum of $76,840.00 for the removal of the existing windows and installation of new windows, and $24,000.00 for the scaffolding. This makes up the sum of $100,840.00 set out in the Respondent's Statement of Claim. However, the learned trial Judge did not allow this sum on the basis that the design in the proposed new windows was different from the design of the existing windows installed by the Appellant.

[37] Despite the Respondent's willingness to deposit the balance sum of $10,000.00 in the Solicitor's Trust Accounts until the Appellant rectified the faulty windows, the Appellant was unwilling to accept this course of action and continued to refuse to attend to the repairs. The failure to repair could be attributed to more than one reason; that the Appellant itself knew that the windows were so badly structurally designed that it saw no purpose in attempting to repair them, or that the Appellant was unwilling to perform the contract. Either way, it made no difference to the correct finding that there had been a breach of contract by the Appellant.

[38] In Daydream Cruises Ltd v Myers [2005] FJHC 316, Connors J considered the issue of unjust enrichment in respect of a claim of breach of contract and unjust enrichment. The Plaintiffs pleaded that the Defendants had benefitted from the use of the name "Daydream Island". In determining this claim, Connors J. having considered the relevant authorities said:

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – Fibrosa Spolka Akcylina v Fairbarn Lawson Combe Babarbaur LD [1943] A.C. 32 at 61 per Lord Wright.*
>
> *The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs..*
>
> *In Pravery & Mathews Pty Ltd v Paul [1987] HCA 5, [1987] 162 CLR 221, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum merit."*

The three elements of a claim for unjust enrichment are – National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR:

[i] Proof of enrichment by receipt of a benefit;
[ii] Enrichment at the expense of the plaintiff; and
[iii] That retention of the benefit is unjust.

[39] In Daydream Cruises Ltd v Myers (supra) the claim of unjust enrichment was upheld on the basis that the 1st Defendant has received the benefit of the use of the Plaintiffs' name, and the infrastructure and facilities erected on it by the Plaintiff together with the expertise and services of the Plaintiffs. In the circumstances of that case, it was held that the right to use that island was clearly a 'significant enrichment' of the 2nd Defendant.

[40] In the present case, the property in the windows passed to the owner when the contract price was paid by the Respondent. The fact that twelve years after the breach of the contract, the windows were, due to the efforts of the Respondents yet in place, does not amount to due performance of the contract by the Appellant nor does it amount to unjust enrichment on the part of the Respondent. There can be no unjust enrichment based on goods and services manufactures and delivered in breach of contract.

[41] The retention of the faulty windows by the Respondent cannot be regarded as unjust enrichment, because the Respondent had paid for them. Even a claim for set-off would not have been possible because the Respondent had paid $20,000.00 and the Appellant claimed $10,459.61 being the balance due. However, since the Appellant had breached the contract, the Counterclaim was correctly dismissed by the learned trial Judge.

[42] When the money was paid by the Respondent, and the windows were affixed, as part of the contract of services, the property in the goods passed from the Appellant to the Respondent. Thus, in the totality of the circumstances of the case, I hold that the learned trial Judge did not err in not considering that the windows that were affixed to the Respondent's building, belonged to the Appellant. I therefore dismiss the third ground of appeal.

[43] In my view, the Respondent suffered loss and damage as a result of the leakage in the windows manufactured and installed by the Appellant. The leakage was a direct cause of the failure on the part of the Appellant to properly perform the contract entered into between the parties. This entitles the Respondent to damages. In the absence of a pro-rated breakdown in the Appellant's quotation distinguishing between the goods and services components

respectively, (i.e. the cost of the windows as distinguished from the cost of the installation of the windows). I am of the view that the contract entered into between the parties, was a contract for services, and the Appellant failed to perform the contract. I am of the view that in all the circumstances of this case, it would not be correct to hold that the Respondent has benefitted or that its property has been enriched by the faulty windows installed by the Appellant".

In the instant case, the payment by the First Respondent to the applicant **(the shareholder of the Second Respondent Company)** was made pursuant to the oral contract and because the contract require it to be paid, and for no other reason. The payment was therefore, in my opinion, one of the effects of the oral contract. So long as the money remains in the applicant's hand (as the shareholder of the Second Respondent company) the oral contract, in my judgment, is seen to have had an effect though the statute requires that from its inception it shall have none.

Therefore, the First Respondent is entitled to recover the money. In seeking to do so he **"is not forced either to found his claim on the illegal contract or to plead its illegality in order to support his claim"**. The First Respondent was not asking the Court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention of his money by the Second Respondent. His case is in the nature of a claim for "**money had and received.**"

See; * **Bowmakers Ltd v Barnet Instruments Ltd**
(1945) KB 65
(1944) 2 All.ER. 579

* **Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd.**
(1943) AC 32

* **Amar Singh v Kulubya**
(1964) AC 142
(1963) ALL – ER 499

Therefore, I state with conviction that the First Respondent is entitled to recover the earnest money paid to the Second Respondent Company.

The First Respondent does not face the bar that defeats an action on an illegal contract at common law.

The leading authority is **Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65; [1944] 2 All E.R. 579**. In that case the Defendants, who had been given possession of machine tools under hire purchase agreements which the Court was ready to assume were affected by illegality on the ground that the original sale to the Plaintiffs, negotiated in concert with the Defendants, contravened the Control of Machine Tools Order 1940, after making some only of the agreed payments, converted certain of the tools to their own use by selling them, and refused to return to the Plaintiffs other tools still in their possession. The Plaintiffs accordingly sought to recover damages for the conversion of all the tools. The judgment of the Court was delivered by Du Parco L. J. who said: *" Mr Gallop is, we think, right in his submission that, if "the sale by Smith to the Plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the Plaintiffs are not now relying on these agreements or on the third hiring agreement. Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the Defendant in Pearce v Brooks, supposing that she had converted the Plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the Courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words founded on an illegal contract. The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the Courts act are Scott v Brown, Doering, McNab & Co. and Alexander v. Rayson but as Lindley L.J. said in the former of the cases just cited: 'Any rights which (a Plaintiff) may have irrespective of his illegal contract will, of course, be recognized and enforced.' In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the Trial, that the chattels in question came into the Defendant's possession by reason of an illegal contract between himself and*

the Plaintiff, provided that the Plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim".

(Emphasis added)

I take comfort in the oft-quoted words of Lord Roche from the decision of '**Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd' (1943) AC 32;**

> *"It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the (defendant company) in affording some security that the (Plaintiff) would implement their contract and take up (the transfer) and pay the balance of the price, and it may be that it had other advantages ..... but if no .....document of title were delivered to (the plaintiff)...(or, as in this case, the contract is declared illegal ab initio) then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable. It was contended that unless there is found some default on the part of the recipient of such payment .... the consideration cannot be said to have wholly failed merely because the frustration of the contract produced a result which, had it been due to some default, would have amounted to a failure of consideration. I find no authority to support this contention, which seems appropriate to an action for damages, but foreign to the action for money had and received."*

For these reasons, the First Respondent succeeds on his claim.

Thus, I see no merits in ground (2) .

12. The applicant's Second complaint is that the Resident Magistrate erred in law by lifting the 'Corporate Veil'. **This is contained in intended ground of appeal No. 03.** It is necessary to examine the ground in some detail to determine whether it is meritorious. I do not find it easy to form a view without detailed consideration

of it. No court likes to shut the door on any appeal which arguably has reasonable prospect of success.

The applicant's second complaint (*viz*, the intended ground of appeal No.3) is set out in detail in paragraph 13 and 14 of his written submissions.

> *[13] The Appellant if leave is allowed will argue that the Learned Magistrate by lifting the veil of incorporation was wrong at law as the dealings were made between the Company and the Original Plaintiff. Hence the 2nd Defendant the Appellant (Arvind Kumar) should not have been held liable for the debts owed by the Company if any.*
>
> *[15] Therefore we as counsel for the Appellant submit that the learned magistrate misdirected himself and by uplifting the veil of incorporation had caused serious miscarriage of justice against the Appellant. As there was fraud whatsoever pleaded against the Applicant.*

13. What is meant by the phrase "**Corporate Veil**"?

A legal concept that separates the personality of a corporation from the personalities of its shareholders, and protects them from being personally liable for the Company's debts and other obligations.

A company once incorporated becomes a separate legal entity or personality and the liability of the members are said to be limited. This is the principle enshrined in "**Solomon v Solomon & Co. Ltd**" **(1897) A.C. 22,** where the House of Lords affirmed the principle that the company was a separate legal person, can own property, sue and be sued in its own corporate name. Therefore, the company is distinct from its members, whose liability is limited to the amount paid in their shares and they are not liable for any of the company's debts.

The logic of separate personality and limited liability was not tested to its full extent until the late 19th century as exemplified by the case of "**Solomon**" **(*supra*).**

One of the most significant effects of separate corporate personality based on the "Solomon" principle is that members are not personally liable for the debts of the corporation. The company owns the property and not its shareholders.

14. What is meant by the phrase "**lifting the corporate veil?**"

At times it may happen that the corporate personality of the company is used to commit frauds and improper or illegal acts. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty. This is known as **"lifting of Corporate Veil".**

Lifting the corporate veil refers to the possibility of looking behind the Company's frame work (or behind the Company's separate personality) to make the members liable, as an exception to the rule that they are normally shielded by the corporate shell (i.e. they are normally not liable to outsiders at all either as principals or as agents or in any other guise, and are already normally liable to pay the Company what they agreed to pay by way of share purchase price or guarantee, nothing more.)

When the true legal position of a company and the circumstances under which its entity as a corporate body is ignored and the corporate veil is lifted, an individual shareholder may be treated as liable for its acts.

There are two existing theories for the lifting of the corporate veil. The first is the "***alter-ego***" theory and the other is the "**instrumentality**" theory.

The ***alter-ego* theory** considers if there is indistinctive nature of the boundaries between the corporation and its shareholders.

The **instrumentality theory** on the other hand examines the use of a corporation by its owners in ways that benefit the owner rather than the corporation.

It is up to the Court to decide on which theory to apply or make a combination of the two doctrines.

Prevention of fraud or improper conduct

Where the medium of a company has been used for committing fraud or improper conduct, courts have lifted the veil and looked at the reality of the situation. The two classic cases of the fraud exception are **Gilford Motor Company Ltd v Horne (1933) Ch. 935 CA.** and **Jone v Lipman (1962) (1) WLR 832.** In the first case, Mr. Horne was an ex-employee of the Gilford motor company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this he incorporated a limited

company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne. In this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud." Thus the court of appeal regarded it as a mere sham to cloak his wrongdoings. In the second case of **Jones v Lipman** a man contracted to sell his land and thereafter changed his mind in order to avoid an order of specific performance. He transferred his property to a company. **Russel J** specifically referred to the judgment in **Gilford v. Horne** and held that the company here was "a mask which (Mr. Lipman) holds before his face in an attempt to avoid recognition by the eye of equity". His Lordship awarded specific performance both against Mr. Lipman and the Company.

As to the general principles, in "**Midland Beach Estate Ltd v Balgovind**" **(2012) FJHC 1043**, Hon. Madam Justice Dilrukshi Wickramasinghe said;

Piercing the Company veil

> *[49] Mr Mishra submits that the plaintiff company, i.e. Midland Beach Estate Limited is a private company carrying on its business in its company name. He says that the property is now sold to a third party thus, he is not seeking specific performance.*
>
> *[50] Mr Mishra submits that the major shareholder of the company Dr. Sahu Khan used the company as a façade to perpetrate the fraud therefore the court must pierce the corporate veil and award aggravated damages to the first defendant, holding the shareholders also liable. The claim is set out in paragraph 16 (d) read with paragraph (D) of the relief.*
>
> *[51] As said in the seminal decision Solomon v A.Solomon & Sons [1897] AC. 22, it is a well-established principle of company law that a company is a separate and distinct legal entity different from its shareholders. The company has its own locus standi as a legal entity. The liability of the shareholders is therefore limited to the extent they have contributed to the company's capital. Thus, the company acts as a shield to protect the assets of the shareholders from personal liability. Due to*

these rooted principles, the courts are cautious in piercing or lifting the corporate veil.

[52] The two oft cited decisions; Gilford Motor Company v Horne [1933] Ch 935; and Jones v Lipman [1962] 1 WLR 832, the court pierced the veil of incorporation and considered the rights and duties of the plaintiff as the rights or liabilities of its shareholders. The courts have in several instances endeavoured to lift the corporate veil, by considering the theory of economic reality and doctrine of control but the judicial dicta seems to prefer an orthodox approach. R v Darby [1911] 1KB page 95. Littlewoods v I.R.C [1969] 1 WLR 1241, 1254; Snook v London and West Riding Investments Ltd [1967] 2 QB 786 at 802 (Diplock LJ); Wallersteiner v Moir [1974] 1 WLR 991.

[53] Sir Andrew Morrit VC in Trustor AB v Smallbone and others (no 2) 2001 WLR 1177 at 23 said:

> *"In my judgment the court is entitled to pierce the corporate veil and recognise the recipient of the company as that of the individual (s) in control of it if the company was used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability of those individual (s)".*

[54] In Adams v Cape Industries plc [1976] All ER Vol 3 page 462 the court held that the corporate veil may be lifted when a company is set up for fraudulent purposes or when it is established to avoid existing obligations. In DHN Food Distributors v Tower Hamlets [1976] 1 WLR 852 Lord Denning MR examined the overall business operation as an economic unit i.e.' considering the corporation as a separate legal form. Lord Goff, in Bank of Tokyo v Karoon [1987] AC 45n agreed with Lord Denning's above dicta. In Woolfson v Strathclyde BC [1978] UKHL5 the House of Lords approached the issue based on 'totality of circumstances' – confined to the facts of the case. However in Adams v Cape Industries (supra), Creasy v. Breachwood Motors Ltd (1992) BCC 638, Ord v Belhaven Pubc Ltd [1998] 2 BCLC 447, Trustor AB v Smallbone (No 2) [2001] 2 BCLC 436 seems to view that corporate veil should not be lifted simply because justice requires it.

[55] In Antonia Gramaci Shipping Corporation v Oleg Stepanovs [2011] Lyods Rep Page 647 Justice Burton dealt with piercing of the company veil extensively in his decision. In this case, there were several one ship corporate defendants with 63 chartering transactions interposed between the plaintiffs and third parties to siphon of profits from the Plaintiff. The defendant and four other beneficial owners of the company had masterminded the scheme and the Corporate Defendants were merely used as vehicles. Justice Burton discusses extensively the law in paragraphs 18 to 20 of his judgment and concluded in paragraph 20 that piercing the corporate veil although an exceptional course is possible and in fact does not need to be pleaded or shown to be necessary to give relief to the claimant.

[56] His Lordship stated as follows:

> *21. The concept of necessity is not a fetter upon such a claim. It does not need to be pleaded or proved in limine. Piercing the veil is an exceptional course, not a "routine adjunct to any claim brought against a company for dishonest assistance or knowing receipt" per Norris in Law Society v Isaac [2010] EWHC 1670 (ch) at para 40);*

[57] Justice Burton completed his reasoning by stating at paragraphs 26 and 27 that there is 'no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppet who, all the time was pulling the strings ....I accept ... the puppeteer can be made liable, as a party to the contract, but that as a matter of public policy he cannot enforce the contract'.

[58] I also considered carefully the details reasoning given by Arnold J in the case of VTB Capital v Nutritex International Corp [2011] EWHC 3107 (Ch) where he considered the historic development of the doctrine examining various authorities on the point (paragraphs 65 to 102). In the case after given detail reasoning his Lordship held that the facts in that case did not warrant piercing the corporate veil.

> [59] *However, I find that the judicial dicta resonates minimum two instances where the courts have not been hesitant to pierce the corporate veil i.e. fraud or using the alter ego doctrine. If the corporate is used as a façade or a vehicle to defraud, then the courts have not been hesitance to lift the corporate veil. So as when the corporate is the alter ego of the fraudster then courts have pierced or lifted the corporate veil to look beyond the legal fiction and consider the reality of the situation.*
>
> [60] *The equitable remedy of piercing the corporate veil is fluid. Therefore, in my view the court must examine the evidence in totality before piercing the corporate veil."*

A limited company covers its shareholders through the corporate veil. Courts can lift the corporate veil, in cases that a Company is formed for a fraudulent purpose. In the case of "**United States v Milwaukee Refrigerator Transel Company", (1905) 142F, edn. 2, U.S.** Supreme Court held that "where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons".

With these considerations in mind I approach the case before me;

In relation to the 'lifting of corporate veil', the Resident Magistrate held that;

> *"Considering the above authorities and the circumstances of this case, I decided to lift and or pierce the veil incorporation of the 1st Defendant Company for several reasons. Firstly, the defence witness testified that, the 2nd Defendant was the sole proprietor of the 1st Defendant Company and he had the real control over the same. All the payment and the operation of the company was done on the instruction of the 2nd Defendant. He ran the business of the company on his personal capacity through the employees. Secondly, he used to take the money from the company for his personal needs accordingly to his own witness whenever he wanted money and in addition he took a sum of $4,000.00 from the Plaintiff. Thirdly, the part payment of $25,000.00 was made to the Plaintiff on his instruction and he tries to use the veil of incorporation as a shield to evade the balance payment having made the part payment.*

Fourthly, if the veil is not lifted or pierced, it would cause disadvantage and injustice to the creditor – the Plaintiff."

With respect, the reasoning of Resident Magistrate does not appear to me to be convincing.

The principle laid down in **"United States v Milwaukee Refrigerator Transel Company", (1905) 142F, EDN.2,** (by U.S. Supreme Court) is that "where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat is as an association of persons."

I found nothing in the judgment to the effect that;

- The notion of legal entity is used to defeat public convenience
- Justify wrong
- Protect fraud or
- Defend crime

Besides; there is, no scintilla of evidence for that;

- ❖ the company is set up for fraudulent purposes.
- ❖ the company is established to avoid existing obligations.
- ❖ the company was used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability.

I spent considerable time trying to understand under what theory, the Resident Magistrate pierced the corporate veil. Was it 'alter-ego' theory or 'instrumentality' theory?

The topic of fraud is not raised in the First Respondent's pleadings. To pierce the corporate veil, the First Respondent must **adduce some cogent evidence** to establish that the Second Respondent Company is formed for a fraudulent purpose. I find no evidence whatsoever to show that the Second Respondent Company was formed and was carrying on business merely as a cloak or sham for the purpose of enabling the applicant shareholder to perpetrate fraud. Assuming, for the sake of argument, the First Respondent has pleaded fraud in

his Statement of Claim; a bare allegation of fraud raised in the pleadings is not sufficient. An allegation of fraud or near fraud, cannot properly be decided on pleadings. It requires *viva voce* evidence.

In the context of the present cases, I would prefer to be guided by the robust approach of the Court in **Sigatoka Builders Ltd v Pushpa Ram & Ano. (Unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002** and allow my doubts to be submerged in what I think I may just call the current of authority.

Fraud: Sufficiency of evidence:

In **Sigatoka Builders Ltd v Pushpa Ram & Ano**. (unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002 the Court held in relation to "Fraud: sufficiency of evidence";

> *"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the court's further investigation. In Darshan Singh v Puran Singh [1987] 33 Fiji LR 63 at p.67 it was said:*
>
> *"There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent. There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."*
>
> *In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 inappropriate; see too Ram Devi v Satya Nand Sharma & Anor. [1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In Wallingford v Mutual Society[1880] 5 AC 685 at p. 697 Lord Selbourne LC said:*
>
> ***"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which***

> *any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."*
>
> (Emphasis Added)

I can see no reason why the rule of law enunciated in the aforementioned judicial decisions should not be applied in this case.

Generally, Courts prefer the sanctity of the corporate form as a separate legal personality and are slow to lift the corporate veil, as evidenced by **Adams v Cape Industries (2000, 6 comp LJ 377)**. The matters which it is necessary to establish before the Court will pierce the corporate veil were considered by Munby J in **Ben Hasham v Al Shayif [2009] 1FLR 115**. Paragraphs [158] to [185] contain a convenient survey of the principles and of their recent application. They elaborate the fundamental principle enunciated by Lord Keith of Kinkel in **Woolfson v Strathclyde Regional Council (1978) SC (HL) 90 at 96** – that piercing the corporate veil is appropriate only when there are special circumstances which indicate that the company is a mere façade concealing the true facts. Piercing the veil is an exceptional course, not a 'routine adjunct to any claim brought against a company for dishonest assistance or knowing receipt' per LJ Norris in **Law Society v Isaac (2010) EWHC 1670 (ch) at para 40.**

Perhaps it is splitting hairs, but to my mind, it is an explicit recognition that some improper conduct must have occurred, establishing that the corporation was controlled and dominated.

Control and domination part of the test determines the relationship between the shareholder and the corporation. Generally, mere majority stock ownership will be insufficient to satisfy this element. Instead, one must show "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction has no separate mind, will or existence of its own." **To determine the existence of "complete domination", courts usually require the Defendant to produce evidence of inadequate capitalization or undercapitalization, failure to follow corporate formalities.** (See; *Shagun Singh, Lifting the Corporate Veil with reference to leading cases, available at http://artismc.com/index.php/blogs/view/55/221/*

Where is evidence in the instant case for inadequate capitalization, or undercapitalization or failure to follow corporate formalities?

For the reasons which I have endeavoured to explain, **I am not satisfied** that the Second Respondent Company is "a mere cloak or sham".

Thus, the intended ground of Appeal No. 3 (as to the lifting of the corporate veil) is arguable and meritorious. The Applicant has a chance of success in appeal.

Prejudice

15. The Court does not like to shut the door on any appeal which arguably has reasonable prospects of success.

Of course, I do not deny for a moment that if an extension is granted it would prejudice the First Respondent as the Respondent would be made to undergo further proceedings on this matter. Any extension would prejudice the First Respondent putting him to unjustified expense and delay. He would be denied the fruits of his Judgment for probably for about one year.

All I am saying is that if the applicant is deprived of an extension, **greater prejudice would be caused to him.**

The decision of the Resident Magistrate works a substantial injustice to the applicant. In my Judgment, it would be in denial of justice to the applicant not to extend his time for lodging his Notice of Intention to Appeal.

Obviously, it is in the interest of all parties that the litigation which has gone on since 2009 should be brought to an end, but that is no reason, in my view, to shut out the unsuccessful party from the exercise of an undoubted right, a right which, in my view, is in the nature of a fundamental right. As has been said; ***finality in litigation is good, but justice is better.***

(F) ORDERS

(1) The application for extension of time to lodge Notice of Intention to Appeal is granted.

(2) The applicant to file and serve Notice of Intention to Appeal on the Respondents within 07 days from the date of this Ruling.

(3) The execution of the Judgment is stayed until the determination of the appeal.

(4) As the application to extend the time involves granting of an indulgence for the applicant, it is appropriate that there be no order for costs.

HIGH COURT OF FIJI
LAUTOKA

12/10/2018

Jude Nanayakkara
Judge

At Lautoka
Friday, 12th October 2018