

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**

**CIVIL APPEAL NO: CBV 0010 of 2014**  
**[Court of Appeal No: ABU 19 of 2012]**

**BETWEEN** : LAUTOKA CITY COUNCIL  
*Petitioner*

**AND** : AMBARAM NARSEY PROPERTIES LIMITED  
*1<sup>st</sup> Respondent*

MOHAMMED YAKUB KHAN  
MOHAMMED NASIR KHAN  
MOHAMMED SABIR KHAN  
MOHAMMED IQBAL KHAN  
MOHAMMED MUKTAR KHAN  
MOHAMMED AZAD KHAN  
*2<sup>nd</sup> Respondents*

**Coram** : Hon. Justice Chandra  
Justice of the Supreme Court

**Counsel** : Mr. V M Mishra for the Petitioner  
Mr. C B Young for the 1<sup>st</sup> Respondent  
Mr. V Singh for the 2<sup>nd</sup> Respondents

**Date of Hearing** : 22 October 2014

**Date of Ruling** : 26 November 2014

**RULING**

1. This is an application seeking leave to file a petition for special leave out of time and stay of the execution of the judgment of the Court of Appeal.
2. The Appellant's application was by way of summons filed on 25<sup>th</sup> July 2014 seeking leave to file a petition for special leave out of time and for stay of the execution of the judgment of the Court of Appeal.

3. The application was supported by an affidavit sworn on 21st July 2014 by Jone Nakauvadra.
4. The application was opposed by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent did not oppose the Applicant's application.
5. The principles regarding applications for extension of time have been dealt with in several decisions and the following principles have been laid down :
  - (a) The length of the delay;
  - (b) The reason for the failure to file within time;
  - (c) Whether there is a ground of merit justifying the appellate court's consideration;
  - (d) Whether the Respondent will be unfairly prejudiced if time is enlarged?

**Kamlesh Kumar v. The State** CAV0001.09(21 August 2012); **NLTB v. Ahmed Khan and Another** (2013) FJSC 1; **MacCaig v. Manu** (2012) FJSC 18.

**The length of delay**

6. The Judgment of the Court of Appeal was delivered on the 5<sup>th</sup> of March 2014 and the Appellant should have filed its appeal within 28 days of that date. (Rule 65(1) Court of Appeal (Amendment) Rules 1999.
7. The application of the Appellant was filed on 25 July 2014, a delay of 114 days.
8. In **MacCaig v. Manu** (Supra) a delay of 2 days, in **Native Land Trust Board v. Khan** (Supra) a delay of 96 days, **Sharma v. Singh** (2004) FJCA 52 a delay of 40 days were held to be fatal.
9. It would be necessary to consider the other principles regarding extension of time to consider whether the delay of 114 days in this case would be fatal.

### The reason for the failure to file within time

The Appellant relies on the affidavit of Jone Nakauvadra who has stated the reasons for the delay as:

*"4. The reasons for the delay in applying for a stay of execution and leave to appeal out of time were that the Council wanted more than one legal opinion and asked for an opinion from the Solicitor General's Office in regard to the decision by the Court of Appeal.*

*5. There were differences in the legal opinions given to the Council."*

10. There are no details given in the affidavit as to when legal opinions were sought by the Appellant Council and obtained; when the Solicitor General's office was asked for an opinion and, as to why the Council was not able to file the appeal within time if it was really bent on appealing the decision of the Court of Appeal.

11. In **Vimal Construction and Joinery Works Ltd v. Vinod Patel and Co. Ltd** [2008] FJCA 98 where the Court of Appeal had to consider an application for extension of time to file an appeal, the Court said:

*"[15] ... litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications 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 **Gallo v. Dawson** [1990] HCA 30 where the delay was due to the applicant taking time to research the issues involved it was stated that a case would need to be exceptional before a court would enlarge by many months the time for lodging an appeal simply

because the applicant had refrained from appealing until he or she had researched the issues involved.

13. The fact that there were differences in the legal opinions given to the Council would by themselves be insufficient to explain the delay if the Council was in fact wanting to appeal the decision of the Court of Appeal. As stated earlier, as to when such legal opinions had been obtained had not been stated in the affidavit which was filed in support and thereby the Appellant had not been forthright in making this application.

#### **The Merits of the Appeal**

14. It is the submission of the Appellant that liability could not be imposed on the Appellant Lautoka City Council and raised the following issues in relation to the Judgment of the Court of Appeal:

- (1) *That the Court of Appeal was bound to follow the Supreme Court decision in **Ravind Milan Lal v LTA** which accepted the House of Lords decision of **Stovin v Wise** and held that statutory bodies will only be held liable if the statute specifically gave a right to citizens to take proceedings and recover compensation for breach of statutory duty.*
- (2) *Whether the decision in **Suruj Lal v Suva City Council & Others** [1983] Vol.29 F.L.R. 71 which followed **Anns v London Borough of Merton** [1977] 2 All E.R. 492 is good law given that *Anns* has been overruled by the House of Lords.*
- (3) *Whether the High Court was bound by its earlier decision of **Eastern Express v Tuitoga Labasa** H.B.C. No.0014 of 2001 and whether the law of precedent obliged it to follow the same.*
- (4) *Whether the Fiji Court of Appeal erred in accepting that the decision of **Anns v London Borough of Merton** (supra) was good law when it had been overruled to a substantial extent in its own jurisdiction by the House of Lords and whether Fiji is bound to follow English common law.*
- (5) *Whether the Fiji Court of Appeal is able to and has jurisdiction to hold that the public trust doctrine applies in view of the Supreme Court in the LTA Ravind Milan Lal case.*

*(6) Whether the view of a single Judge of the Fiji Court of Appeal can overrule the finding of a High Court Judge on apportionment."*

15. The Court of Appeal dealt with the application of judicial precedents exhaustively in its judgment from paragraphs [87] to [125] and dealt with the decisions cited by the Appellant.
16. The Court of Appeal distinguished the decision in Stovin v. Wise (Supra) on the basis that Stovin's case was concerned solely with the omission by a highway authority to perform a statutory power, whereas in the instant case allegation of negligence related to the manner in which the local authority exercised its statutory duty and powers. The Court of Appeal also referred to Ravind Milan Lal v. LTA (Supra) as having referred to Stovin v. Wise and concluded that it did not support the Appellant's contention that the Appellant City Council could not be held liable.
17. The Court of Appeal in its judgment at paragraphs [147] to [164] dealt specifically with the decisions in Suruj Lal v. Joseph Michael Chand, Anne's and others v. London Borough of Merton and Murphy v. Brentwood D.C. and their effect. The Court of Appeal having dealt with those decisions concluded that Suruj Lal's case presently stands as precedent.
18. Having dealt with the above decisions the Court of Appeal concluded that the learned High Court Judge's approach was correct in deciding the matter against the Appellant on the factual aspect of negligence as well as on the applicable law having regard to the principle of *stare decisis*.

19. Another ground urged by the Appellant was that the Court of Appeal referred to the public trust doctrine *per se* and raised the question as to whether that doctrine would apply in Fiji. What was stated by court in that sense was that the public (statutory) authorities hold and exercise power in trust for the public. Although the doctrine of public trust was referred to by the Court of Appeal, the ultimate decision of the Court was not based on that doctrine and therefore raises no issue as to its applicability in Fiji and would be a matter to be considered in appropriate situations.
20. The Appellant also raised the issue as to the decision of the Single Judge of the Court of Appeal regarding the observations made in respect of joint and several liability of the parties.
21. The Ruling of the Single Judge was in respect of an application for extension of time to file Respondent's notice which was refused and the observations were made in the course of giving the ruling regarding the joint and several liability of the parties which was referred to in the judgment of the High Court. The Appellant has not appealed against that ruling if it was concerned with the said observations and in any event would be a matter relating to execution of the judgment.
22. In the result it is a misconception to contend that, a single judge of the Court of Appeal has decided on the issue regarding joint and several liability. It was the Court of Appeal (Full Court) that decided on that issue as distinguished from the observations made by the single judge in the matter of an application for extension of time to file the respondent's notice.
23. In considering the merits of the appeal as discussed above, it is my view that the matters raised by the Appellant have been dealt with by the Court of Appeal in its judgment adequately and there is no error when the Court of Appeal accepted the finding of the

High Court and dismissed the appeal. In the result there are now concurrent findings of fact by the High Court and the Court of Appeal.

24. As stated above the High Court and the Court of Appeal have correctly applied the law relating to negligence in imposing a duty of care on the Appellant and the Second Respondent.
25. In considering an application for extension of time to appeal to the Supreme Court, it is necessary that the criteria in Section 7(3) of the Supreme Court are met.
26. Having considered the judgment of the Court of Appeal, as discussed above, I find that the grounds urged by the Appellant do not have a real prospect of success and satisfying the criteria in section 7(3) of the Supreme Court Act.

#### **Prejudice to the Respondent**

27. A considerable period of time has lapsed from the time that the damage to the building had occurred which was in 1993/1994. Litigation had commenced around the year 2000 and the Court of Appeal judgment was in March 2014.
28. The 1<sup>st</sup> Respondent complains of escalating costs to rebuild and the loss of rental income since the judgment of the High Court in 2007 and the reduction of interest by the Court of Appeal, which they state would not cover the total loss suffered. That the lost opportunity of reviewing and collecting of increased rentals for the period of 14 years is irrecoverable and would be made worse if this matter is prolonged further.
29. In these circumstances if the application of the Appellant is granted prejudice would be caused to the 1<sup>st</sup> Respondent.

Application for Stay

30. The Appellant has sought a stay of execution pending the application for extension of time to file a petition of appeal in the Supreme Court and relies on the affidavit for the same. The stay is opposed by the 1<sup>st</sup> Respondent.
31. The Appellant in support of its application for stay has cited the case of Prem Singh v. Krishna Prasad and Rupeni Nacewa & Others Civil Appeal No.CBV 0001/2002 to the effect that it would be sufficient to show that there was a “significant prospect” of the appeal succeeding, and submitted that there was a significant prospect of the appeal being successful and that the balance of convenience is in favour of a stay being granted.
32. However, in Native Land Trust Board v. Shanti Lal and Others Civil Appeal CBV 0009/11 (17th, 20<sup>th</sup> January 2012), Chief Justice Gates in refusing an application for stay stated as follows:

*“[13] I had set out the approach to such applications in a ruling in Stephen Patrick Ward v. Yogesh Chandra CBV0010.10(20<sup>th</sup> April 2011). It was this:*

*“The issue for determination is whether the Petitioner’s case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a stronger test than that favoured in New South Wales where the hurdle was said to be overcome if “the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour.”: Alexander v Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685 at p.694’ applied in Penriith Whitwater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor [2007] NSWCA 103.”*

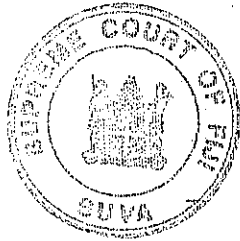
Accordingly the test now is whether the case is sufficiently exceptional to allow an application for stay.



33. As stated above there is no real prospect of the Appellant meeting the criteria set out in Section 7(3) of the Supreme Court Act of 1998. The Appellant's chances fall short of the special or exceptional chances required for a stay and the Appellant's application for a stay is refused.

**Conclusion**

34. Since prejudice would be caused to the 1<sup>st</sup> Respondent if leave is granted and as the Appellant has failed to establish the necessary foundations for granting of leave, I decline the application for extension of time and stay and award costs to the 1<sup>st</sup> Respondent summarily assessed at \$2,000.



*[Handwritten signature]*

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Hon. Mr Justice Chandra  
JUSTICE OF THE SUPREME COURT