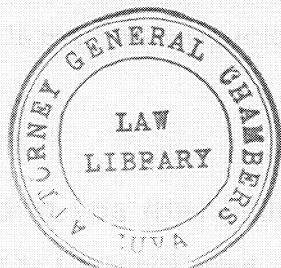


**IN THE COURT OF APPEAL, FIJI ISLANDS**



**Application No. Misc 5 of 2006**  
(High Court Civil Action No. HBC 564/2000S)

**BETWEEN:**

**K. LAL & SONS INVESTMENT (FIJI) LIMITED**

**Applicant**

**AND**

**THE PERMANENT SECRETARY FOR PUBLIC WORKS**

**AND**

**THE ATTORNEY-GENERAL**

**Respondents**

G. O'Driscoll for the Applicant

S. Sharma for the Respondents

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**DECISION**

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- [1] On 25 April 2000 Kissun Lal (f/n Ram Narayan) received head injuries when he was struck with the bucket of an excavator. He was a labourer employed by the PWD and was working on drainage excavation works at Dravo village near Nausori.

[2] The drainage works had been contracted out by the PWD to the Applicant company whose employee was operating the excavator at the time of the accident.

[3] Unfortunately, I was not supplied with any of the pleadings and therefore do not know exactly how Kissun Lal framed his claim, nor how it was answered by the Respondents, who were the named Defendants, or by the Applicant who was joined as third party.

[4] On 7 September 2005 the High Court (Pathik J) found in favour of Kissun Lal. The judge concluded:

"In this case I find as fact on the civil standard that it was through the negligent handling and fault of the third party excavator driver that the accident happened and caused injuries to the Plaintiff's head. For these reasons it is ordered that the Defendants be indemnified by the third party for any award made herein against the Defendants".

[5] This is an application for leave to appeal against the judgment out of time. As explained in Ahilya Sharma & Anr v. Mahendra Pratap Singh ABU 27/03 leave will only be granted when it is in the interests of justice, having regard to the whole history of the case, for time to be extended. The four principal considerations are (a) the length of the delay (b) the reasons for the delay (c) the chances of the appeal succeeding and (d) the prejudice to other parties affected by the decision.

[6] Judgment was delivered on 7 September 2005. This application was filed on 27 April 2006 and is accordingly about 6 months out of time. That is not an inordinate period but neither is it a technical delay of a mere few days.

[7] In the supporting affidavit, the Applicant's Managing Director, Uma Shankar provided a convoluted explanation for the failure to file notice of appeal within time, which depended on instructions being given to a solicitor who formerly represented him. In view, however, of a notice of change of solicitors filed in August 2004 and the concession that he was well aware of the judgment against him by as early as November 2005, the explanation is wholly unconvincing. A second explanation involved "some difficulties" in Mr. Shankar health. These difficulties were not specified, despite an adjournment being granted for further and better particulars to be made available. As pointed out by Mr. Sharma, the Applicant is a limited company. The indifferent health of one of its directors is not a sufficient ground for allowing the appeal period to expire. In my view the grounds advanced for failing to file an appeal within time are wholly unsatisfactory.

[8] Turning to the merits of the intended appeal, Mr. O'Driscoll suggested that the judge erred by failing to assess the extent to which the Respondents' actions (the PWD) were responsible for the accident which occurred. On page 7 of the judgment the judge stated that:

"the supervisor neglected his duty; he should have been close to the site instead of going into the village talking to villagers".

[9] The relevance of that finding is its relationship with paragraph 15 of the general conditions of contract between the PWD and the Applicant. That paragraph provides that the Applicant shall indemnify the PWD in respect of injury caused during the performance of the contract:

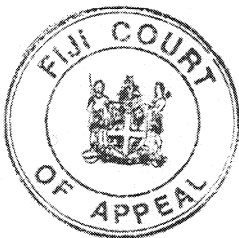
"unless due to any act or neglect on the part of the government or of its servants or agents."


In these circumstances, Mr. O'Driscoll suggested, the court should have assessed the extent of the supervisor's responsibility for what occurred and reduced the Applicant's liability to the degree assessed.

[10] In my view Mr. O'Driscoll was correct to suggest that there are passages in the judgment which are difficult to reconcile with each other. In particular, the finding, on page 6 of the judgment that the Respondents were liable is not satisfactorily explained. At the same time, however, the conclusion and finding of fact already quoted at paragraph [4] above is perfectly plain and accurately reflects the whole of the evidence which, as it appears from the judgment, was placed before the court. The answer, therefore, to Mr. O'Driscoll's point is that while the PWD supervisor may also have neglected his duties, there is nothing to suggest that this neglect had any consequence at all for the

accident which occurred. In my view, the chances of an appeal succeeding on this ground, Mr. O'Driscoll's "main point" are minimal.

- [11] The final matter is prejudice. The Plaintiff has already recovered from the Respondents. All that remains is for the Applicant to indemnify the Respondents as required by the contract. Mr. Shankar suggested that the Applicant would be seriously prejudiced by having to satisfy the claim against it but he did not give any particulars of the prejudice which would occur. Neither was he able to argue that in the event of a successful appeal the Applicant would be unable to recover the amount paid from the State. Mr. Shankar's "usual undertaking in damages" was not supported by any statement of financial worth.
- [12] In the absence of exceptional factors, a successful plaintiff is entitled to the fruits of his action. I find no exceptional circumstances in this case.
- [13] Taking all the above considerations into account, I am not satisfied that it would be in the interests of justice to grant the application. It is dismissed.



  
M.D. Scott  
Resident of Appeal

2 August 2006