IN THE FIJI COURT OF APPEAL

Civil Appeal No. 14 of 1986

Between:

IMAM ALI — Appellant

- and -

NATIVE LAND TRUST BOARD — Respondent

Dr. M.S. Sahu Khan for the Appellant
Mr. P.A. Brown for the Respondent

Date of Hearing: 12th November, 1986
Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

O'Regan, J.A.

The issues in this appeal have narrowed since the hearing in the Court below and some of the matters there canvassed and dealt with by the learned Judge do not now fall for consideration.

On 28th April 1982, the Divisional Estate Manager (Western) of the respondent board wrote to the appellant in response to the latter's application for a lease of a small parcel of land in Nadi. The latter reads as follows:-

> " RE: APPLICATION TO LEASE NATIVE LAND
>
> A tenancy has been provisionally approved to you over the land acting as a drainage easement in the Vodawa Subdivision at Nadi.
>
> The Lease will be subject to your gaining all necessary approvals including that of the Nadi Town Council, the Director of Town and Country Planning and the Lands

Department, whichever may be required. As well, survey diagrams for lease documentation are to be supplied by you. It is proposed that the Lease will be for ninety nine (99) years commencing from 1 July 1982 at the annual rental of $1,500.00. The rent is to be reassessed at each ten yearly interval of the lease term.

A premium of $3,000.00 will be payable at the inception of this lease along with the following fees and rent:

Stamp Duty	481.00
Rent to 30 June 1983	$1,500.00
NLTB Fee	55.00
	2,036.00

These amounts should be paid within two months of the above date failing which it will be considered you do not wish to proceed with your application and others interested in this land will be contacted. "

The appellant contended in the court below that the application he made for the lease was an offer. The learned Judge rejected the submission. The submission was renewed by the appellant before us but during the course of the argument it was abandoned. The cause of the appellant would not have been advanced even if it were to be classified as an offer for the reason that the terms of the respondent's letter did not correspond in all particulars with the terms of the application. We think that the letter of 28th April 1982 was clearly an offer and we proceed to deal with the case on that basis.

The appellant did not accept the offer in writing. Had he done so, the parties would have been in contract and this litigation would have been unnecessary. The offer, however remained open, until a date in July 1983 upon which the appellant either received or could be deemed to have received the respondent's letter of 12th July. That letter withdrew the offer.

The letter reads:

"I refer to my offer letter dated 28th April in which two months was given for you to respond by the payment of premium, rent, and other fees. I am aware of some of the difficulties associated with building on this drainage easement however the inordinate delay in your responding to my offer leaves me no alternative but to withdraw this offer with immediate effect. This property will now be offered elsewhere."

On 11th October, 1983 the appellant commenced an action seeking a declaration that the respondent was in breach of contract in not granting him a tenancy over the land in question, specific performance, damages and further or other relief. In a reserved judgment delivered on 23rd January 1986 the Judge found in favour of the present respondent. From that decision the appellant appealed to this Court. The grounds of appeal which were pursued in this Court were :-

"a) THAT the learned trial Judge erred in law and in fact in deciding what was specifically an offer and what was specifically an acceptance rather than holding that the series of correspondences constituted sufficient note and memorandum whereby a binding contract was formed sufficient to warrant an order for specific performance.

b) THAT the learned trial Judge erred in law and in fact in not holding that on the facts of the case even if the letter dated the 28th day of April, 1982 by the Respondent was offer and was subject to the performance of condition by the Appellant then although the Board did not become contractually bound by the offer until those conditions have been fully performed, the Respondent became bound, once the Appellant commenced to perform those conditions by an implied collateral contract not to prevent the performance of those conditions and not to remove the offer.

c) THAT the learned trial Judge erred in law and in fact in not holding that the Respondent was estopped from denying that the relevant period within which the moneys were to be paid was at the earliest two months within the grant of approval by the Director of Town and Country Planning. "

The first ground of appeal is founded upon the decision of the majority of the Court of Appeal in Gibson v. Manchester Council (1978) 2 All E.R. 583 and in particular the dictum of Lord Denning to be found at p. 586g, upon which counsel for the Appellant placed a deal of reliance. Lord Denning said:-

> "To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so, but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement in everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforth to be binding then there is a binding contract."

That approach of the matter did not find acceptance in the House of Lords - (1979) 1 All E.R. 972 in which Lord Diplock, referring to the passage from Lord Denning's judgment which we have just quoted, had this to say:-

> "....there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which successive communications other than the first are in reply to one another is not one of these. "

We pause to say that here the "correspondence" after the initial application there was but one letter touching the question of contract or no contract.

The passage continues:-

> "I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the Council to sell the house to Mr. Gibson and and acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led, into error."

Lord Diplock's opinion received the concurrence of the other members of the House engaged in the hearing of the appeal.

We respectfully adopt as our own the view of the House of Lords which concludes this ground of appeal against the appellant. We think also that had Lord Denning's view prevailed the appellants would still have failed on the facts because a consideration of the relevant correspondence would not have disclosed an agreement between them "in everything that was material".

This ground of appeal fails.

The second ground of appeal argued has its foundation in the decision of the English Court of Appeal in Daulia Ltd. v. Millbank Fourmill Bank Nominee Ltd. (1978) 2 All E.R. 557.

That was an unusual case having to do with an oral contract to enter into a contract for the sale and purchase of land. To compare it with the present case it is necessary to set forth its facts.

The defendants were mortgagees exercising powers of sale and the plaintiffs were prospective purchasers, keen to buy. On Tuesday 21st December, 1976 terms of a proposed sale between the plaintiffs and defendants were agreed upon between A on behalf of the plaintiffs and B, who was acting on behalf of the defendant. The terms were partly in writing and partly oral.

Later, in the afternoon of 21st December 1976, C acting on behalf of the defendants promised A that the defendants would enter into a contract for the sale of the properties with the plaintiffs, if the plaintiffs procured a banker's draft for the agreed deposit, and attended at the defendants' offices before 10 a.m. on Wednesday 22nd December, 1976 at 4 Millbank and tendered to the defendants the plaintiff's part of the contract in the terms already agreed upon and the banker's draft for the deposit. In reliance to the promise, the plaintiffs obtained the draft for the deposit, executed and signed their part of the contract and then attended at the appointed time and place with the deposit and their part of the contract ready for tender to the defendants. The defendants however, refused to exchange their part of the contract. They had, overnight, received a higher offer.

There are, therefore, features to the contract sought to be enforced in that case which distinguish the case on the facts from the present case. First, as we have already observed, the contract was an oral contract. Secondly, the "conditions" which the defendants made terms of their offer were "conditions" to be performed, if performed at all, by the plaintiffs as offerees; not, as here, "conditions" which depended for their performance upon the decision of third

persons. And in the result, they did perform the conditions, whereas in the present case the conditions had not been met when the offer was withdrawn.

The Court of Appeal held that there was a concluded unilateral contract by the defendants to enter into a contract of sale on the agreed terms.

In his judgment, Goff L.J. said:-

> "The concept of a unilaterial or "if" contract is somewhat anamalous, because it is clear that until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror is free to revoke. Doubts have been expressed whether the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so. In my judgment, however, we are not concerned in this case with any such problem because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time, and place appointed with a banker's draft for the deposit and their parts of the written contract for sale duly engrossed and signed and retendered (sic) the same which I understand to mean proferred it for exchange."

Having thus concluded the matter at issue in the above passage Goff L.J. went on to say, in a passage, upon which Dr. Sahu Khan strongly relied in support of the ground of appeal under consideration:-

> "Even if any reasoning so far be wrong, the conclusion in my view is still the same for the following reasons. Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require the full performance of the condition he had imposed and short of that he is not bound, that must be subject to one important qualification which stems from the fact that there must be an implied obligation on the

> part of the offeror not to prevent the condition being satisfied, which obligation arises as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked upon performance it is too late for the offeree to revoke his offer."

In our opinion, this ground of appeal and the applicability of the above case to the present case is misconceived. Indeed it is based on two misconceptions. We preface our observations in the matter, however, by a few words on the various meaning of the word "condition" and its use in legal documents and decided cases.

The learned author of Chitty on Contracts 24 Ed. Vol. 1 para 690 - 1 deals succinctly with the topic:-

> " The word "condition" is sometimes used even in legal documents to mean simply "a stipulation, a provision" and not to connote a condition in the technical sense of the word. "
>
> and later in para 691 -
>
> " The most commonly used sense of the word "condition" is that of an essential stipulation of the contract which one party guarantees is true or promises will be fulfilled. Such a condition will be termed 'promissory';condition and non-performance of it gives a right of action for breach. This sense must be carefully distinguished from that of a 'contingent' condition i.e. a provision that, on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the condition gives no right for breach; it simply suspends certain obligations of one or both parties. "

The ground of appeal proceeds on the assumption that the fulfilment of the conditions as to the obtaining the consent or approval of the Nadi Town Council, the Director of Town and Country Planning and the Lands Department of Town and Country Planning and the Lands Department was an essential prerequisite to the formation of a contract between the parties. That is clearly not the case. A contract could have been and would have been concluded by the appellants accepting in writing the respondent's offer. True, the contract so concluded would have been subject to the above conditions - contingent conditions postponing the coming into force of the obligations created by that contract until the consents were obtained. The misconception is manifest in the words from the text of the ground of appeal:

> ".....although the board did not become contractually bound by the offer until these conditions have been performed ....."

In any event, the Board would not become liable under the contract merely by the fulfilment of the conditions. Even if they were fulfilled it would not be in contract with the appellant until the appellant had accepted the offer in writing and notified the Board thereof.

The second misconception is the appellant's belief that the principles laid down in the Daulia case (supra) have application to the present case. That misconception arises because he has taken the word "conditions" used in the judgment and the same word appearing in the appellant's offer as having one and the same meaning. The "conditions" that the purchasers procure a bank draft, draw up and their part of the contract of sale and tender same to the defendants before 10 a.m. the following day, were neither "promissory conditions" - or "contingent conditions" as those terms are described in the extract from Chitty we have cited

above. They are merely "stipulations", "provisions" or "terms" in an offer and the judgments refer to "conditions" in that sense. On the other the conditions in the offer are clearly contingent conditions. Accordingly, the extracts from the judgments upon Dr. Sahu Khan relies and indeed upon which the very ground of appeal itself is based have no application to this case.

In the text of the ground of appeal reference is made to the offer "being subject to the performance of the condition(s) by the appellant". The fact is that it was beyond the power of the appellant to perform the conditions. They were to be performed, if performed at all, by bodies not potential parties to the contract. The text of the ground of appeal speaks also of the appellant becoming bound by an implied collateral contract "once the appellant commenced to perform those conditions". He did not commence to perform the conditions. It was beyond this power to do so.

The final ground of appeal advanced was to effect that the Judge "erred in law and in fact in not holding that the respondent was estopped from denying that the relevant period within which the moneys were to be paid was at the earliest two months within the grant of approval by the Director of Town & Country Planning".

The moneys there referred to are the various amounts stipulated for in the appellant's offer.

We do not find it necessary to consider this ground. Even if we decided it in the appellant's favour it would not alter the destiny of the case which fails in limine, as the parties never concluded a binding contract.

The appeal is dismissed. The appellant is ordered to pay the costs of the appeal, which, if not agreed upon, are to be taxed by the Registrar.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal