IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.33 OF 1987

Between:

SHIU KUMARI (daughter of Ram Dayal) Appellant

- and -

FIJI INSURANCE COMPANY LIMITED Respondent

Mr. S.M. Koya for the Appellant
Mr. Anand Singh for the Respondent

Dat of Hearing: 25 May 1989
Date of Delivery: 9 June 1989

JUDGMENT

This is an Appeal from the Judgment of Mr. Justice Dyke delivered on the 6th day of March, 1987 in Civil Action (Lautoka Registry) No. 225 of 1985 in which action the Appellant had her claim dismissed.

The facts are not in dispute. Briefly they are as follows:-

In 1983 the Appellant took out an indemnity policy of insurance for $54,000 with the Respondent Company to cover various risks in respect of her residential premises at Lautoka. Between 17th and 20th January, 1985 the building suffered damage said to amount to total destruction as a result of cyclones Eric and Nigel. Thereupon the Appellant

submitted a claim for $54,000 being the full amount stated in the policy and refused to accept any lesser sum in settlement. In April 1985 she issued a writ claiming $54,000 plus interest of 13.5% per annum from the date of the writ to the date of judgment. A defence was filed in court but never served. So on 15th July 1985 the Appellant's Counsel obtained final judgment for the full amount plus interest as claimed and costs. On 16th of September 1985 Kearsley J. acceded to an application to set aside the judgment but did so on terms.

The Respondent's pleadings denied liability on two grounds -

(a) fraudulent, exaggeration and alternatively

(b) non-disclosure of a material fact.

On the question of non-disclosure of a material fact the trial judge held -

> "However the fact that the plaintiff had previously made a claim in respect of a fire loss should have been disclosed and there is no doubt that the plaintiff had made a false reply to this question."

He concluded his judgment thus -

> "This is not just the case of an exaggerated claim, it is a claim which is grossly exaggerated, dishonest and fraudulent and the defendant is quite entitled in accordance with the terms of the policy to reject it and forfeit all benefits. The claim is therefore dismissed and judgment given for the defendant with costs to be taxed if not agreed. Had I not dismissed the plaintiff's claim I would certainly have limited it to $8,000."

The first ground of Appeal alleges that the judgment entered by the Appellant remained "extant" and therefore the Respondent was disabled and estopped from proceeding with its defence. The Notice of Appeal gave lengthy particulars of the matters which the trial judge was alleged not to have considered. There were allegations that orders had not been perfected by being drawn up and sealed and failures to comply with orders within the times ordered.

The first ground was prepared by Mr. Koya on the basis that the summary final judgment entered up the Appellant was a valid one. He now concedes the judgment was irregular. One of the reasons why Kearsley J. set aside the judgment was because he was not convinced that the claim was a liquidated one. The claim was indeed not a liquidated one and the fact that the claim for interest was included, being interest claimed under Section 3 of the Law Reform (Miscellaneous Provisions) Act which could only have been awarded by the court should have alerted all concerned to the fact that the final judgment could not be entered up. The judgment entered up should have been for an interlocutory one for loss to be assessed.

On the request of the then solicitor for the Appellant, who indicated he would consent to judgment being set aside if the $54,000 was paid into Court, the learned judge set aside the judgment and gave leave to defend on terms that the Respondent paid $54,000 into Court within 4 days. That condition was one which should not have been requested by the Appellant's solicitor or imposed by the learned judge. There was no risk to the Appellant even if the judgment was regular. Both the solicitor and the learned judge did not appreciate that under the Insurance Act the Respondent had to deposit with the Permanent Secretary concerned the prescribed security in respect of each class of business transacted by it in Fiji. Fixing the time at 4 days within which to comply with the order was unnecessarily short in any event.

Following this order there were a number of applications to and orders made by the Court. The Respondent sought a stay, to fix security for costs of appeal and two applications to vary the order concerning payment into Court of the $54,000.

The first variation order made by Mr. Justice Kearsley was to the effect that the Respondent establish a letter of credit and deposit it in Court. On the Bank concerned pointing out that letters of credit were not issued by Banks as security for payment of a judgment debt and suggesting lodgement of a Bank guarantee, the learned judge further amended his order. The Guarantee was duly lodged with the Court.

The time to object to procedural irregularities and failures to strictly comply with orders is soon after those irregularities occur and before taking any fresh step after becoming aware of the irregularities (See Order 2 Rule 2(1) of the R.H.C.). The Appellant was represented by a solicitor from institution of the action until the action was brought on for hearing without any objection to those irregularities or failures by the Respondent.

We did not call on Mr. Anand Singh to reply to Mr. Koya's argument on this ground of Appeal. We were satisfied the judgment was defective and that was the fault of the Appellant's then Solicitor who was not Mr. Koya. The grounds were technical. The Solicitor then acting for the Appellant should not have pressed for payment into Court in the circumstances. If it was necessary to now waive the procedural errors, omissions or failures to comply with orders in time we would do so but we consider solicitors on both sides in agreeing to enter the action for trial and accepting the special two day fixture must be deemed to have waived all irregularities and failures to comply with orders in time. We find no merit in the first ground of appeal.

The second and third grounds were argued by Mr. Koya together. They are as follows:-

> "2. THAT the Learned Trial Judge erred in law in rejecting the Plaintiff's application for an adjournment following the withdrawal of Mr. G.P. Shankar from the action as Solicitor and Counsel for the Appellant on the morning of 29th October, 1986 when the matter was set down for trial."
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> "3. THAT the Learned Trial Judge erred in law in not allowing the Plaintiff/Appellant any opportunity or sufficient time to engage another Counsel on the 29th October, 1986 to conduct her case and that such denial was a fundamental breach of the rules relating to fair trial and or relating to natural justice. Consequently there has been a substantial miscarriage of justice."

The facts giving rise to these two grounds of appeal are also not in dispute.

The Action came on for hearing on 29th October, 1986 more than 13 months after Mr. Justice Kearsley had made an order for a speedy trial. That delay is indicative of the pressure of work on the then Supreme Court at Lautoka and it obviously had a bearing on that Court's refusal at the hearing to entertain an application for an adjournment after a special fixture had been made for the hearing and two days had been set aside for it.

Mr. G.P. Shankar appeared for the Appellant at the hearing and the notes made by Mr. Justice Dyke tell the story:-

"G.P. Shankar - Have dispute with client, who will not listen to me, wishes to conduct case himself. Seek leave to withdraw.

Parshu Ram: - Attorney for plaintiff - agree and ask for adjournment - will not accept my instructions. Want other counsel.

Court: - G.P. Shankar given leave to withdraw.

P. Ram: - Request adjournment to brief other counsel.

D. Fatiaki - Object - speedy trial was asked for and given. Two days set down for case. This is second counsel who have had to withdraw. Witnesses are here or are subpoenaed for tomorrow. All available.

Court - This case was given special treatment and speedy trial ordered. After several attempts two days were set down for hearing and any adjournment now would result in loss of 2 court days. This is second counsel who has had to withdraw because of disagreements with Parshu Ram.

Adjournment refused."

Both Mr. Koya and Mr. Anand Singh referred to the YATES SETTLEMENT TRUSTS [1954] 1 AER 619 CA. That case is authority for the proposition that the adjournment of a proceeding under the relevant rule or under the inherent jurisdiction of the Court is a judicial act which may be reviewed on Appeal, but as it is a matter of discretion, the Court of Appeal will be slow to interfere.

We also considered the case of MCINNIS AND THE QUEEN 143 C.L.R. 575 a decision of the High Court of Australia in 1979, which on the facts more closely follows the facts in the instant case than Yates case. It was a criminal case but it dealt with the question whether there had been a miscarriage of justice.

The head-note to that case states:-

"Trial - Application for judgment - Accused through no fault of his own suddenly without counsel - Adjournment refused - Conduct of defence by accused - Whether miscarriage of justice."

Four of the five judges held that even if the judge had erred in refusing an adjournment, the test of whether a miscarriage of justice had occurred was whether by the refusal of an adjournment the accused really lost a chance of acquittal. In view of the strong case against him and the lack of credibility of his defence, no such miscarriage had occurred.

We accept the propositions and having considered the facts we see no grounds for interfering with the exercise of the learned trial judge's discretion in refusing the application for adjournment to engage another counsel.

We set out our reasons for not interfering and in so doing will also cover Mr. Koya's contention that there was a denial of "a fundamental breach of rules relating to fair trial and in relation to natural justice leading to a substantial miscarriage of justice."

The gravamen of Mr. Koya's complaint is that if the Appellant had had legal counsel for the hearing the Appellant's case would have been presented professionally with more prospects of success.

As to this argument Mr. Parshu Ram had employed two able and experienced solicitors, Mr. Jairam Reddy and Mr. G.R. Shankar, both of whom had been forced to seek leave to withdraw from the case due to Mr. Parshu Ram's conduct.

It was unfortunate for the Appellant, as it later turned out, that Mr. Shankar felt compelled at the commencement of the hearing to seek Court leave to withdraw. It appears from the Record that Mr. Shankar had at some time previously informed Mr. Parshu Ram he was withdrawing because he informed the Court that Mr. Parshu Ram wished to conduct the case himself. Mr. Parshu Ram confirmed this and he was entitled as attorney for the Appellant to act on her behalf. He should have appreciated that his application for an adjournment might not be approved and that he would have to conduct the case.

It is very relevant that the Court was hearing a civil claim and not a criminal one. It has often been said that civil cases can be won or lost on the pleadings. From the institution of the action until the date of hearing the Appellant was represented throughout by solicitors.

The position at the date of the hearing, so far as the Appellant's case was concerned, was that it was only necessary to establish the Appellant's loss to prove her claim and to rebut the defence.

The statement of claim however did not properly describe or quantify the Appellant's loss. It is clear that her claim was based on the sum insured on the building.

The Respondent disputed the quantum of that loss. On that issue the Appellant had first to establish her loss being the value of the building at the time of the cyclones. If she proved it was worth $54,000 or in excess of that she was over a major hurdle.

There was a valuation from a retired valuer supporting the Appellant's claim. The learned trial judge however preferred the evidence of an experienced New Zealand loss assessor (called by the Respondent) who assessed loss at $8,000. The learned trial judge would have given judgment for that sum to the Appellant but for the defence raised by the Respondent.

The facts clearly show that the Appellant was given a fair hearing. There was no miscarriage of justice as alleged.

In our view there is no merit in the second and third grounds.

At the hearing we enquired from Counsel whether or not the learned trial judge when considering the merits of the case had erred. Mr. Koya who is most thorough in his preparation of grounds of appeal did not in his Notice of Appeal seek to challenge the learned judge's findings of facts. Nor did he seek leave at the hearing to amend his grounds of appeal. We therefore see no need to consider that possible issue, except to observe that the trial judge would have been amply justified in dismissing the claim in toto solely on his finding that there was a false non-disclosure of a material fact.

This appeal is therefore dismissed with costs to the Respondent.

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(SIR TIMOCI TUIVAGA)
PRESIDENT, FIJI COURT OF APPEAL

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(SIR RONALD KERMODE)
JUSTICE OF APPEAL

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(SIR MOTI TIKARAM)
JUSTICE OF APPEAL