IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 33 OF 1992
(High Court Civil Action No. 288 of 1989)

BETWEEN:

BANK OF BARODA — APPELLANT

-and-

CHAUHAN INVESTMENTS LIMITED — RESPONDENT

Mr. S. J. Stanton and Mr. H. M. Patel for the Appellant
Mr. Q. B. Bale and Miss V. Narayan for the Respondent

Date of Hearing : 15th February, 1994
Date of Delivery of Judgment : 24th February, 1994

JUDGMENT OF THE COURT

In these proceedings the Court was constituted by two Judges. The Acting President had certified that in his opinion it was impracticable to summon a Court of three Judges. The Court was, therefore, duly constituted pursuant to section 6(2) of the Court of Appeal Act (Cap.12). At the commencement of the hearing of the appeal we informed counsel of that fact; counsel for both parties stated that they had no objection to the constitution of the Court by two Judges.

In this case the appellant ("the Bank") has appealed against the judgment of Fatiaki J. in the High Court awarding the respondent damages, with interest, for breach of an agreement to execute a lease. The respondent ("the Company") has cross-appealed in respect of the quantum of the damages, the rate of

the interest and failure of the Judge to award it costs. In its statement of claim the Company had sought an order for specific performance of the agreement. That remedy was refused by His Lordship. That refusal has not been made the subject of the cross-appeal.

The alleged agreement which was the subject of the action was a written document signed on behalf of the two parties, and in the case of the Company also sealed, on 16 June 1989. It was headed "Memorandum of Preliminary Agreement to Enter into an Agreement to Lease". It related to the ground floor of a two-storey building in Labasa. The consent of the Director of Lands to the lease of the land or any dealing with it was required by section 13 of the Crown Lands Act (Cap. 132). The agreement was expressly made subject to such consent; consent was given on 22 June 1989. Over the preceding 2-3 months the parties had been negotiating with a view to the Company letting the premises to the Bank to be used by the Bank to accommodate its Labasa branch. At that time the branch was accommodated in other premises in Labasa. The Company's premises were, however, larger than the other premises and the rent which the Company was seeking was less than the Bank was currently paying. However, there was one problem; in 1987 the Bank had renewed, or had purported to renew, the lease of the other premises for five years.

The director of the Company who undertook the negotiations with the Bank was Mr. K. Chauhan, a solicitor practising on his own in Suva. The Bank wished to absolve itself of any obligation

it might have to continue renting the other premises. The employees of the Bank who were conducting the negotiations told Mr. Chauhan that it had received oral advice from a solicitor, Mr. J. G. Singh, that it could not do so; Mr. Chauhan expressed disagreement with the advice. The employees of the Bank conducting the negotiations asked him for his opinion on the matter. He pointed out to them that he was an interested party and told them that they should obtain independent advice. Nevertheless, they pressed him to give them his opinion and he did so orally. It was that the renewal of the lease had been invalid. They asked him to obtain advice from an independent solicitor for them on the matter; he obtained, and supplied to them, advice from another solicitor practising in Suva. That solicitor advised that the purported renewal of the lease had not been effective. There was no evidence to suggest that either Mr. Chauhan or the solicitor from whom he obtained the advice gave advice which he did not believe to be correct. The Bank asked the solicitor who had given it advice orally, Mr. Singh, to give advice in writing. He did so on the letterhead of his firm, one of the leading firms in Suva; it was to the effect that the renewal of the lease of the other premises had been valid and effective and that the Bank was bound to rent those premises until 1992. That advice was received before 16 June 1989.

Fatiaki J. in a careful judgment decided that the document signed and sealed by the parties on that date was an agreement to execute a lease on specified terms, that the parties had intended to be bound by its terms and that it was valid and binding. He

rejected arguments that its terms were uncertain and that Mr. Chauhan had exercised undue influence on the Bank to enter into the agreement or had breached any fiduciary obligation.

The agreement provided for the Company to carry out at its own expense specified alterations (described in the agreement as "renovations") to the interior of the ground floor of the premises before the commencement of the lease; that undertaking was described in the agreement as consideration given by the Company. In compliance with it the Company entered into a contract with a builder on 17 June 1989 for extensive alterations to be made to the premises; they were necessary to convert what had been three shops into a large banking chamber, two or three small offices and a strongroom. That contract was not submitted to the Director of Lands for his consent. The work did not start until on or after 22 June. It had not been completed when the Bank refused to execute the lease; it was then stopped and remained uncompleted.

Fatiaki J. awarded as damages $20,000 "for breach of the contract", $5,600 for wasted expenditure on the alterations and $18,000 as the cost of reinstating the premises so that they could be let as shops. His Lordship stated that he was applying the principle *restitutio in integrum* and was taking into account that an early draft of the agreement had contained a liquidated damages clause which had set the amount of such damages at $20,000.

The first three grounds of the appeal go to issues of liability. The first two are as follows:-

> *"1. The Learned Trial Judge erred in failing to find the terms and conditions of the "Memorandum of Preliminary Agreement" as at 16th June 1989 in other than a general finding devoid of the specific terms and conditions of any such agreement.*
>
> *2. The Learned Trial Judge erred in law in holding that there was an agreement in the form as ultimately held it being insufficient either as a question of construction and/or by its necessity for further execution of a formal agreement to be capable of being regarded as constituting a complete contract."*

A copy of the Memorandum of Preliminary Agreement was tendered in evidence at the trial. In it the parties, the premises, the term of the lease and the rent were all stated clearly. Provision was made for an option to renew the lease at the expiration of its term; the term of the renewal was stated and the manner in which the rent for that term was to be set, namely by agreement, if possible, and otherwise by arbitration.

There was provision in the agreement for the Bank to have an option in specified circumstances to give notice to terminate the lease after renewal. The "renovations" to be carried out by the Company were specified in detail, as were the materials which could be removed from the premises where the Bank currently had its branch and installed in the premises which were to be the subject of the lease.

Finally there was provision in the following terms:-

> *"Other usual general provisions in the Lease are to be as close as possible to those provided in [the lease of the other premises] with minor amendments in a proper drawn-up lease between the parties."*

The Judge relied on Attorney General v Barker Brothers Ltd [1976] 2 NZLR 495 as authority for holding that the provision for setting the rent on renewal did not lack the certainty required for a binding agreement. He took the view also that the clause relating to "other usual general provisions" did not contain such an unusual or uncertain term as to negate the existence of a concluded agreement. In that regard he considered that support was provided by Sweet & Maxwell Ltd v Universal News Services Ltd [1964] 2 QB 699, where at page 726 Harman L.J. held that agreements for leases lacking express provision for inclusion of the "usual covenants" were nevertheless enforceable, as evidence would be accepted from surveyors or conveyancers regarding the kind of covenants used in each particular kind of lease. Fatiaki J. also noted the dictum of Lord Wilberforce in Cudgen Rutile (No.2) Pty. Ltd. v Chalk [1975] AC 520 at p.536 that Courts are now readier than in the past "to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some terms such as price, provided that some means or standard by which the term can be fixed can be found".

An agreement to enter into an agreement or lease will be enforced if it is certain what the terms of the later agreement or lease are to be. What was in issue at the trial was whether the terms on which the lease was to be entered into were ascertainable with certainty. We have come to the conclusion that His Lordship was correct in holding that they were. The clause relating to setting the rent on renewal provided for it to be determined by arbitration. The rent for the first term was set by the agreement; it would have provided an appropriate yardstick or standard for the arbitrator to apply. Similarly the "usual terms" were required by the agreement to be "as close as possible" to the actual terms of an existing lease, which could be readily ascertained. Any amendments to them were only to be minor and, by implication, such as were required to take account of any differences between the premises and between the terms specified in the agreement and those of the lease of the other premises. His Lordship made no error in finding that the agreement did not lack certainty or as to its terms.

In **Masters v Cameron** (1954) 91 CLR 353 at p.360 the High Court of Australia stated:-

> *"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise*

but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

After examining the evidence Fatiaki J. came to conclusion that the memorandum of preliminary agreement in the present case fell into the first class. We are satisfied that he made no error in doing so.

Mr. Stanton drew to our attention the evidence of the Bank's doubts about the validity of the renewal of the lease of the other premises and of its having unsuccessfully pressed Mr. Chauhan to include in the agreement a clause providing for the Company to indemnify it in respect of any liability it might incur if it terminated its tenancy of the other premises, as it would have needed to do if it had moved its branch into the Company's premises. He submitted that in those circumstances the Bank could not have intended to enter into a binding agreement to execute a lease of the Company's premises running from 1 August 1989. We acknowledge that it was foolish of the Bank to enter into a binding agreement in those circumstances. But folly is not uncommon, even in the transactions of major financial institutions. If it did not intend to be bound, it is surprising, to say the least, that the Bank's manager signed and sealed it.

There had been two previous drafts before the parties reached agreement on the content of the document which they signed and sealed. It provided for the Company to make alterations to the premises before the tenancy was to commence. The Company acted immediately to give effect to that obligation and the Bank initially cooperated with it. It is clear that both parties believed the agreement for the execution of the lease to be binding upon them and that was the situation when they executed it.

Mr. Stanton submitted that the agreement was rendered illegal because the consent of the Director of Lands was not obtained for the contract between the Company and the builder to make the alterations to the premises. For reasons which we state below we are satisfied that that contract was not illegal. Even if we had found that it was, however, we can see no way in which that could have tainted the agreement to execute the lease.

The third ground of appeal is as follows:-

> *"3. The Learned Trial Judge erred in failing to imply and/or hold that the agreement as found was completely devoid of the indemnity by the Respondent to the Appellant in the event of its liability to its former Lessor R.M.K. being found to be incapable of being released."*

Fatiaki J. held that no term was to be implied in the agreement that the Company would indemnify the Bank against any liability arising from its termination of its current lease. A

Court will generally imply a term in a contract only when it is reasonable and equitable to do so and when it is necessary to give business efficacy to the contract; no term will be implied if the contract is effective without it (B.P. Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 A.L.J.R. 20 at p.26). At one point in his address it appeared that Mr. Stanton might be about to submit that, if the agreement was valid, an indemnity provision should be implied as included in it. However, it was noted that Mr. D. K. Kapadia, the bank officer who was called by the Bank to give evidence at the trial, said that, when the parties were discussing one of the drafts of the agreement, the Bank was "insisting on Chauhan & Co.", the name under which Mr. Chauhan practised as a barrister and solicitor, "giving a written undertaking to indemnify" the Bank but that "Mr. Chauhan refused to incorporate the clause". Mr. Stanton then submitted that the non-inclusion of the indemnity provision was to be taken into account for the purpose of deciding whether the Bank intended to be bound by the agreement, a submission with which we have dealt above in respect of the second ground. He did not present any argument that its inclusion was to be implied. We are satisfied that the inclusion of such a provision cannot be implied in this case and that the trial Judge made no error on that point.

The next ground of appeal is that:-

> *"4. The Learned Trial Judge erred in law in failing to find that there existed as between Chauhan and Appellant and its officers-*

(a) a relationship of undue influence;
(b) a fiduciary relationship and duty owed by the said Chauhan to the Appellant; and

that the said Chauhan breached the duty owed by reason of the existence of the relationship referred to aforesaid."

Having regard to the relative economic strength of the parties and the resources available to the Bank, which is an international financial institution, we are surprised that it should have put this matter in issue at the trial and that it has made it a ground of appeal. That it should have done so is even more surprising in view of the fact that Mr. Chauhan drew the Bank's attention to his personal interest in the agreement and advised it to obtain independent legal advice, and that it did obtain such advice from one of the leading firms of barristers and solicitors in Suva but chose to ignore it. This ground of appeal is utterly lacking in merit.

The remaining grounds of the appeal and the grounds of the cross-appeal relate to the quantum of damages, the award of interest to be paid on that amount and costs. The damages and interest were awarded in the following terms:-

"(a) For breach of Contract	*$20,000.00*
(b) For wasted expenses	*5,600.00*
(c) For reinstatement	*18,000.00*
	$43,600.00

together with interest thereon at the rate of 7% per annum with effect from the 17th day of August, 1989 until payment."

Grounds 5 to 9 of the Bank's grounds of appeal are as follows:-

"5. The award of damages for breach of contract in the sum of $20,000 was and did amount to an award of liquidated damages for which there was no warrant or basis in the circumstances.

6. Further and in the alternative the award of damages in the sum of $20,000 on the basis that it constituted restitution in integrum was in the circumstances devoid of either a contractual basis or any basis at law or in equity.

7. The Learned Trial Judge further erred in awarding interest on the sums so held on the basis that the amount of interest was excessive.

8. The Learned Trial Judge failed to find that the Respondent had failed to mitigate or attempt to mitigate its damages thereby erring in law in so awarding damages in the sums given, in favour of the Respondent.

9. The Learned Trial Judge failed to hold that there was no evidence of reinstatement, expenditure or the liability therefor and in the circumstances the award of $18,000 was wrong in principle."

In none of the grounds of appeal did the Bank challenge the award of $5,600 for wasted expenses. However, at the hearing of the appeal Mr. Stanton submitted that the money paid to the builder for the alteration of the Company's premises was not recoverable from the Bank because it was paid in respect of a

dealing with the land which had not been approved by the Director of Lands and which was, therefore, illegal.

The grounds of the Company's cross-appeal were that the Judge:-

> *"(a) failed to take into account that the premises had remained vacant for a period of almost 3 years;*
>
> *(b) failed to take into account that 7% per annum interest is not a realistic commercial return on an investment in Fiji; and*
>
> *(c) failed to award costs to the Plaintiff when giving judgment in the Plaintiff's favour, despite awarding the sum of $18,000.00 on the principle of restitutio in integrum."*

At the hearing of the appeal Mr. Bale abandoned ground (b).

Generally an appellate Court will not interfere with an award of damages unless it is convinced that the Judge acted upon some wrong principle of law (Benham v Gambling [1941] AC 157).

The Company was entitled to recover as damages all losses resulting from the breach of the contract which were within the reasonable contemplation of the parties when they entered into the agreement (Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 and Koufos v C. Czarnikow [1969] 1 AC 350). His Honour made no explicit finding which losses were within the parties' reasonable contemplation; but there was ample evidence from which it could be inferred that the Bank knew that the

alterations would make the premises suitable only for a banking business and that the Company would be unlikely to be able to let them to another bank, if it did not take up the tenancy itself. In our view the calculation of damages should have been undertaken with express regard to that situation and the losses suffered by the Company should have been calculated by reference to it. As there was no evidence of the basis on which the amount of liquidated damages was calculated and as inclusion of the term providing for payment of them was rejected by the parties, it was not appropriate to base the award of damages on it rather than on the reasonably contemplated losses which were actually suffered. At the hearing both parties agreed on that point. We find that the Judge erred in principle in basing the award of damages on the negotiations in respect of liquidated damages.

Having decided to base the award on the amount of the liquidated damages, His Lordship did not address his mind to the question of mitigation of damages. In so far as the loss suffered by the Company related to loss of the rent which would have been paid under the lease, he should have considered the likely effect of reinstatement of the premises on the Company's ability to let them to other lessees. In our view, having commenced the proceedings in the High Court, the Company should have mitigated its loss by proceeding with the reinstatement of the premises. Mr. Bale submitted that, because the action was for specific performance with damages for breach of contract claimed as an alternative remedy, the Company could not reasonably have been expected to reinstate the premises while the

action was pending. We do not agree; a plaintiff cannot simply sit back and await events. It should have been clear to the Company that there was a considerable chance in the circumstances of the case that specific performance would not be ordered and that the alternative remedy would be granted, as in fact occurred. The defendant in the action, the Bank, was a person of considerable financial substance; so the Company could have been confident of recovering the cost of the reinstatement if it succeeded with its claim.

Although there is no evidence expressly relating to the length of time the work of reinstatement should have taken, there was evidence of the likely cost. From that it can be deduced that the work should have taken a matter of days or one or two weeks, rather than months. There was evidence that the Company had been trying unsuccessfully for some months to let the premises before it entered into the agreement with the Bank. It is reasonable, in our view, to allow nine months from the date when the Bank would have become the Company's tenant, i.e. 1 August 1989, for the reinstatement to take place and for the premises to be let to other tenants. The Company's loss would, therefore, if it had been properly mitigated, have been nine months' rent at $1,500 per month, the wasted expenditure on the alterations and the cost of reinstatement.

As noted above, however, Mr. Stanton submitted that the wasted expenditure was not recoverable because the building contract under which the work was performed, and the payment made

for the work, were illegal because the consent of the Director of Lands was not obtained in respect of the contract. He argued that such consent was required by section 13 of the Crown Lands Act (Cap.132). That was not pleaded by the Bank in its defence but it was raised by its counsel in his written submission in the High Court and was dealt with by His Lordship in his judgment. Mr. Bale conceded that an issue of illegality could be raised at the trial, even though not pleaded. However, he submitted that the consent of the Director of Lands given on 22 June 1989 in respect of the agreement between the parties extended to the alterations to be made to the Company's premises, as they were specified in detail in the agreement. Mr. Stanton acknowledged that such consent had been given but pointed out that it had been given only five days after the building contract was made. That contract was itself, he argued, a dealing with the land which required the Director's consent at the time it was made. Mr. Bale in turn submitted that the consent given on 22 June 1989 had retroactive effect and validated the contract.

There is a plethora of judgments of the former Supreme Court and of the Fiji Court of Appeal - and indeed one decision of the Privy Council - in which various dealings and alleged dealings with land have been examined to determine whether section 13 of the Crown Lands Act or the similar provision in the Native Land Trust Act (Cap. 134) rendered them unlawful. Fortunately, we find it unnecessary to add another thread to the complicated web of fine points and distinctions which those judgments have created.

Uncontradicted evidence was given in the High Court that the work on the alterations began on or after 22 June; to the extent that the alteration of the interior of the ground floor of the building may have constituted a dealing with the land (and we express no view on that point), the Director's consent had been given for it by the time it began. However, Mr. Stanton submitted that the building contract gave the builder the right to take possession of the premises in order to carry out the work and that the giving of that right constituted a dealing with the land. He relied on Hounslow London Borough Council v Twickenham Garden Development Ltd [1971] 1 Ch 233.

At page 257 of that case Megarry J., discussing submissions made to him regarding a builder's right to enter and be on land where he was to carry out work, said:-

> *"I do not think that I have to decide these or a number of other matters relating to possession. First, I am not at all sure that the matter is determined by the language of the contract. It is a standard form, and may be used in a wide variety of circumstances. In some, the building owner may be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site. Second, in recent years it has been established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily denied to a licensee.*
>
> *.....The contract necessarily requires the building owner to give the contractor such possession, occupation or use as is*

> *necessary to enable him to perform the contract, but whether in any given case the contractor in law has possession must, I think, depend at least as much upon what is done as upon what the contract provides; and in relation to this aspect of the case the evidence before me on what was done is somewhat scanty."*

In the present case the building contract was exhibited at the trial. Clause 5 provided that the builder was to commence work on 22 June 1989. That was the date on which he had a right to enter onto the premises and to remain on them. If the granting of such a right constituted a dealing with the land, as Mr. Stanton argued that it did, it was not the grant of an immediate right of entry or of a right of entry before 22 June 1989, the date on which the Director consented to the work being done and, by necessary implication if entry of the builder to carry out that work was a dealing with the land, to the granting of that right with effect from that date. We have, therefore, come to the same conclusion on the question as Fatiaki J. We are satisfied that the payment of the builder for the work done by him was not tainted by illegality and that, as His Lordship found, the Company is entitled to recover from the Bank the amount of that wasted expenditure.

So far as the cost of the reinstatement is concerned, Fatiaki J. fixed the amount at $18,000 on the basis of evidence of substantial increases in the cost of building work between the time when the alterations were carried out and the time when the action came on for trial. If, however, the work had been done soon after the repudiation of the agreement, as we have found it

should have been done in order to mitigate the Company's loss, its cost should have been substantially commensurate with the cost of the alterations. In our view, it would have been reasonable to find that the Company's loss in that regard was $6,000.

The total amount of damages awarded should, therefore, have been $25,100, made up as follows:-

Loss of rent	$13,500
Wasted expenditure	$ 5,600
Reinstatement work	$ 6,000

As the expenditure had been, or would have been, incurred by September 1989 and the loss of rent taken into account in the award of the damages occurred during the period from 1 August 1989 to 30 April 1990, it is reasonable that, as Fatiaki J. ordered, interest should be paid on the amount of the damages from 17 August 1989.

The Judge did not discuss costs and it seems that it was through inadvertence that he omitted to order the payment of the Company's costs by the Bank. Mr. Stanton submitted that, as no order at all was made in respect of costs and in consequence the appeal was not against any order of the High Court, this Court had no power to deal with the matter. We do not agree. Asked to support his assertion with authorities, Mr. Stanton referred to Codelfa Construction Pty Ltd v State Rail Authority of New South

Wales (1982) 149 CLR 337. However, that case dealt with the power of an arbitrator to order the payment of interest in an arbitration containing a **Scott v Avery** clause. It turned on the fact that, where there is such a clause, there is no cause of action before the arbitration is completed. It affords no support for Mr. Stanton's submission.

We must, we consider, resolve the question by reference to the provisions of the Court of Appeal Act (Cap. 12). Section 13 of the Act reads:-

> *"13. For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court and such power and authority as may be prescribed by rules of Court."*

Order 62 rule 4(2) of the High Court Rules 1988 provides:-

> *"4.-(2) In the case of an appeal the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the Court hearing the appeal;...."*

We have come to the conclusion that this Court does have power to allow the cross-appeal in respect of costs of the proceedings in the High Court.

In civil actions in the High Court the Court has the same discretion whether or not to order the payment of the costs of

the action as the High Court of Justice in England (High Court Act (Cap. 13), section 18). Order 62 of the High Court Rules 1988 contains rules relating to the making of orders for costs. The provisions of Order 62 rule 4(2) are similar in essentials to those of Order 62 rule 4(2) of the Rules of the Supreme Court in England. The discretion to award costs must be exercised judicially (**Aiden Shipping Co Ltd v Interbulk Ltd** [1986] AC 965 at 981). Failure to exercise it at all is in fact failure to exercise it judicially. That is an error which this Court can and should correct.

Although the terms of Order 62 are now such that a party is not entitled to have costs ordered in his favour simply because he has been successful in his action and has not misconducted himself in any way, exercise of the discretion in accordance with reason and justice enables, and probably requires, weight to be given to those matters. In the High Court the Company was successful, albeit receiving an award of damages larger than it should have been; there is nothing on the record to indicate that it had misconducted itself in any way and Mr. Stanton did not suggest before us that it had done so. Exercising the discretion which His Lordship should have exercised, we have come to the conclusion that the Bank should be ordered to pay the Company's costs in the High Court. The cross-appeal on that matter is to be allowed.

The appeal is allowed in part, i.e. by the reduction of the total amount of the damages from $43,600 to $25,100. The cross-appeal is also allowed in part, i.e. in respect of the ordering of costs in the High Court. Otherwise the judgment of the trial Judge is affirmed. So far as the costs of the appeal and the cross-appeal are concerned, we order that the Bank pay two-thirds of the Company's costs.

R. A. Williams

.....

Sir Edward Williams
Judge of Appeal

I. R. Thompson

.....

Mr. Justice Ian R. Thompson
Judge of Appeal