

IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0042 OF 95S
(High Court Civil Action No. HBC 593 of 1994S)

BETWEEN:

MOHAMMED ESHAQ ALI
ZAHEERUN NISHA

APPELLANTS

-and-

ROHIT TARUN KUMAR AMBALAL

RESPONDENT

Mr. H. K. Nagin for the Appellants
Mr. M. B. Patel for the Respondent

Date and Place of Hearing : 28 February 1996 Suva
Date of Delivery of Judgment : 1 March 1996

JUDGMENT OF THE COURT

This appeal come before us pursuant to Notice of Appeal filed 17 July 1995 for an order that the judgment delivered by His Lordship Mr. Justice John E. Byrne on 6 July 1995 be wholly set aside and for an Order that Caveat No. 365428 registered against the land comprised in Certificate of Title No. 13196 being Lot 39 on Deposited Plan No. 2069 be extended until the hearing and determination of HBC 593 of 1994S and further that the Respondent be restrained from disposing of the said property until the hearing and determination of HBC 593 of 1994S and for costs.

The hearing before Byrne J. arose out of an action commenced by Writ of Summons issued by the Appellants against the Respondent on 15 December 1994 seeking an Order for specific

performance ordering him "to forthwith proceed with the sale" of the above described commercial property, and also claiming damages and costs.

On the same day the Appellants filed an "Ex parte" Notice of Motion returnable the same day before a Judge in Chambers applying for an Order extending the time for removal of the Caveat above described "until the hearing and determination" of the abovementioned action and an Order restraining the Respondent from "disposing" of the above described land until the hearing and determination of the action.

This application was brought ex parte, before Fatiaki J. on the same date, supported by the affidavit of the firstnamed Appellant sworn on 15 December 1994. He made the orders sought.

It is desirable to now set out the salient facts sworn to in that affidavit.

It alleged that on 6 May 1994 the Respondent entered into an Agreement to sell the above described property for a price of F\$180,000.00. The alleged agreement was contained in a letter from the Respondent to one of the Appellants dated 6 May 1994 which, after describing the said land, read:

"This is to inform yourselves that I have agreed to sell above located property for the sum of F\$180,000.00 validty (sic) until end of month May/94 (31-5-94). Hereafter, this time of selling will not be valid at above price or maybe sold to other interested parties in Nadi.

*Thanking you, I remain
Rohit Tarun Ambalal."*

The first appellant further deposed

- (a) to subsequently "applying" for a loan from Home Finance Company Limited to purchase the said property;
- (b) that on 17 June 1994 the Home Finance Company wrote to the Respondent informing him that the Appellants' Loan application was being processed; that the Company had "all the details required in processing the loan"; that it would advise when the loan was approved and that the approval process was likely to take seven days. He also enclosed a copy of the Finance Company's Letter of Offer with Memorandum As To Advances, dated 13 July 1994 and which recorded that the application was dated 10 May 1994;
- (c) that on or about 13 July 1994 the Appellant's loan application was approved by the Home Finance Company Limited;

- (d) that the Appellants then instructed their Solicitors Messrs Khan & Co of Suva to prepare the necessary sale documents, which were duly prepared and were uplifted by the Respondent to be executed before his Solicitors. The documents were not returned to Khan & Co;
- (e) that on 8 September 1994 Khan & Co wrote to the Respondent asking him to attend to the execution of the Transfer documents and to advise the date of settlement;
- (f) that the Respondent not having responded to the last mentioned letter, the first Appellant instructed his then Solicitors Messrs Sherani & Co to write to the Respondent on 22 September 1994 stating inter alia, that the Appellants had approval for the necessary loan to complete the purchase and requesting that the Respondent complete the settlement of the sale;
- (g) that on 15 September 1994 the Appellants, claiming an estate and interest in the said land as purchasers under and by virtue of the Agreement to sell dated 6 May 1994, registered a Caveat upon the said land.

After obtaining the usual undertaking as to damages, Fatiaki J. made his order of 15th December 1994 and reserved liberty to the Respondent "to apply on two days notice".

On 11th January 1995 the Respondent filed a Notice of Motion seeking that the ex parte orders be dissolved, and that Caveat No. 365428 registered by the Appellants in respect of the Respondent's land (on 15 September 1994) be removed forthwith upon grounds set forth in his affidavit.

On 22 March 1995 the defendant's application came before the Honourable Mr. Justice Byrne. The learned Judge gave his decision on 6 July 1995. In a reasoned judgment he concluded that only two questions arose for his consideration. He said:-

"Although there is a certain conflict in the affidavits which have been filed on behalf of the parties which at first glance might be thought to raise some triable issues, I have come to the conclusion that the two questions which I have to decide here are questions of law only and that their resolution will determine the matter. These questions are:

- (1) Has there been part performance of the agreement by the Plaintiffs?
- (2) Do the Plaintiffs have any Caveatable interest in the land?

Having considered the evidence and counsels' submissions in my opinion both questions must be answered in the negative. I shall now give my reasons."

(The underlining is ours)

In the result His Lordship ordered in these terms:

"I accordingly make the orders in terms of the Defendant's Notice of Motion of 11th January 1995, namely that the ex parte order made on the 15th of December 1994 be dissolved and that the Caveat No. 365428 registered by the Plaintiffs be removed

forthwith. The Plaintiffs are also to pay the Defendant's costs to be taxed in the absence of agreement."

In coming to his decision Byrne J had also before him the affidavit of the Respondent filed 11 January 1995, and an affidavit by one Changanlal Ambalal, the father of the Respondent. The latter swore that he was "the lawful attorney of the Defendant and as such am duly authorised to swear this affidavit on his behalf" This latter affidavit is a mixture of hearsay, opinion and purported submissions on fact and law. It gives no clue to his source of information and belief and the nature of his authority as the "lawful attorney of the Defendant". This Court got no assistance from his affidavit.

Reverting to the Respondent's affidavit, he denied the allegations set out in paragraphs 3 and 4 of the affidavit of the first Appellant but he did admit that on or about 13 July 1994 "the plaintiff's loan application was approved". The tenor of his affidavit was a mixture of admissions and denials which left relevant facts in a state of uncertainty.

When this is considered with the further affidavit of the first appellant filed 7 March 1995 and that of Jaffar Ali Khan filed on 17 March 1995, an even greater state of confusion emerges. The Respondent's affidavit has many of the hallmarks of a lawyer's pleading rather than a deposition on facts. It is quite noteworthy for what it does not say. We did not find it particularly helpful in any search for the overall picture. That

may possibly be clarified by cross examination. An order for discovery of documents as in a Court action might well have helped.

In view of the unsatisfactory and incomplete nature of the allegations on relevant issues, we feel for the learned Judge below, when on page 6 of his reasons on 6 July 1995 he said:-

"Although there is a certain conflict in the affidavits which have been filed on behalf of the parties which at first glance might be thought to raise triable issues....."

In his Ruling on 5 September 1995 however, on the granting of a Stay of his own order based on substantially the same facts as these on which he had previously opined, he said:-

"As the Plaintiffs have only to show an arguable case I consider that on the material they have established this. In my view they should at least be given the opportunity to test my Judgment in the Court of Appeal."

His Lordship at pg.2 of his Ruling concluded that the "uplifting" of the Transfer documents did take place.

This is but one factor that leans towards a possible conclusion that from the date of the agreement (6 May 1994), both parties knew that the Appellants had applied for a loan in order to complete the sale and that the Respondent was kept informed of the progress of the loan application agreeing, not only before the 31 May 1994 arrived but thereafter as the course of the

appellant's loan application was conveyed to him, to extend time for completion.

One thing is certain there was no clear cut evidence of a failure to complete "on time". However, it does seem to us that the inference is open that from the date of the agreement, the Respondent was aware of the appellants' need for finance to complete the deal and he cooperated from time to time in extending the time for completion.

Although the Indemnity Guarantee & Bailment Act (Cap. 232) Vol. XIII which requires a contract for the sale of land to be in writing, loomed large in the consideration of Counsel and the learned Judge below, this passage from Chitty on Contracts, 26th Edition at para 1607 may raise "an arguable case" against the Appellants' cause of action being demolished by the provisions of the above Act.

"The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later day than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered."

The question for this Court is whether the order he made on the stay application was the type of order he should have made on the original application to remove the caveat?

This depends on what is the appropriate approach to be taken on an application to remove a caveat where there are disputed facts and legal questions which do in fact raise an arguable case. Should the Chamber Judge decide the issues or should he order the action go to trial in the usual manner or in an appropriate case, be tried speedily.

Reference to decided cases show that this latter should have been the proper approach. See the cases referred to under the following passage in Francis, "Torrens Title in Australasia (1972)" at pg. 349:-

"The Courts have adopted the attitude that they do not have the power, on summary application under these provisions, to decide questions of title as to lands already under the system, or to determine the rights of the parties, but have not uncommonly indicated that they will order the removal of a caveat unless the caveator takes prompt action by appropriate proceedings to test the validity of his claim"

and at page 351

"It was held in McGreery v. Murray 1912 1 DLR 285 that a caveat based on a document which prima facie is valid will not be removed on a summary application where the facts are involved and seriously disputed, though such an application might be entertained if the facts were undisputed and the issue rested on the interpretation or the validity of the written document on which the caveat is founded."

The appropriate order of this Court should be

- (1) Appeal allowed;
- (2) The order made by Mr Justice J E Byrne on 6 July 1995 be set aside and the Orders sought in the Notice of appeal filed 17 July 1995 be made;
- (3) Certify that Civil Action No. HBC 593 of 1994 is one which ought to be tried speedily (Having regard to his close involvement in the history of this matter, His Lordship Mr Justice Byrne may think it proper that the action be tried by some other Judge);
- (4) Refer action to Chief Registrar for appropriate directions on all matters necessary for trial and to take all necessary steps to ensure a speedy determination of the action;
- (5) The respondent pay to the appellants their costs of and incidental to this appeal including the applications for a stay, such costs to be taxed by the Chief Registrar unless otherwise agreed by the parties;

(6) All other questions of costs (if any) be reserved to the Trial Judge;

E. S. Williams
.....
Sir Edward Williams
Judge of Appeal

M. Casey
.....
Sir Maurice Casey
Judge of Appeal

P. Hillyer
.....
Mr. Justice Peter Hillyer
Judge of Appeal