IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0041 OF 1996
(High Court Civil Action No. HBC 0139 OF 1996S)

BETWEEN:

FONG SUN DEVELOPMENTS LTD — APPLICANT

-and-

MINSON FIJI LIMITED — RESPONDENT

Mr H. Nagin for Applicant
Mr. J. Flower for Respondent

DECISION
(Chamber Application)

The applicant is seeking leave to appeal against an interlocutory order made by Fatiaki J. in a civil action in the High Court that $115,500 deposited in court by the applicant be paid out to the respondent. That money has already been paid out to the respondent; the applicant is, therefore, seeking a further order that it be paid back into court forthwith.

Section 12(2)(f) of the Court of Appeal Act (Cap.12) ("the Act") provides that no appeal shall lie against an interlocutory order without the leave of the judge who made it or of the Court of Appeal. The applicant applied to Fatiaki J. for leave to appeal but it was refused. Mr. Flower submits that the applicant cannot now seek the leave of the Court of Appeal. He says that the Act gave the applicant a choice between seeking the leave of Fatiaki J. or seeking the leave of the Court of Appeal and that, as it chose the former course, it cannot now take the latter

course. Mr. Nagin submitted in response that the jurisdiction of the judge who made the order and of the Court of Appeal are concurrent and not exclusive of one another.

So far as I am aware, the Court of Appeal has always regarded the jurisdiction as concurrent. Rule 26(3) of the Court of Appeal Rules provides that, whenever an application may be made either to the court below or to the Court of Appeal, it must be made in the first instance to the court below. That implies that section 12(2)(f) is to be construed as providing concurrent jurisdiction. If the words of section 12(2)(f) could not properly be so construed, the rule could not override the Act; but in my view, the words of section 12(2)(f) are capable of bearing that construction.

I am fortified in that view by the fact that, for all relevant purposes, the words of section 12(2)(f) are the same as section 18(1) of the Supreme Court Act 1981 (England) and that the Court of Appeal in England regards them as creating concurrent jurisdiction (see Supreme Court Rules note 59/14/7).

I am satisfied that section 12(2)(f) does create concurrent jurisdiction and that consequently, having failed in its application to Fatiaki J. for leave to appeal, the applicant is entitled to apply to the Court of Appeal for that leave, as it has done. By virtue of section 20(a) of the Act the powers of the Court to grant leave may be exercised by a single judge.

The order against which the applicant wishes to appeal was made together with an order refusing an application by the applicant for the matters in issue in the High Court action to be referred to arbitration. His Lordship has already granted the applicant leave to appeal to this Court against that order.

In the action the respondent claimed sums alleged to be due and payable to it by the applicant and a director of the applicant for work performed by it for them under a building contract. It also sought an injunction restraining the applicant from dealing in any way with its interest in the property in respect of which the work had been performed, a mandatory injunction against the architect to compel him to deal with certain matters, an injunction against the director to restrain him from interfering in the conduct of the building work and damages against the applicant, the director in person and as a business name in which he allegedly operated and the architect.

The action was begun on 2 April 1996. On 17 April 1996 the respondent obtained *ex parte* interim injunctions against the applicant and the other defendants to the action in essentially the same terms as the injunctions sought in the writ. The injunctions sought in the writ were to restrain them from deducting from payments due to the respondent under the contract any amounts by way of liquidated damages and from demanding or receiving from a named bank payment under a performance bond relating to the building work.

The respondent then amended its statement of claim to include a claim against the architect for loss by way of liquidated damages resulting from delay in his performing his duty to issue certificates. The applicant filed a defence but also applied for an order that the action be stayed, the matter referred to arbitration and the *ex parte* orders discharged. In its defence the applicant said that the respondent had failed to complete the work contracted for and that the applicant was entitled to retain $115,500 as liquidated damages for delay by the respondent in performance of the building contract. Its motion for the stay, referral for arbitration and discharge of the *ex parte* orders was supported by an affidavit sworn by its director and co-defendant.

On 8 May 1996 Pathik J. dissolved the *ex parte* orders but adjourned the hearing of the application for a stay and referral to arbitration to be dealt with by Fatiaki J. on 16 May 1996. On 10 May 1996 the applicants filed another notice of motion seeking an interim injunction restraining the respondent from preventing it completing the building work and an order that the respondent hand over the keys. On 14 May 1996 the respondent in turn moved for leave to issue committal proceedings against all the defendants to the action. On 16 May 1996 Fatiaki J. granted the interim injunction and the order sought but ordered the applicant to pay $115,500 into Court within 10 days; his orders were made with the consent of counsel for both parties.

On 23 May 1996 the respondent applied for the order for payment of $115,500 to be varied so that it would be paid directly to the respondent and for an order for the applicant and its director and co-defendant to pay $10,430 to compensate the respondent for costs wasted when one of its directors came from Australia to Fiji to take part in a "pre-trial conference" which the director of the applicant allegedly failed to attend. The hearing of the motion was adjourned on a number of occasions to accommodate the parties who were attempting to settle their dispute. Eventually on 14 June 1996 they informed Fatiaki J. that settlement could not be attained. He asked counsel for written submissions and, having received them, gave his decision on 23 August 1996. He refused to stay the proceedings and refer the matter to arbitration, he dissolved the interim injunction preventing the applicant from leasing the building and he ordered the payment of the $115,500 out of court to the applicant forthwith. That order is the subject of the present application for leave to appeal; as noted above, leave was given by Fatiaki J. to appeal against his refusal of the stay and referral to arbitration.

As soon as the order was made and perfected, the respondent applied in the court registry for payment out of the $115,500; it was paid out on 2 September 1996. Mr. Nagin was critical of the registry for paying out the money, as he had written to the Deputy Registrar on 30 August 1996 requesting that payment out of the money be "held", as the applicant was applying for leave to appeal against the order. However, the notice of motion

seeking leave to appeal against it and stay of it was not filed until 2 September, by which time the payment out had been processed. In those circumstances I can find no fault with the registry which simply conplied with the judge's order, as it was required to do. The order did not, as such orders often do, direct payment out only after a period allowed for making application for leave to appeal. In hindsight it appears that it might have been desirable for His Lordship to include such a direction in his order. But, as he ordered payment out *forthwith,* the registry had no right to do other than obey.

In the statement of the reasons for his decision to make the order the learned judge rejected a submission by Mr. Nagin that the moneys were paid into court as a pre-condition to the applicant being allowed to enter and complete the building work and was intended to be held until the final determination of its right to withhold that amount by way of liquidated damages. His Lordship stated that in his view the payment in was a condition for setting aside the injunction but could not be "tied down" to a resolution of any particular dispute between the parties in the substantive action. He observed that there was no evidence before him of how the amount was calculated. He considered that the balance of justice was "best met" by dissolving the injunction and at the same time ordering payment-out of the money to the respondent.

The history of events in the High Court action cannot but generate fear that it will become so protracted by applications

for interlocutory orders and appeals against them that the ends of justice will be defeated by the inevitable delay in bringing it to a conclusion. I can, therefore, well appreciate why His Lordship was concerned to maintain "the balance of justice" and not to allow a situation to develop where either party could expect to benefit from delay. For that reason I am reluctant to interfere with his order. Nevertheless, it is abundantly clear that the question whether the applicant could withhold $115,500, or any smaller amount, by way of liquidated damages from payments otherwise payable to the respondent is a major issue in the action. The respondent itself has, by its amended statement of claim, sought to recover from the architect its losses caused by the architect's delay in issuing certificates. Although it is not entirely clear that the loss referred to includes liquidated damages payable by the respondent for its own delays, it appears that it probably does. The building contract contains provision for unliquidated damages for delay and there is evidence on which a finding of delay might be made. It is, therefore, arguable that the respondent has no right to be paid by the applicant the $115,000 which it withheld from its payments to the respondent.

If the applicant had not already been given leave to appeal against His Lordship's refusal to stay the action and refer the matter to arbitration, I might well have considered the question of the payment out of the $115,500 not of such moment, in light of the amount of the contract overall (over $2.6 million), as to justify delaying the hearing of the action pending determination of the appeal. However, as the first part of the order is

already under appeal, to grant leave to appeal against the remaining part should not cause further delay.

I have come to the conclusion, therefore, that, as the issue of the withholding of liquidated damages remains undetermined and there is evidence that the applicant has an arguable case in respect of it, the application for leave to appeal should be granted.

The purpose of the appeal in respect of the order for payment-out is defeated if the respondent retains the money now. I invited Mr. Flower to make submissions regarding my power to order the respondent to pay it back into court. He said that he was satisfied that I had the power to do so if I thought fit. In those circumstances I shall not discuss the question further, stating only that I rely on section 13 of the Act, which confers on the Court for the purpose of hearing and determining appeals the powers of the High Court, which in turn has the powers which the High Court of Justice has in England, and on section 20(g) of the Act, which confers on a single judge the powers of the Court to make any order incidental to an appeal or an intended appeal. I have decided, therefore, that I should order the respondent to pay the $115,500 into court within fourteen days.

The result of that order may tip "the balance of justice" against the respondent, as the applicant, being able to lease the building, may feel less need to proceed urgently with the appeal. I shall, therefore, make a third order, for the application now

before me not to be treated as finally disposed of but to be reinstated and relisted on 2 February 1997 for further consideration of the order for payment-out of the money if the appellant has not by 26 January 1997 caused the appeal to be set down for hearing by the Court.

Accordingly I order -

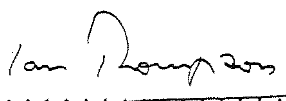
(1) that the applicant have leave to appeal against Fatiaki J.'s order for the $115,500 to be paid out of court to the respondent;

(2) that within 14 days of this order the respondent repay $115,500 into court to be held, subject to (3) below, until the hearing and determination of the appeal or further order, and the order of Fatiaki J. for its payment out of court is stayed until then;

(3) that, if by 26 January 1997 the appellant has not caused the appeal to be listed for hearing by the Court, the application for order (2) above is to be reinstated and relisted at 9.30 a.m. on 2 February 1997 for further consideration; and

(4) that the respondent is to pay the applicant's costs of the application to date.

Made at Suva the 5th day of November 1996.



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I. R. Thompson
<u>Justice of Appeal</u>