IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0022 OF 1997
(High Court Civil Action No. 233 of 1993)

BETWEEN:

PETER SUJENDRA SUNDAR & CONCAVE INVESTMENT LIMITED

Appellants

AND:

CHANDRIKA PRASAD

Respondent

Coram: **The Hon. Sir Mari Kapi, Justice of Appeal**
The Hon. Justice I. R. Thompson, Justice of Appeal
The Hon. Justice D. L. Tompkins, Justice of Appeal

Hearing: **6 May 1998**

Counsel: **Dr. M.S. Sahu Khan for the Appellants**
Mr. H.K. Nagin for the Respondent

Date of Judgment: **15 May 1998**

JUDGMENT OF THE COURT

This appeal relates to an action in the High Court for specific performance of a contract for the sale of land and damages for non-performance, and a counterclaim for damages for breach of contract, for interest on rents received and for an order for accounts to be taken. Scott J. dismissed both the claim and the counterclaim. He appears to have made no order as to costs.

The first appellant, Sundar, was the first plaintiff in the High Court and the respondent, Prasad, was the defendant. Both have at all relevant times resided in Sydney,

Australia. Prasad's son is married to the Sundar's daughter. An agreement for the sale of land in Suva with a residence or residences on it by Prasad to Sundar was signed by both of them in Suva at some time in 1989; the full date is not recorded in it. The purchase price agreed was $51,000, of which $1,000 was to be paid "as deposit" and the balance on settlement. Settlement was to be "no later than" 30 April 1992; time was made of the essence.

On 8 June 1989 the parties entered into another agreement in Sydney. In that agreement it is recited that "[Prasad] has lent [Sundar] the sum of Fifty Thousand Dollars" and that "[Sundar] had previously purchased from [Prasad] a property in Fiji for the sum of Fifty Thousand Dollars....which sum remains outstanding". It is further recited that the parties "wish to regulate their verbal agreement and enter into an agreement in writing in relation to the full sum of One Hundred Thousand Dollars.....borrowed by [Sundar] from [Prasad]". The parties agree that Sundar is to "repay" that amount with interest at the rate of at least $1,000 per month and that, if he ever defaults, the whole amount outstanding is to become due and payable immediately. At the hearing in the High Court Prasad gave evidence that one of the two amounts of $50,000 referred to in the agreement was an estimate of the rent payable up to 30 April 1992 by tenants of the property which was the subject of the sale and purchase agreement and that it had been agreed that Sundar should collect and retain that rent in return for the payment by him to Prasad of $50,000; that was the first of the two amounts of $50,000 lent to him by Prasad.

As Sundar's case was presented in the High Court on the basis that the second amount of $50,000 referred to in the agreement was the balance of the purchase price of the

property, there was no dispute between the parties that the sale and purchase agreement was signed by them at some time in 1989 before 8 June.

On 2 April 1993 Sundar assigned, or purported to assign, to the second appellant ("Concave") the benefits of an agreement between himself and Prasad but the subject-matter of the agreement assigned is not stated in the instrument of assignment even in the most minimal terms.

The action in the High Court was commenced by Sundar and Concave on 19 May 1993. The trial began on 30 July 1996. Before then, on 19 January 1994 a Deputy Registrar ordered *inter alia* that the action be entered for trial within 60 days and made the usual orders for discovery and inspection of documents. Twenty months after the Deputy Registrar made her orders a pre-trial conference was held, on 19 September 1995. Scott J. noted in his judgment that by the time the trial began almost no discovery of documents had been made by either party. On 24 November 1995 the trial was listed for 30 and 31 July 1996.

On 16 April 1996 the solicitor for the plaintiffs issued a summons seeking an order for Sundar to be examined on commission in Australia but on the return date before Scott J. no one was present to represent them. Counsel for Prasad told the learned judge that the matter had been settled. Scott J. adjourned the application to 15 May 1996; on that date counsel for both parties informed him that settlement discussions were continuing and the application was again adjourned, to 29 May 1996 for mention. On that date counsel informed His Lordship that the settlement had fallen through. He then heard the application and delivered an *ex*

tempore decision rejecting it. The first ground of the appeal is that he "erred in law and in fact" in not granting the application.

The plaintiffs then took out a summons on 14 June 1996 seeking leave to appeal against that decision, adjournment of the trial of the action to 11 February 1998 or to the date of the determination of the appeal and leave to amend the Statement of Claim. In his judgment Scott J. records that the solicitor for the plaintiffs did not appear on the return date of the summons and that another barrister and solicitor did so on his behalf but had no proper instructions and was unable to present any submissions in respect of the application. The proceedings were, therefore, adjourned to 18 July 1996, when the plaintiffs were represented by counsel. Arguments were presented only on the application for leave to appeal; Scott J. reserved his decision until 30 July, the date set for the trial to begin. The hearing of the applications for an adjournment and for amendment of the Statement of Claim were adjourned to 30 July.

So on 30 July, before the trial began, His Lordship gave his decision on the application for leave to appeal; he refused leave. He then heard the other two applications and dismissed them. The second ground of appeal is that he "erred in law and in fact" in not granting the adjournment.

After the cases of both parties had been closed, counsel for the plaintiffs again sought leave to amend the Statement of Claim. Scott J. rejected the application. The third ground of appeal is that he "erred in fact and in law" in refusing both the applications for leave to amend the Statement of Claim.

The fourth ground of appeal is that documents were admitted as evidence which ought not to have been admitted. The other three grounds of appeal concern the process of reasoning by which Scott J. arrived at his decision to dismiss the action. It is asserted that he took irrelevant matters into consideration and failed to take relevant matters into consideration, that he did not properly or adequately evaluate the evidence and that his findings of fact were unreasonable.

At the commencement of the hearing of the appeal we raised with Dr. Sahu Khan the question whether, as the first four grounds of appeal were concerned with the effect of interlocutory orders of the High Court, there was need to appeal against those interlocutory orders, and by virtue of section 12(f) of the Court of Appeal Act (Cap.12) to obtain leave to do so, before those grounds could be proceeded with. After hearing Dr Sahu Khan, who was of the view that that was not necessary but applied for leave if it was necessary, we agreed to grant that leave. On further consideration of the question we have come to the conclusion that, where a ground of appeal against a final judgment or order is that the judge erred in making an interlocutory order and that as a result the trial miscarried, it is not necessary for the prosecution of that ground that there should be a separate appeal against the interlocutory order.

We turn then to consider the first ground, that is to say the appeal against Scott J's interlocutory decision to reject the application for Sundar's evidence to be taken on commission in Australia. Evidence was presented that Sundar was in prison in Australia and unable to travel to Fiji for the trial on the dates set. When the application for him to be examined on commission was heard, counsel was unable to say on what date he was due to be

released from prison. There is an uncontradicted assertion by Prasad's counsel that he had been in prison since February 1994. It is apparent that that fact had not been brought to attention when the dates for the trial were set in November 1995.

Whether an order should be made for a witness to be examined on commission instead of giving evidence in court at the trial is a matter within the discretion of the trial judge. It is described in the English Supreme Court Practice, in respect of O.39, as being "in the highest degree" a matter for his discretion. Nevertheless, like all judicial discretion, it must be exercised fairly and justly and in the best interest of the administration of justice. In the past it was generally regarded as unsatisfactory to have a witness examined on commission if his credibility was going to be in issue. There was a greater reluctance to allow it in respect of the parties than in respect of other witnesses (*Willis v. Trequair* (1906) 3 CLR 912, 922). In the present case it was clear from the pleadings that Prasad would challenge Sundar's veracity. That was the reason given by Scott J. for rejecting the application. No undertaking to pay the cost of taking the evidence on commission had been given by the solicitor for the plaintiffs. Somewhat surprisingly, in his judgment Scott J. said that "if proper arrangements had been made, it might indeed have been possible to have [Sundar's] evidence taken on commission"; possibly he was referring to the failure of the plaintiffs to offer to pay the costs involved but that was not the reason he gave for his decision at the time when he made it.

Advances in technology have of late influenced the courts in the major common law countries to adopt a more accommodating attitude towards applictions for evidence to be taken on commission (see the discussion of this matter in *D.P.P.* v *Alexander* (1993) 69 A.Crim.

R. 397). If the evidence of a witness is vital to the case of one or other of the parties, the interests of justice require that, if that evidence can be placed before the Court without prejudice to the proper interests of the other party, means should be found for achieving that. That applies as much where the witness is a party as where he is not. The weight to be accorded to the evidence will depend on the extent to which the means adopted for examining the witness and for recording his evidence enable his credibility to be ascertainable.

In the present case only two persons possessed knowledge of many of the facts in issue in the action. One was Prasad; the other was Sundar. The evidence which Sundar alone could give was vital to the plaintiffs'case. If it were possible for his evidence to be presented to the Court, that would clearly better enable the Court to determine the issues in the action. Mr Nagin submitted to us that, if the application had been granted, the hearing date for the trial of the action would have had to be vacated with further delay in hearing and determining an action already grossly delayed. We agree that the action had been grossly delayed but do not accept that, if the application had been granted, the trial could not have proceeded on the hearing dates allocated; there was a period of nearly three months between the return date of the summons and the dates set for the trial. The judge could have granted the application conditionally on the evidence being taken in good time before the hearing dates and on the appellants bearing the whole of the costs of both parties arising out of the taking of Sundar's evidence on commission in Australia. Although not all the advanced technology available to the courts in some other countries is available to the courts in Fiji, equipment is readily available here for displaying video film; if the taking of Sundar's evidence on commission had been filmed with a video camera, that would, we believe, have given the judge

and counsel, at the trial an opportunity to consider Sundar's demeanour and generally to assess his credibility. In our view the exercise by the learned judge of his discretion whether to allow the evidence of Sundar to be taken on commission miscarried.

We turn now to the third ground of appeal, which is an appeal against the refusal to allow amendment of the Statement of Claim.

The evidence of the loan agreement adduced by counsel for the plaintiffs at the trial was inconsistent with their Statement of Claim. In it they stated that they had always been, and still were, willing to pay the purchase price provided for in the sale and purchase agreement "immediately upon the Defendant executing the necessary transfer" of the title. There was no reference to the loan agreement and no suggestion that Sundar's liability to pay the purchase price had been discharged; but the case, as presented on the plaintiffs' behalf at the trial, depended largely on that agreement. The amendment of the Statement of Claim which was sought on 14 June 1996 was intended to make the Statement of Claim accord with the evidence which was to be presented.

Scott J. stated in his judgment that he refused leave to amend at that stage because the application "was quite unnecessarily made at the very last minute and, if granted, would have entailed the pleadings being reopened and the trial being adjourned". He also gave his reasons for refusing to grant leave after the parties had closed their cases. He said that the application was made necessary by reason of the variance between the Statement of Claim and the evidence at the trial and should have been made before the defence case was opened. He

commented that the trial dates had been set in November 1996, so that there had been ample time to seek leave for the amendment before the trial. He could "see no justification" for granting leave at that late stage of the trial.

Scott J. had a discretion whether to grant leave. Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party's case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (*G.L.Baker Ltd. v. Medway Building and Supplies Ltd* [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real contrversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (*Elders Pastoral Ltd v. Marr* (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it.

In the present case the application for leave to amend the Statement of Claim was made on 14 June 1996, just over six weeks before the dates set for the trial of the action. The proposed amended Statement of Claim was annexed to the summons. Whereas in the original Statement of Claim it was stated that the plaintiffs had been and remained willing to pay the purchase price of the property, in the proposed amended Statement of Claim it was stated that Sundar and Prasad had entered into a later agreement by which the outstanding balance of the

purchase price was " converted into a loan". When Prasad was cross-examined at the trial he admitted that there was a second agreement, although he disputed what its terms were. Prasad's solicitors had six weeks to obtain instructions from him regarding the second agreement. Even though they were in Fiji and he was in Sydney, that was ample time for them to have provisionally prepared an amended defence in case the Court granted leave to amend the Statement of Claim. In those circumstances we cannot see any reason why it should have been necessary to adjourn the trial on 30 July 1996 if the Statement of Claim had been amended or how Prasad would have been prejudiced by leave being granted.

It was undoubtedly most unsatisfactory that the plaintiffs' solicitors had not ascertained the real basis of their clients' case - or at least had failed to take action to bring their pleadings into line with it - until nearly three years after the action was commenced and seven months after the action had been listed for trial when supposedly the parties were ready for it to be tried. However, as the trial should not have been delayed by the amendment and the other party would not have been prejudiced, leave should have been given to amend the Statement of Claim. In the event, even though leave was not granted, evidence was presented by the plaintiffs which tended to establish the facts stated in the proposed amended Statement of Claim and not those stated in the original, and subsisting, Statement of Claim. However, the real issues in dispute were not before the Court for determination; as a result the hearing was unsatisfactory and the judgment of the Court did not determine the real controversy between the parties.

Because of the conclusions we have reached in respect of the first and third grounds, we are satisfied that the appeal must be allowed. There is no need for us to deal with

the other grounds. Dr. Sahu Khan informed us that the appellants were not seeking to have this Court substitute for the High Court's judgment a judgment in their favour; they were seeking only an order that the action be retried. That is, we consider, the only order to which they are entitled, except for an order granting leave to amend the Statement of Claim as sought by the summons dated 14 June 1996. We would add that, as the respondent did not appeal against dismissal of his counterclaim, the judgment of the High Court dismissing it will stand.

Although generally costs follow the event, we consider that it would be inappropriate for us so to order in this appeal. Much of the blame for causing the errors into which the learned judge fell must rest squarely on the shoulders of the appellants, because of their dilatory prosecution of their action and the unnecessarily late stage at which they sought leave to amend their Statement of Claim. However, we have little sympathy with the respondent who, in our view, unreasonably contested that applicaton. We have come to the conclusion, therefore, that each party should bear his own costs of the appeal.

Before concluding this judgment we find it necessary, with considerable regret, to refer to the failure of both parties to comply with directions given in the proceedings in the High Court and to make proper and timely discovery of documents and also to the unnecessary rancor with which the proceedings were conducted. This case illustrates vividly the need for an effective system of case management by the judges of the High Court and the imposition of sanctions on solicitors who fail to cooperate with the judges in that process. It is totally unsatisfactory that solicitors should be able with impunity to ignore directions and to fail to prepare their cases for trial in proper time. It is particularly disappointing when the solicitors

concerned are senior members of the profession who should be setting a good example to less experienced members.

The appeal against the judgment of the High Court in respect of the appellants' claim is allowed. The judgment in respect of it is set aside and a retrial of the action before a different judge is ordered; each party is to bear his own costs of the proceedings in the High Court and in this Court up to this date. The parties should now get their pleadings into order, make proper discovery and have the action listed for trial without delay.

Sir Mari Kapi
Justice of Appeal

Justice I.R.Thompson
Justice of Appeal

Justice D.L. Tompkins
Justice of Appeal

Solicitors:

Messrs. Sahu Khan and Sahu Khan for the Appellants
Messrs. Sherani and Company for the Respondents

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