IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0031 OF 1999S
(High Court Civil Action No.HBC 395 of 1995L)

BETWEEN:

SHIU RAM
PRADHUMAN

Appellants

AND:

PARMA NAND MAHARAJ

Respondent

Coram: Eichelbaum JA, Presiding Judge
Sheppard JA
Smellie JA

Hearing: Wednesday, 14 November 2001

Counsel: Mr. D. S. Naidu for the Appellants
Mr. G.P. Shankar for the Respondent

Date of Judgment: Thursday, 22 November 2001

JUDGMENT OF THE COURT

Introduction:

This is an appeal from a decision of the High Court at Lautoka on the 25 of June 1999. The grounds of appeal are that the Judge in the High Court disqualified counsel appearing because he had made an affidavit when the proceedings were in the Magistrates Court and then refused an adjournment and proceeded to either strike out or dismiss the appeal.

The respondent, however, has filed a notice pursuant to rule 19 of the Court of Appeal Rules indicating that on the appeal the respondent would argue additionally that the

appellants' appeal to the High Court was devoid of merits and had no prospect of success. Additionally this court by virtue of section 13 of the Court of Appeal Act and rule 22 of the Court of Appeal Rules has a wide jurisdiction to make any further orders that ought to have been made on the appeal. It follows that this judgment deals with two distinct aspects of the appeal. First what happened at the hearing itself and secondly the matters raised in respondent's notice and the issues of delay which both counsel addressed before us and which were central to the decision made in the Magistrates Court which was under appeal in the High Court.

What Happened on the Appeal

At pages 108 and 109 part of the court record and the terms of the sealed order are provided. The Court record shows that Mr. Shankar who appeared for the respondent in the court below as he did before us, raised objection to the appearance of Mr. Akbar on the grounds that he had earlier sworn on affidavit in the matter. The Judge apparently supported Mr. Shankar in this matter and Mr. Akbar accordingly applied for an adjournment so that his senior (Mr. Naidu who appeared in this court) could step in and represent the appellants. The adjournment was opposed and refused. At page 108 the ruling of the court is recorded as follows:

> ***"Adjournment refused. The position of counsel was a clear conflicting interest and known to him or ought to have been known to him from the start. The appeal is accordingly struck out with costs of $300 summarily assessed against the appellant."***

The terms of the sealed order were at variance with that ruling in that the order recorded:

> *"it is this day ordered that the appeal be dismissed and costs of $300 to be awarded to the plaintiff/respondent."*

The grounds of appeal set out in the notice of appeal to the High Court were as follows :

> ***"1. That the learned judge erred in law in dismissing the appellant's appeal on the ground that the appearance by counsel for the appellant of Mr. Parvez Farook Akbar was in direct conflict due to the affidavit filed by the said counsel in this matter without at first addressing his mind the following : -***
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> > ***(a) That the affidavit of Mr. Parvez Farook Akbar filed in the Magistrates Court was for extension of time in which to file a notice of appeal and on the hearing of the application Miss Munam of Haroon Ali Shah Esquire appeared in support of the said motion.***
> >
> > ***(b) That the substantive appeal dealt with the default judgment and not with the extension of time within which to appeal as this had already been granted.***
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> ***2. That even if there was conflict because of the affidavit filed by Counsel for the Appellant Mr. Parvez Farook Akbar, the learned Judge erred in fact and in law in refusing to have the matter adjourned to enable Counsel to instruct another Counsel."***

The rule regarding the appropriateness of counsel who has made an affidavit appearing on the matter was succinctly set out in the judgment of the Court of Appeal (delivered by Speight V.P.) in John Alexander Watson v. Bish Limited FCA No. 68/1984 at page 10 where the court said:

> *Before leaving the matter we wish to make the following observations.*
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> *In the matters leading up to the hearing summons, affidavits had to be filed containing matters which could well have been contentious. Those contentious matters could have been crucial at the hearing. Yet the affidavits were made by the solicitors for the respective parties who then appeared as counsel in the Supreme Court and before this Court.*
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> *"This is not proper. It has been mentioned many times before. Practitioners should note that in such circumstances there is a very real probability that a court will refuse to hear counsel who has sworn an affidavit in the proceedings."*

We have no quarrel with the words of the learned Vice President in the above passage and indeed we endorse them. As is made clear in the above passage from the judgment however it is only when the affidavit contains matters which are, or could be, contentious in relation to some matter relevant to issues at trial that the Court can properly refuse to hear counsel. In this case as the record clearly shows, and as is accurately set out in the grounds of the appeal recorded above, the affidavit in question was in no sense contentious. It merely supported an application for extension of time which had been granted. Its effect therefore was spent and the refusal of the Judge in the court below to hear Mr. Akbar was in the circumstances unwarranted.

To avoid any misunderstanding we add that nothing we have said is intended to throw doubt on the rule that counsel should not appear on the application where he or she has sworn an affidavit in support, whether the subject matter is contentious or otherwise.

The other ground of appeal was the refusal to grant an adjournment. The principles to be applied when adjournments are sought are well established. Any reasonable

application should be granted provided the party who opposes will not be prejudiced and any additional expense can be compensated by an award of costs. When pressed Mr. Shankar had to acknowledge that his client in the High Court would not have suffered any prejudice if the judge had stood the matter down (it having been called at 10.00 a.m.) to 2.15 p.m. to allow other counsel to appear. Indeed no prejudice would have been suffered had the case been adjourned from Friday when it was called to a day early in the following week. We are of the view therefore that the application for the adjournment was reasonable and ought to have been granted.

It follows that on the two grounds advanced by the appellants to this Court they succeed. That however is not the end of the matter. We now turn to consider the other aspects of the appeal.

The Respondent's Notice and the Court's Jurisdiction

The notice of the respondent filed pursuant to rule 19 (2) of the Court of Appeal Rules reads as follows:

> ***"Take notice that the respondent will contend, argue in support of the order dismissing the grounds namely :-***
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> ***(1) That the dismissal of the appeal of (sic) the appellate judge of the High Court be supported on the grounds that the appellants appeal to the High Court was devoid of any merits, and had no prospect of success on merits, having regard the facts and circumstances disclosed in the record and this appeal raises no question of law before the court."***

By that notice the respondent put the merits of the appellant's case and its prospect of success squarely in issue. In addition however pursuant to section 13 of the Court of Appeal Act and rule 22 of the Court of Appeal Rules and in particular Rule 22(3) this court has a wide jurisdiction on an appeal to give "any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require."

In fact counsel addressed us not only on the merits but also on what in one sense is "the real question and controversy between the parties" (R 22(4)) namely whether the appellants' delays have been such that their application to set aside the default judgment obtained on a dishonoured cheque in the Magistrates Court should be set aside.

We propose to deal with these issues in reverse order.

The Appellants' Delays

Despite Mr. Naidu's submissions to the contrary we are satisfied that in this matter there have been inordinate and unexplained delays. They have been triggered in part at least by failures to either file appropriate notices in opposition or enter appearances when matters have been called before the courts.

The circumstances giving rise to the litigation are not complex. The undisputed facts are that on the 31st of December 1992 the respondent sold a tractor for $8000. He

received from the purchaser a cheque drawn on the Westpac Banking Corporation for $8000. The cheque when presented was dishonoured. The respondent sought judgment on the dishonoured cheque. His writ was duly served and a date of hearing for the 6th of April 1993 allocated. On that date there was no appearance for the appellants and judgment was entered by default for a total sum of $8075.70 being the original sum of $8000 plus bank fee of $7.50 on the dishonour, court fees, bailiff's fees and costs. In the absence of payment the respondent caused a writ of *fieri facias* (fifa) to issue. He attended with the bailiff at the first appellant's home on the 22 of June 1993 to execute the writ. It was agreed, however, that the respondent would accompany the first named appellant to his solicitors. There an undertaking was drawn up whereby the first appellant undertook to pay "without prejudice" $1000 immediately and the balance by instalments of $1000 on the 2nd of July by 1993 and thereafter on the last day of each calendar month until the debt plus the costs were fully paid. A few days later, however, on the 30th of June the appellants moved for a stay and to set aside the judgment. In an affidavit filed in support the first appellant deposed that he and the other appellant were not personally liable. It was contended that the purchase had been made by a company and that the undertaking referred to had been given under duress. The Respondent replied on the 27th of July 1993 denying duress and affirming that the cheque he had received had been drawn by Carmat Repairs and his default judgment was valid. There were then further affidavits by the appellants on the 30th of September and the 4th of November 1993 affirming the purchase had been by a company named Carmat Repairs Limited and attaching a letter from The Westpac Banking Corporation in which was recorded as follows (page 52 of the record):

"Re : Dishonoured Cheque No. 052985 Dated 31/12/92
Account No : 230596 - 00

We refer to your letter dated 18/10/93 and advise that the drawer of above cheque was Carmat Repairs and the account was styled as Carmat Repairs Limited."

There then occurred a most unfortunate event which was not the responsibility of either party. A disastrous fire apparently razed the Lautoka Magistrates Court to the ground in January of 1994. All the records of the court, including this file and the cheque in question which was upon it, were destroyed. Counsel were then required to "reconstruct" the file. This was finally accomplished at some time about mid 1995. The Magistrate's Court record shows that on the 5th of September 1995 the matter was called and adjourned to the 7th of November 1995 for oral submissions regarding the application to reinstate. On the 7th of November 1995 there was no appearance by the appellants and on the respondent's application the motion was struck out. The respondent then petitioned to have the first named appellant adjudicated bankrupt. On the 8th of May 1996, six calendar months later, the appellants moved afresh, to set the default judgment aside and stay all proceedings. The respondents filed a lengthy affidavit on the 22nd of October 1996 in opposition. When the matter came before the Residing Magistrate on the 29th of October, it was further adjourned to allow the appellants to file an affidavit in reply with a fresh hearing date of the 17th of January 1997. When the matter was called on that day, Mr. Naidu was not well and an adjournment was sought. The matter was stood down to 11.00 a.m.and when a medical certificate was produced orders were made providing for written submissions to be filed. The matter was apparently called on the 28th of February 1997 and again on the 4th of March 1997 but on neither occasion did

counsel for either party appear. Judgment was given on the 4th of March with a direction that the parties should be notified that copies of the same were available for them to uplift. In that judgment the Learned Magistrate traversed the history of the matter and discussed both the delays and the merits. He dismissed the applications.

The time allowed to appeal the Magistrate's judgment which was in favour of the respondent, was seven days. No appeal in time was filed. On the 18th of March, however, the appellants applied for an extension of time and Mr. Akabar made the affidavit referred to earlier in this judgment in support of that application. On the 26th of August 1997 an extension of time was granted and a further application for a stay and fixing security was also granted.

As can be seen from the above record, even allowing for the disastrous burning down of the Court House and the loss of all its records the appellants took no effective steps in the matter from the 4th of November 1993 to the 8th of May 1996 - the best part of 30 months. The last 6 months of that period is the gap between the striking out of the original Application to set the default judgment aside and the filing of the second Application.

As affirmed by this court in Pankaj Bamola and Another v. Moran Ali FCA 50/1999 applications to set aside default judgments must be made "promptly" and without delay. In that case a party seeking to set aside an order had delayed for nearly 8 months. The Court took the view that no adequate explanation had been provided for that and other delays

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and concluded that the application should be refused because it had not been made promptly and without delay. Here, despite the defaults of various members of the legal profession from time to time and the unfortunate burning down of the Court House, we nonetheless consider that the 30 months delay has not been adequately explained. The Appellants knowing that the default judgment was outstanding against them, ought to have been far more assiduous in attending at various times before the court and advancing their applications to set the judgment aside.

In Russell v. Cox [1983] NZLR 654 the New Zealand Court of Appeal considering an application to set aside a default judgment referred (at page 659) to an earlier judgment of the Court in Paterson v. Wellington Free Kindergarten Assoc. Inc. [1966] NZLR 975 pointing out that what the Court said in the Paterson case did no more than emphasise the "three matters which, as a matter at common sense and practice, the Court will generally regard as of importance in deciding whether it is just to set aside a judgment."

What was said in Russell in the judgment of the Court delivered by McCarthy J. at page 983 reads as follows:

> ***"In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance. This was accepted by the Chief Justice in the Court below and by all counsel in this Court. They are, 1.That the defendant has a substantial ground of defence; 2.That the delay is reasonably explained; 3.That the plaintiff will not suffer irreparable injury if the judgment is set aside; Atwood v. Chichester (1878) 3 QBD 722; Hovell v. Ngakapa (1895) 13 NZLR 298; Trengrove v. Inangahua Hospital Board [1956]***

NZLR 587. But, whilst it appears from these cases that delay, if reasonably explained and if it does not create irreparable injury, is not of itself a good reason for refusing to set aside, we do not doubt that where the delay is substantial, as it is here, the Court can more readily conclude that injury would be caused."

A Real Prospect of Success

In Wearsmart Textiles Limited & General Machinery Hire Limited & Another FCA 98/267 at page 15 of the Judgment when addressing the merits of the application before it the Court said:

"Dealing with the discretionary powers of the Courts under English Order 13 r.9 sub-rule 14 the Supreme Court Practice 1997 (the White Book)(Vol.1 p.145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep.221 as authority for following propositions:

(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."

Notwithstanding the Court of Appeal's later decision in Allen v Taylor [1992] PIQR 255 which purports to dilute the principles emerging from Saudi Eagle, we subscribe to the White Book's preferred view that 'unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on (sic) fact no "real prospect of success" is shown and relief should be refused."

In this case there are a number of unresolved factual issues. This much, however, is clear. The respondent was present when the appellants signed the cheque and handed it to him. The cheque was drawn as for Carmat Repairs and made payable to the respondent. The account on which the cheque was drawn, however, was Carmat Repairs Limited and when it was presented it was dishonoured.

The appellants in various affidavits have said that whereas they previously traded as Carmat Repairs, the Company was incorporated early in 1992 and thereafter it was the company which traded. They further contended that the old trading entity known as Carmat Repairs did not exist at the time the cheque was drawn.

A cheque of course is a bill of exchange and the law regarding bills of exchange in the Republic is set out in the Bills of Exchange Act Cap. 277 which is based upon the original English Statute of 1882. Section 23 of the Act provides:

> *"No person is liable as drawer, ... of a bill who has not signed it as such: provided that -*
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> *(a) where a person signs a bill in a trade or assumed name, he is liable thereon as if he has signed it in his own name;*
>
> *(b) the signature of the name of a firm is equivalent to the signature by a person so signing of the names of all persons liable as partners in that firm."*

As already mentioned the undisputed evidence of the respondent is that he saw the defendants sign the cheque and indeed the first appellant acknowledges that he did sign

it but says he intended it to be for the company rather than a partnership. The respondent has deposed that he had no intention of dealing with a limited liability company and would not have done so without further enquiry. On the face of it the appellant's position appears to be covered by section 23(1) above if they used an assumed name whether intentionally or otherwise.

Additionally however there are the provisions of section 55 (1)(a) dealing with the liability of the drawer. Those provisions read as follows :

> ***"55 - 1 The drawer of a Bill by drawing it -***
>
> ***(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;..."***

Here the first Appellant without question was the drawer and on the respondent's evidence which is not disputed by the second appellant (he having not filed any evidence at all) so was the second appellant.

We said earlier a cheque is a bill of exchange - section 73 at the Act so provides.

Discussing the liability of the drawer and liability on cheques Halsbury 4th Edition Vol. 4 at paragraphs 474 and 475 states:

"474. Liability of a drawer. The drawer of a bill of exchange undertakes that the bill on due presentment will be accepted and paid according to its tenor and that if it is dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken.

He is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

"475. Liability on cheques. The drawer of a cheque gives an undertaking similar to that given by the drawer of a bill, save that he undertakes that on presentment it will be duly paid (not accepted), and if it is not paid the holder is referred for his remedy to the drawer."

Given the above provisions, the meaning of which is beyond argument, we are of the clear view that the appellants' defence that it is the company which is the party liable on the cheque is untenable. In those circumstances we need not consider the appellants' argument that the undertaking given to make payments, part performed as it was by the payment of a $1,000,was secured by duress. We observe, however, that we were not impressed by that contention.

Decision

Although the appellants succeed on their grounds of appeal they fail on the respondent's notice which in effect is a cross-appeal. Furthermore the inexcusable delay on the appellants' part would have precluded the court from exercising its discretion to set the default judgment aside in any event. The appeal is dismissed.

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The respondent is entitled to costs. We award $ 500 plus disbursements to be fixed by the Registrar.

The respondent is now free to enforce its judgment obtained in the Magistrate's Court at Lautoka and the matter is remitted to that Court to make such further orders, if any, as may be appropriate.

Result

1. Appeal dismissed.
2. Appellants ordered to pay costs of $500 to respondent.
3. Case remitted to Magistrate's Court at Lautoka to make such further orders, if any, as may be appropriate.

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Eichelbaum JA, Presiding Judge

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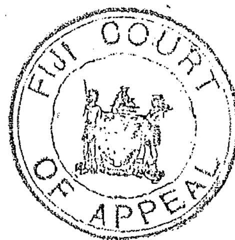
Sheppard JA



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Smellie JA

Solicitors:

Messrs. Pillai, Naidu and Associates, Nadi for the Appellants
Messrs. G.P. Shankar and Company, Ba for the Respondent

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