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

CIVIL APPEAL NO. ABU0050 OF 1999S
(High Court Civil Action No. HBA0015 of 1999s)

BETWEEN:

SUNIL KUMAR

Appellant

AND:

FIJI POST AND TELECOMMUNICATIONS LIMITED

Respondent

Coram: Reddy, President
Tompkins, JA
Smellie, JA

Hearing: Wednesday, 22 May 2002, Suva

Counsel: Mr. R P Singh for the Appellant
Mr. S Vadei for the Respondent

Date of Judgment: Friday, 31 May 2002

JUDGMENT OF THE COURT

This is a simple case which has generated more effort and occupied more judicial time than it deserves.

The Facts

On 22 April 1993 the appellant entered into a written contract with the respondent for the installation and supply of telephone services. The consideration for the services was the appellant's agreement to pay the charges made on demand.

The telephone was duly installed and for some time the appellant's tenants, (the appellant himself never lived in the premises) paid the accounts rendered by the respondent. Eventually, however, one tenant, over a relatively short period, ran up overseas toll charges and other charges amounting to $2,044.53 but did not pay the accounts.

The respondent than made demand on the appellant who refused to pay claiming he had requested discontinuance of the service which had not been acted upon. Respondent denied receipt of such a request and in due course took proceedings to recover the outstanding amounts.

The Contractual Setting

The appellant had bound himself to meet the charges for the services provided. The respondent was entitled to look to him and no other to honour the contract. When the plaintiff failed to settle the account after many demands the respondent rescinded the contract, as it was entitled to do, because of the appellant's breaches in failing to pay.

As is recorded in the High Court judgment the contract did not contain a specific provision for termination. The law in such circumstances, however, is quite clear. It is correctly set out in Chitty on Contract (general principles) 24th edition at

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para. 799 as follows:

> *"Implied term as to duration of contract. A contract which contains no expess provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties. The question whether a contract can be determined in this way is often said to depend upon the implication of a term, although it is probably better to regard it as depending upon the true construction of the agreement. Nevertheless since, ex hypothesi, the agreement contains no provisions expressly dealing with determination, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement. Thus a contract to supply gas to a public authority in such quantities as it should require has been held determinable by either party on reasonable notice, and a licence to occupy a theatre and to produce there stage plays, which gave to the licensee an option to extend the licence at stated intervals, but which contained no provisions for determination by the licensor, was held to be determinable by the licensor upon giving reasonable notice. Similar constructions have been adopted in the case of contracts between employer and employee, between principal and agent, and between solicitor and client in respect of an indefinite retainer."*

So the appellant was able to terminate on reasonable notice. And since he had to take the initiative the burden was on him to prove that such notice had been given. This issue of the evidential burden in respect of notice of termination was in dispute in the High Court. But before this Court the appellant properly conceded that the onus in respect of this point rested upon him.

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The Crux of the Case

It follows from the above that if reasonable notice was given before the $2,044.53 of charges were incurred the appellant would not be liable. The crux of the case is did he give such notice. The onus being on him to prove that he did.

The Magistrate's finding of Fact

Having heard a very experienced long standing officer of the respondent who swore that no request for determination had been received and the appellant who swore he had written to that effect and produced a photocopy of the letter, the learned Magistrate held as follows:

> ***"The application for disconnection was not made neither can it be inferred. Any intention to terminate the contract between the parties had not been clearly communicated. There is no evidence on which the court can safely rely on (sic) that the intention to terminate was clearly communicated to the plaintiff. The defendant's evidence is unsubsantiated. The onus at all times was on the defendant to prove this allegation, not the plaintiff as submitted."***

Decision

It is trite law that an appellate court which has not seen and heard the witnesses give evidence cannot substitute its view of credibility for that of the judicial officer responsible for finding the facts. In this case the judicial officer concerned was of

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course the learned Magistrate. So the giving of reasonable notice of termination was not proved and this court cannot interfere with that finding.

The appeal accordingly fail.

The respondent is entitled to costs in this court which we fix at $350 plus reasonable expenses as fixed by the Registrar if the counsel are unable to agree.

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Reddy, President

FIJI COURT OF APPEAL

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Tompkins, JA

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Smellie, JA

Solicitors:

Messrs. Kohli and Singh, Suva for the Appellant
Legal Officer, Fiji Post and Telecommunication Limited, Suva for the Respondent

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