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

CIVIL APPEAL NO. ABU0042 OF 2000S
(High Court Civil Action Nos.HBC0793 of 1983, 480 of 1983, 528 of 1983 and 529 of 1983L)

BETWEEN:

SURESH PRATAP
PREMILA WATI t/a PRATAP STONE CRUSHING & SCREENING WORKS

Appellants

AND:

G.L. JOHN LIMITED

Respondent

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Thursday, 22nd May 2003, Suva

Counsel: Mr. G.P. Shankar for the Appellants
Mr. A. Patel for the Respondent

Date of Judgment: Friday, 30th May, 2003

JUDGMENT OF THE COURT

This appeal is against a judgment of Townsley J. delivered on 22 June 2000 in which the respondent, as plaintiff, was awarded a total sum of $208,268.39. The trial proceeded following consolidation of four separate proceedings instituted by the respondent against the appellants. In brief summary, the claims arose out of an agreement under which the respondent provided expert engineering advice and services to the

appellant, and also separate agreements for the supply of parts for the appellants' stone crushing machinery. The appellants, operating as a partnership, had engaged the respondent to assist them in tendering for a contract with the Civil Aviation Authority for the supply of aggregates at Nadi Airport. The appellants were awarded the contract, but met some difficulties in performance of their obligations, and received assistance from the respondent's personnel to overcome those difficulties. The contract was ultimately successfully completed. In Action No. 793/83 the amended claim was for services and royalties in the sum of $82,876.14. Action No. 480/83 was based on dishonoured bills of exchange and sought $60,476.5 plus notarial and bank charges. Action No. 520/83 was for the supply of machinery parts for value of $33,048.56 plus notarial and bank charges. Action No. 529/83 was for the supply of spare parts for machinery in the sum of $4,659.15 plus notarial and bank charges. The respondent sought judgment in New Zealand dollars, together with interest. The appellants denied liability on a number of separate grounds, and also counterclaimed for the sum of $569,781.74 alleging negligence on the part of the respondent in respect of the advice it had provided.

The lengthy history of the proceedings shows that the first of the respondent's actions was commenced on 5 August 1983. On 30th September 1997 the appellants issued a summons to strike out Action No. 793/83 for want of prosecution. That application, together with an application by the respondent for consolidation of the four actions, was heard by Lyons J. on 15 October 1997. The strike out application was dismissed in a reserved judgment delivered on 24 November 1997, when the Judge also ordered consolidation.

On 10 August 1999 the appellants issued a further summons to strike out for want of prosecution, and also on 7 October 1999 separately sought leave to appeal Lyons J's dismissal of their earlier strike out application. Both these applications were dismissed by Townsley J in a judgment delivered on 13th October 1999, the day the hearing of the consolidated action was due to commence.

Following delivery of that judgment the hearing proceeded with the respondent plaintiff's counsel opening his case and proceeding to call evidence. The hearing comprised, over broken periods, 14 sitting days with the evidence concluding on 3rd May 2000. A large number of documentary exhibits were produced during the course of the hearing. At the conclusion of evidence, the Judge called for final submissions to be in writing. Those of the appellants as defendants were to be supplied by 17 May, and those of respondent as plaintiff by 31 May. As mentioned at the outset, judgment was delivered on 22 June 2000.

Adequacy and Validity of the Judgment

The substance of one of the grounds of appeal is that the reasons for judgment are deficient and do not adequately address and determine the issues between the parties. To appreciate the nature of this complaint, we set out as an appendix the judgment of the High Court of 22 June 2000 which is under challenge. Viewed objectively, the judgment raises four matters of serious concern – two as to its adequacy in considering and ruling upon the numerous issues, and two as to form.

Reasons for Judgment

The paucity of the reasons is self evident from the appendix. Although there is no inflexible rule of law that in all judicial proceedings reasons for judgment must be given (**R. v. Awatere,** [1982] 1 NZLR 644, 647), to give reasons is always good judicial practice (**Awatere**, at p. 648). It is also generally accepted in common law jurisdictions that it has long been the traditional practice of Judges to express in adequate terms, which can be the subject of objective analysis and consideration, reasons for conclusions on issues of fact. It is also good practice to expound the law and apply it to the findings of fact. Authorities to this effect include **Pettit v. Dunkley,** [1971] 1 NSWLR 376, and **Public Service Board of New South Wales v. Osmond,** 159 CLR 656. The importance of reasons was highlighted by the New Zealand Court of Appeal in **Bell-Booth v. Bell-Booth** [1998] 2 NZLR 2, and we endorse the observations of Thomas J on p.6 in giving the judgment of that Court::

> ***"Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge's reasoning – his or her reasons for the decision – is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen to be working and, although possibly at times imperfectly, striving to achieve justice according to law."***

Three important factors regarding the application of the usual practice arise in this case. First, the difficulty facing this Court on appeal in attempting to determine whether justice was done to the appellants' case.

When there is a statutory right of appeal, the need for a properly expressed and reasoned judgment is both apparent and desirable – even in some cases, and the present is in that category – necessary. Secondly, this was a superior court judgment, following a lengthy trial which took 14 days to hear the evidence. It traversed a very large number of separate issues which required separate determination. Credibility featured. The appellants' final submissions occupied some 37 pages. The judgment disposes of the merits of the claims and the counterclaim in a mere 18 lines. The passages contained within those 18 lines do no more than state in bald terms the Judge's acceptance of the respondent's witnesses (without separate identification), and his rejection of the evidence of the first appellant and his witness Dr. Sahib. As regards the second aspect, the Judge failed to set out , even by way of example, any details of his summary rejection. This Court is now placed in an impossible situation in endeavouring to determine whether or not the Judge's disposal of the claims was justifiable. What was required of the trial Judge was at least a formulation of the various claims, a determination that they had been properly proved as to liability and as to quantum, and a consideration both of the objections taken by the appellants and, importantly, detailed consideration of their allegations of negligence.

Thirdly, and of additional concern is the Judges acceptance of what he described as a contention of res judicata. That contention by the respondent was not expressly pleaded, but was the subject of quite extensive argument by both parties. The judgment is completely bereft of any detail of just what was being relied upon to constitute a basis for the finding or even of what was the adjudication relied upon. Neither has any consideration been given to what, on the face of it, is a somewhat novel conclusion that a

settlement between parties can come within the relevant principles. The record would seem to show that the appellants agreed to pay a certain sum in settlement of a claim for unpaid hire of machinery, and consented to judgment for that amount without pursuing their counterclaim. How that constitutes res judicata is completely unexplained.

Determination of the issues:

The judgment is also deficient in five other respects. First, although the Judge expressed the view that the counterclaim was meritless, it is not the subject of a final determination and is not expressed as having been dismissed. Secondly, the respondent sought interest on the amounts of its several claims, and also for notarial and bank charges under the several causes of action. These have not been the subject of either consideration or determination. Thirdly, respondents sought judgment in New Zealand dollars, but neither the right to that nor the appropriate conversion factors have been addressed. Fourthly, the amount of the judgment in Action No. 529/83 is considerably in excess of that actually claimed at trial. Fifthly, Action No. 480/83, in respect of which judgment is given for the respondent was, we are advised by counsel, resolved by the parties with no relief finally being sought under that head of claim. Some of these discrepancies may possibly in part be due to the fact that the respondent's final submissions were never filed in the Court registry, and never presented to the Judge. We were advised by counsel that the submissions for the appellants were, by agreement, filed late on 31 May. When the respondent's solicitors attempted to file submissions in reply they were rejected by the Registry, it was said as a consequence of advice from the Judge. Those submissions have

therefore not found their way into the Court record. Nevertheless, all these matters are of concern.

Authentication of the Judgment

The reasons for judgment were not signed by Townsley J, but by another Judge of the High Court "per pro." We are unsure of the basis upon which one Judge can authenticate another Judges written judgment. Here there is nothing on the face of the document or elsewhere to give the assurance that what is recorded in the document does in fact accurately represent what Townsley J intended. But in view of the conclusion we have reached overall on the ground of appeal now under consideration, we do not propose to give more detailed consideration to this particular matter. The questionable validity of such a practice, as well as the dangers surrounding it, are apparent and to be avoided. The importance of the signed judgment as a clear disclosure and declaration by the Judge of the intention that what has been written and signed shall operate as the Judge's decision was exemplified in **Westfield Freezing Company Limited v. Steel Construction Company Limited** [1968] NZLR 680.

Validity of Judgment

The written judgment is dated 22 June 2000, as is the sealed judgment which was perfected on 15 July 2000. In the course of his submissions, Mr Shankar for the appellants stated that Townsley J. had left Fiji some time shortly after the insurrection and State of Emergency which was declared on 19 May 2000, and suggested that the Judge did not

have either the full record or counsel's submissions available to him when the judgment was prepared. Whether or not that was the situation, we thought it necessary to ascertain when Tonwsley J. resigned from office, as Mr Shankar had also referred to that having happened about the time in question. In response to our enquiry, we have been advised that Justice K.J. Townsley resigned his office as a High Court Judge effective from 16 June 2000. Notice of resignation to that effect was given by him in writing on 26 May 2000, with approval or acceptance being given in a letter to the Chief Registrar, High Court of Fiji, from the Secretary for the Public Service dated 30 May 2000. We understand the Judge left Fiji permanently on 30 May 2000.

It appears therefore that the judgment now under challenge was delivered by, or on behalf of, Townsley J. when he no longer held office as a High Court Judge. Without formally deciding this point, that would appear to make the judgment a nullity. There appears to be no provision in the 1998 Constitution under which a Judge may continue in office so long as it may be necessary to enable delivery of judgment. There was such a provision in the 1990 Constitution and also the 1970 Constitution, although we note that those continuation provisions are confined to a situation where a Judge has attained the statutory retiring age. Accordingly, even if s.139 of the 1998 Constitution, which provides that nothing in the Chapter 9 affects the continuance in office of an appointment made before the commencement of the 1990 Constitution could be applied, it would not assist. Townsley J. resigned, and did not cease to hold office by reason of having reached retirement age.

Conclusion on this ground of appeal

Mr Patel for the respondent responsibly accepted that there were the major difficulties we have discussed above, and also responsibly advised that there was little he could put forward by way of upholding the judgment. For the reasons which we have set out we are therefore satisfied that the judgment cannot stand, and that it must be set aside in its entirety.

Dismissal for Want of Prosecution

The first ground of appeal is formulated as being against the refusal of the appellants' applications to dismiss the actions for want of prosecution. The first summons to this effect was issued on 22 August 1997. In a comprehensive judgment delivered on 24 November 1997, Lyons J dismissed the application. On 10 August 1999 the appellants issued a further summons for dismissal, and also on 7 October 1999 sought leave to appeal the earlier judgment of Lyons J. Both applications came before Townsley J. on 12 October 1999, and were dismissed by him on 13 October 1999. The trial then commenced that same day.

In his judgment of 13 October, Townsley J. noted that Mr Shankar confirmed that he was only seeking leave to appeal the judgment of Lyons J. He observed that the appellants' summons of 10 August could only be treated as an appeal against the decision of Lyons J. and proceeded to dismiss it as not competent. The Judge then considered the application for leave to appeal Lyons J's decision, and expressed the strong view that any

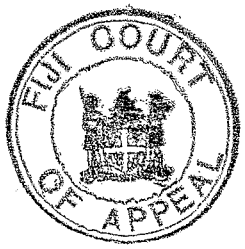
appeal lacked merit and that there was no realistic prospect of success in this Court. He therefore refused leave to appeal.

In his submissions to this Court, Mr Shankar challenged the ruling as to the competence of the 10 August application, and advanced lengthy argument as to why both that and the earlier 1997 application should have been granted. We assume for present purposes that is competent for the appellants now to promote an appeal against both applications, at least one of them. We note that the proceedings have a long and somewhat complex background, with the delay in coming to a hearing being due to a number of different causes. In his judgment of 13 October 1999, Townsley J. refers to some of these reasons as they apply to delay from November 1997. The observations are critical of the appellants in that regard. We have given consideration to Mr Shankar's submissions and to those of Mr Patel in response. Without coming to any final decision, we can say that we are not persuaded to the view that the argument for the appellants that the trial should never have proceeded on 13 August 1999 is so clearly right that an injustice has resulted. In all the circumstances, we have reached the further view that the ends of justice are now best met by giving practical effect to what would be the normal consequence of our conclusions on the ground of appeal we first considered, leaving the parties then to consider their respective positions. This consequence is unfortunate, but unavoidable.

Result

For the reasons which we have expressed the appeal is allowed, and the judgment of 22 June is set aside. There will be an order for a new trial in the High Court of the

consolidated action, including the counterclaim. In the circumstances we make no order as to costs as between the parties, who are not responsible for the situation which has arisen.



Tompkins, JA

Henry, JA

Penlington, JA

Solicitors:

Messrs. G.P. Shankar and Company, Ba for the Appellants
Messrs. S.B. Patel and Company, Lautoka for the Respondent

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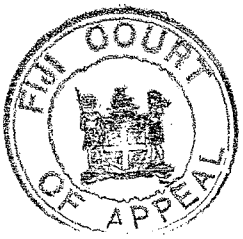
APPENDIX

IN THE HIGH COURT OF FIJI
AT LAUTOKA

CIVIL JURISDICTION

CONSOLIDATED CIVIL ACTIONS NOS
HBCO 793 of 1983, 480 of 1983,
528 of 1983 and 529 of 1983



BETWEEN : G.L. JOHNS LIMITED PLAINTIFF

AND : SURESH PRATAP & PREMILA WATI
Trading as PRATAP STONE CRUSHING
& SCREENING WORKS
DEFENDANTS

Date of Hearing: 13th October, 1999
Date of Ruling : 22nd June, 2000

Mr Everard with Mr A Patel for the Plaintiff
Mr Shankar with Mr Sahib for the Defendants

JUDGEMENT

This was an action commenced in 1983 by the Plaintiff company for payment of monies due under a contract for services between it and the Defendants, and for the price of goods sold and delivered to the Defendants at their request.

The monies were due under a written contract for ascertained sums for which accounts had been rendered to the Defendants for the provision by the Plaintiff of expert engineering advice by named individuals for certain number of specified days.

The balance of the monies claimed were for the supply of the equipment for crushing stone obtained from rivers in Fiji and crushed to specified grade for laying of the run way at Nadi International Airport.

The Defendants refused to pay the sums claimed on the grounds of faulty advice and faulty equipment supplied by the Plaintiff causing the Defendants damage

and loss in fulfilling their contract with the Civil Aviation Authority of Fiji. They counter-claimed.

The Plaintiff had during the currency of the present actions sued the same Defendants in a New Zealand Court for unpaid hire of certain of the same equipment as is involved in the present actions, namely a cage mill.

The Defendants fought that claim on the same grounds exactly as are contained in their counter-claim in the present actions before me.

The New Zealand action was settled part way through the trial. The Defendants offered a sum of money in full settlement of the matter which I find took into account the Defendants counter-claim in that action.

In that event, it is clear law that the subject-matter of the Defendants' counter-claim is res judicata, and cannot now be raised in these present actions.

If I am wrong in this conclusion, then on the merits of the case before me in Lautoka High Court I find such counter-claim to be totally without merit.

Having seen and heard the witnesses on both sides, I find the Plaintiff's witnesses were not only totally believable from their forthright demeanour in the witness box, but were entirely supported by the documentation in evidence, which corroborated their account of affairs.

On the contrary, the male Defendant came across as a devious witness, constantly evading the issues put to him in cross-examination and making far-fetched allegations against the Plaintiff of forgery and fraudulent concoction of documents. His witness, Dr Sahib, knew very little of essential matters in order to be able to assist. He also had a very clear personal attachment to the Defendant such as to make his testimony not very persuasive. I find he deluded himself as to the situation out of partiality to the male Defendant.

Time after time the defence claims, in their pleadings and in the evidence, were refuted by documents in the case signed by the male defendant. I disbelieve him when he says that he knew little or nothing about a whole course of correspondence bearing his name and signature. Ostrich-like, he merely put his head in the sand.

The Defence claims against David John of forged or manipulated documents I find to be pure fantasy.

I therefore give Judgment for the Plaintiff Company, G.L. John Limited for the total amount of its claim in each action, together with costs in each action to be taxed, if not agreed.

Judgments will therefore be for the following amounts:-

Action No. 793/1983 $82,876.14 plus costs

Action No. 480/1983 $60,476.65 plus costs

Action No. 528/1983 $47,924.48 plus costs

Action No. 529/1983 $16,991.12 plus costs

[Kevan J Townsley]
Puisne Judge

DATED AT LAUTOKA this Thursday the 22nd day of June, 2000.

[Kevan J Townsley]
Puisne Judge

DATED AT LAUTOKA this 22 day of June, 2000.