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

CIVIL APPEAL NO. ABU0066 OF 2003S
(High Court Civil Action No 295 of 2000S)

BETWEEN:

HASSAN DIN

First Appellant

AND:

FINANCE SECTOR MANAGEMENT STAFF ASSOCIATION

Second Appellant

AND:

WESTPAC BANKING CORPORATION

Respondent

Coram: Ward, P
Barker, JA
Tompkins, JA

Hearing: Wednesday, 17 November 2004, Suva

Counsel: Mr H Nagin for the Appellants
Mr G Leung for the Respondent

Date of Judgment: Friday, 26 November 2004

JUDGMENT OF THE COURT

Introduction

[1] The proceedings to which this appeal relates involve the interpretation of a clause in a collective agreement between the second appellant, the second plaintiff in the High Court, (the Union) and the respondent, the defendant in the High Court, (the Bank). The first appellant, the first plaintiff in the High Court (Mr Din) is a person affected by the interpretation of the clause.

[2] Mr Din and the Union applied to the High Court by originating summons for:

> A DECLARATION that the Retirement Allowance payable by the [Bank] pursuant to the provisions of Clause 8 (vi) (c) of its Collective Agreement with the [Union] shall be calculated at the rate of one month's salary of the employee at the time of his or her retirement and computed for each completed year of service commencing with year 1 of the employees service, and not only for the years of service over and (sic) 30 years.

[3] They also sought orders consequential on the making of the declaration sought.

[4] Scott J, in a judgment delivered on 28 August, declined to grant the declaration and orders sought. From that judgment Mr Din and the Union have appealed.

The collective agreement.

[5] The collective agreement is dated 9 September 1997. The recitals to the agreement record that it is entered into between the Bank and the Union contracting on behalf of its members employed by the Bank. The collective agreement revokes previous conditions of employment and the matter of salaries of the staff of the Bank covered by the agreement which were hitherto agreed between the Bank and its employees or "which have through custom or usage been understood as are now contained" in the collective agreement. The collective agreement rescinds previous awards between the parties.

[6] Central to the issues between the parties in these proceedings is clause 8 (vi):

> A Manager qualifies for retirement allowance at the age of 55 years and after having completed 15 years of service or more as follows:
>
> | | | |
> |---|---|---|
> | (a) For 15 to 19 completed years of service | - | one month salary at the rate payable at the time |
> | (b) For 20 to 30 completed years of service | - | three months salary at the rate payable at the time in addition to (a) above. |
> | (c) For over 30 completed years of service | - | one month salary payable in accordance with the rate payable at the time for each completed year of service in addition to (a) and (b) above and payable up to the age of 55 years. |

[7] There is no issue about the meaning of (a) and (b). The proceedings and this appeal concern the meaning of (c).

The competing contentions

[8] The Union contended that paragraph (c) of clause 8 (vi) means that where a manager has completed over 30 years of service, he is entitled to a retirement allowance of one month's salary multiplied by the total number of years served. Mr. Din had served 34 years. On the Union's case, he was entitled to a retirement allowance calculated by multiplying one month's salary by 34 in addition to the retirement allowances due under paragraphs (a) and (b).

[9] The Bank contended that paragraph (c) meant that, where a manager has completed over 30 years of service, he was entitled to a retirement allowance of one month's salary multiplied by the number of years service over 30 years. On the Bank's case, Mr. Din he was entitled to a retirement allowance calculated by multiplying one months salary by four, in addition to the retirement allowance due under paragraphs (a) and (b).

[10] The difference in money terms between these two contentions is demonstrated in the following calculations, adopting the monthly salary rate of $4,515.58 applicable to Mr Din:

	Bank	Union
Clause (a)		
15-19 years (1 month's salary)	$4,515.58	$4,515.58
Clause (b)		
20-30 years (3 months salary)	$13,546.74	$13,546.74
Clause (c)		
30-34 years	(4x4,515.58=)	(34x4,515.58=)
	$18,062.32	$153,529.72
TOTAL	$36,124.87	$171,595.04

The evidence in the High Court

[11] Although the only issue before the Court was the proper interpretation of clause 8 (vi), the Union filed three affidavits, as did the Bank, including two by one witness. The affidavits filed on behalf of the Bank questioned the objectivity of the deponent of one of the affidavits filed by the Union. For that reason the parties proposed, and the Judge agreed, that evidence should be taken. In the result, all five deponents gave oral evidence and were available for cross-examination on their affidavits over a two day hearing.

[12] Because of the view we take concerning the admissibility of the evidence called by the Union and the Bank, we do not find it necessary to set out this evidence in detail. What follows is a summary.

[13] Prior to 1995 Westpac managers did not have a trade union of their own. They came under a grouping which eventually became the Union, which was registered as a trade union in about June 1995. The Bank later recognized the Union as the representative of managerial staff.

[14] In December 1995 the Union lodged a log of claims with the Bank. It did so with the assistance of Mr Shankar the National Secretary of the Fiji Bank and Finance Sector Employees Union (the FBEU). That claim included a clause in the same terms as clause 8 (vi).

[15] There followed negotiations between the Union and the Bank over clause 8 (vi) as well as other clauses in the log of claims. The Bank proposed an amendment to paragraph (c) which placed the issue beyond doubt. The Union refused to accept that amendment. In the result, the Union and the Bank reached agreement on all that was to be included in the collective agreement, including clause 8 (vi) in its present form.

[16] The Union submitted in the High Court that events that occurred in the course of these negotiations, including the Bank's agreement not to insist on its proposed amendment to paragraph (c), were matters to which the Court should have regard in interpreting clause 8 (vi).

[17] The Union went further. It put before the Court evidence and a large amount of documentary material relating to negotiations that took place between between FBEU, then acting on behalf of the Westpac managers, and the Bank leading up to July 1992 when an agreement was signed between FBEU and the Bank that included a clause in the same terms as clause 8 (vi). It was the Union's claim that in the course of these negotiations the Bank had accepted that an employee with more than thirty years of service would be paid a retirement allowance calculated on their total years of service starting from year one.

[18] Mr Wilkinson, who represented the Bank in these negotiations, denied that this was so. He said that the Bank made it perfectly plain that it did not accept the Union's interpretation and he proposed specific language to make it absolutely clear how it construed the provision.

[19] In an attempt to resolve this difference in the Union's favour, the Union filed an affidavit from Mr Singh, then the Principal Labour Officer in the Ministry of Labour and Industrial Relations. Mr Singh had presided over the conciliation proceedings in the dispute between the FBEU and the Bank relating, *inter alia,* to the clause in question. Mr Singh deposed to his understanding that the Bank had accepted that employees with more than thirty years of service would be paid an allowance, calculated for their total years of service starting from year one.

The judgment in the High Court

[20] In his judgment, Scott J set out in detail the evidence relating to the negotiations that led up to the signing of the collective agreement including referring to passages in the correspondence that were part of those negotiations.

[21] He also referred to the evidence relating the negotiations between the EFBU and the Bank in 1992. He concluded that even if he were satisfied that the Bank had accepted the EFBU's interpretation of the meaning of the clause, he did not think that the Bank must be held to that interpretation when beginning negotiations with an entirely different union some three years later. He did not consider he could place any great reliance on Mr. Singh's evidence.

[22] He concluded his judgment:

> "In my opinion the decisive consideration is that it cannot, as I find, be doubted that the Union and the Bank agreed to be bound by the clause although well aware that the other party held a different view as to its meaning. Perhaps they thought that it was not worth further negotiation since the number of instances in which the clause would apply would probably be very small. Whatever the motive, the fact that the parties did not agree what the clause meant must have the consequence that there was no agreement between them on the matter embodied in the clause (see eg *Scriven v Hindley* [1913] 3 KB 564.
>
> The clause is clearly severable from the rest of the collective agreement. It is now up to the Bank and the Union to attempt to reach a genuine agreement which can be unambiguously expressed. Meanwhile I decline to grant the declaration and the orders sought."

The approach to the interpretation of clause 8 (vi)

[23] In considering the approach to be adopted in interpreting clause 8 (vi) and the relevance of the evidence, the Judge, and counsel in this Court, relied on the judgment of Mason J in *Codelfa Construction Pty Ltd v State Railway Authority of NSW* (1982) 149 CLR 337. However, we consider that greater guidance is to be had from the observations of Lord Hoffman when delivering the judgment of the majority in the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114:

> "My Lords.... I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All ER 237 at 240-242 [1971] 1 WLR 1381 at 1384 – 1386 and *Reardon, Smith Line Ltd. v. Hansen-Tangen, Hansen-Tangen v. Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarized as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be

mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai investment Co Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 3 All ER 352, (1997) 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v SWalen Rederierna AB. The Antaias* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

"....if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense." "

[24] Lord Hoffman's approach was adopted by the Court of Appeal in New Zealand in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, 81.

[25] What is clear from this approach, particularly the observations in paragraph (3), is that the evidence relating to the negotiations between the Union and the Bank that led to the collective agreement should have been excluded as inadmissible. What the parties may have said or done or offered or rejected in the course of those negotiations is irrelevant when

determining the meaning to be attributed to the clause in question. Similarly what the parties say they intended the clause to mean is inadmissible and irrelevant.

[26] It is also clear from Lord Hoffman's approach that the interpretation of the clause is to be approached objectively. It is the meaning that the clause would convey to a reasonable person having the relevant background knowledge that is to be determined, not the meaning that the parties to the agreement thought the clause would have.

[27] The evidence of Mr Singh should also have been excluded, not only for this reason, but also because what occurs in conciliation proceedings by way of negotiations leading up to an agreement are without prejudice and therefore inadmissible. In *Rush v Tompkins Ltd v Greater London Council and anor* [1989] 1 AC 1280, 1301 Lord Griffiths said that

> " . . . as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement."

[28] Any concessions the Bank may have made in the course of the conciliation proceedings in an attempt to settle the terms to be incorporated into the agreement are within this rule. Evidence of them should have been excluded.

[29] It follows from this analysis that any belief the parties may have had about how clause 8 (vi) should be interpreted is irrelevant. The parties agreed that the clause should be included in the collective agreement that they signed. There was no misunderstanding of the kind the court was concerned with in *Scriven* (above).

[30] At the hearing before us, Mr Nagin for the appellant responsibly accepted that the evidence relating to the negotiations and the events that occurred in the course of the conciliation should not be taken into account in interpreting clause 8 (vi).

The interpretation of clause 8 (vi)

[31] What then is the meaning that would be conveyed by the clause to a reasonable person with the relevant background knowledge? Such a person would be aware that the clause, in the context of the collective agreement as whole, was intended to provide a lump

sum by way of a retirement allowance to managers in recognition of long service. It was not intended to be a pension provision.

[32] In considering the meaning that would be conveyed to a reasonable person, we commence by considering the syntax of clause 8 (vi) and in particular in paragraph (c). The phrase "for each completed year of service" in (c) does not appear in (a) and (b). It is followed by the phrase "in addition to (a) and (b) above". On a normal reading of the paragraph the latter phrase would be taken to qualify the former phrase. The completed years of service in (a) and (b) are from 15 to 30 years. On that approach to the paragraph, therefore, it relates to each completed year of service in addition to 30.

[33] This meaning is consistent with the opening words of (c) "for over 30 completed years of service". In other words (c) is dealing with the completed years of service over 30, not with the years of service with which (a) and (b) are concerned, namely 15 to 19 and 20 to 30 years of service.

[34] There is a further aspect. The interpretation of the clause for which the Union contends produces a strange result. The manager who completes between 15 to 19 years of service is entitled to a retirement allowance of one month's salary. The manager who completes between 20 to 30 years of service is entitled to three months' salary in addition, that is a total of four months' salary.

[35] On the meaning advanced by the Union, the manager who completes one more year of service, that is 31 completed years of service, is entitled to a further 31 months' salary. That result, to use the phrase adopted by Lord Diplock in *Antaios Cia Naviera* (above), flouts business common sense. It must therefore yield to business common sense. It accords with business common sense and the purpose and intent of clause 8 (vi) as a whole, to interpret (c) to mean that a person who completes 31 years of service receives one month additional salary in addition to four, the manager who completes 32 years of service receives two months salary in addition to four and so on, subject to the cap imposed by the 55 year age limit.

The result

[36] For the reasons we have given we are satisfied that the interpretation for which the Bank contended is correct. Both counsel agreed that it was unsatisfactory to leave this issue

undetermined. The Union having commenced these proceedings seeking an interpretation of clause 8 (vi), the Court is able to make an appropriate declaration.

[37] Accordingly, we make the following declaration:

> The retirement allowance payable by the Bank pursuant to clause 8 (vi) (c) of the collective agreement shall be calculated at the rate of one months salary of the employee at the time of his or her retirement for each completed year of service over 30 completed years up to the age of 55 years.

[38] The Bank is entitled to an order for costs on this appeal against both appellants, to be taxed if the parties are unable to agree.

FIJI COURT OF APPEAL

Ward, P

Barker, JA

Tompkins, JA

Solicitors:

Messrs. Sherani & Company, Suva for the Appellants

Howards, Suva for the Respondent