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

CIVIL APPEAL NO. ABU0004 OF 2004S
(High Court Civil Action No. HBC 528 of 2003)

BETWEEN:

ASHWIN PRASAD

Appellant

AND:

CARPENTERS (FIJI) LIMITED

Respondents

Coram: Penlington, JA
Scott, JA
Wood, JA

Hearing: Tuesday, 9th November 2004, Suva

Counsel: Mr. M. S. Sahu Khan for the Appellant
Mr. S. Maharaj for the Respondent

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

This is an appeal from an Order of Jitoko J made on 17th December 2003 wherein he granted the Respondent a Mareva Injunction and other relief in aid of that injunction on the ex parte application of the Respondent.

Background

The Respondent is a substantial company which deals in building and hardware merchandise. It obtains its supplies from a number of overseas countries in Asia. .

From June 1999 the Appellant was employed by the Respondent as an overseas buyer. His job was to place orders on behalf of the Respondent for the supply of goods

from manufacturers. Under a written contract of employment he was prohibited from accepting commissions from any of the suppliers.

The Appellant had two ANZ bank accounts in Suva Number 05271512 (the salary account) and 06100827 (the second account).

In September 2003 the Respondent's ANZ account was credited with the sum of $1,664.21c by telegraphic transfer from a firm in China called Saame Tools. This firm was a supplier of goods to the Respondent. Upon inquiry being made by the Respondent the ANZ Bank advised the Respondent that the monies had been wrongly credited to the Respondent's account and that they were meant for the Appellant. The Bank thereupon reversed the entry in the Respondent's bank account and credited the second account. This incident put the Respondent on alert about the conduct of the Appellant.

On 24 November 2003 three executives of the Respondent questioned the Appellant about the monies from Saame Tools. They put to him that the Money Laundering Unit of the Police had ascertained that he had a bank account (later ascertained to be the second account) which had had a credit balance of about $100,000 derived mainly from commissions from overseas entities and that the funds were withdrawn in two tranches. In response the Appellant admitted obtaining unlawful commissions from suppliers to the Respondent. He was thereupon dismissed.

Inquiries by the Respondent continued. On 10 December 2003 the Respondent received written confirmation from another Chinese supplier, Yantai Tri-Circle of China, confirming that it had paid commissions direct into the second account on several occasions. By mid December the Respondent was awaiting written confirmation from other suppliers.

Mareva Injunction and Ancillary Orders

On 17 December 2003 the Respondent commenced an action against the Appellant out of the High Court. The Respondent alleged that the Appellant while in the employ of the Respondent unlawfully and contrary to the terms of his contract of employment received and retained commissions totaling $172,112.21 between 2 November 1999 and 31 October 2003 from 16 Asian companies or firms and one unknown source. The Respondent asserted breach of contract, breach of fiduciary duty and unjust enrichment as a result of the abuse of his position as an employee.

The Respondent sought to recover from the Appellant $172,112.21 and other relief.

On the same day the Respondent moved ex parte for a Mareva Injunction against the Appellant and for various other orders in aid of the Mareva injunction. The Motion was supported by a detailed affidavit from a Mr. Robert Sen, the Financial Controller of the Respondent. The Respondent gave an undertaking as to damages.

In his affidavit Mr. Sen specifically deposed that the Appellant had the two bank accounts previously referredto and a Nissan motor vehicle registered Number DK307. He further deposed as to information which the Respondent had recently received as to the withdrawal of around the sum of $100,000 from the second account. Mr Sen then importantly deposed:

> *"14 THAT I verily believe that the Defendant will remove moneys from his various Bank account with ANZ Bank, Suva and remove other properties from Fiji or dissipate the same unless he is retrained by the Court Orders as prayed for in the application Motion filed herewith."*
>
> .....

"18 <u>THAT</u> the fact that the Defendant has withdrawn $1000,000-00 (ONE HUNDRED THOUSAND DOLLARS) from one of his Bank Accounts with ANZ Bank, the disposal whereof is unknown to the Plaintiff; and therefore I believe that there is great danger that the Defendant will dispose of his assets or remove the same out of the jurisdiction of this Honourable Court and thus frustrate any judgments that may be given in future in favour of the Plaintiff Company."

The ex parte application came on for hearing before Jitoko J, on the same day. Counsel appeared in support. He made brief submissions. The Judge then made an Order as moved and adjourned the proceedings to 29 January 2004. The Judge did not give any reasons for the Order. We now set out the various individual orders which were contained in the Order as sealed.

"1. That the Defendant by himself and/or through his servants and/or agents and/or his Solicitors, and/or howsoever be restrained from transferring, dealing with, charging, mortgaging, assigning, disposing off or removing from the jurisdiction any of his properties or moneys or assets over which the Defendant has ownership or control within the jurisdiction of this Court including:

(i) ANZ Bank, ANZ House Suva Branch Account No. 0006100827

(ii) ANZ Bank Account No. 05271512

(iii) Vehicle Nissan Sunny Registration Number DK 307.

2. That the Defendant do forthwith disclose and within fourteen days after the service of the order on him make and serve on the Plaintiffs' Solicitors an affidavit disclosing the full value of all and each of his assets within the jurisdiction of this Court identifying with full particularity the nature and whereabouts of all such assets and whether the same be held in his own name or jointly or by nominees such as his wife or children or companies on his behalf and particularly specifying:

(a) The identity of all bank, financial institution or other accounts held in his name or names either jointly or by nominees on his behalf and the balance of each of such accounts and the name and address of the branch at which it is held.

(b) Any other assets, money or goods owned by him and the whereabouts of the same and the names and addresses of all persons having the possession, custody or control of such assets, moneys or goods at the date of service of this order.

3. That the abovenamed Defendant deliver his Passport and Travel documents held by him to this Honourable Court save and unless the Defendant can provide free and unencumbered assets belonging to him having a total value of not less than $172,112.21 **(ONE HUNDRED SEVENTY TWO THOUSAND AND ONE HUNDRED TWELVE DOLLARS AND TWENTY ONE CENTS)** together with interest and costs as claimed in the Writ of Summons and/or in the alternative the Defendant only be permitted to travel on either payment of the said sum into this Honourable Court immediately or by giving security to the satisfaction of the Plaintiff and this Honourable Court that the debt and/or any judgment entered would be satisfied.

4. That a Writ Ne Exeat Regno be issued and directed to the Sheriff of the High Court of Fiji and his Deputy and all his constables and all Police Officers and all Customs and Immigration Officers commanding them that in the event that the Defendant should seek or attempt to depart from and/or enter into the jurisdiction of the High Court of Fiji, they should arrest him and bring him before a Judge of the High Court of Fiji as soon as practicable.

5. Order that all the trading Banks in Fiji provide to the Plaintiff access and liberty to inspect and take copies of any entries in the Banker's books relating to all Bank Accounts held by them in the name of Ashwin Prasad and his wife/or children pursuant to Section (7) of the Bankers' Books Evidence Act Cap.45.

6. That the Defendant forthwith disclose and within fourteen days after the service of the Order on him make and serve on the Plaintiff's Solicitors an Affidavit disclosing full details of Commissions or payouts received by him from various suppliers locally and from abroad by way of commissions or pay-outs in respect of all purchases made by him for and on behalf of the Plaintiff including those received from Saame Tools in China who had paid into his account the sum US$906-25 (FJ$1664-21); Top Plus Co Ltd (Taipei), Ying Ho, Gayathri Steel (Singapore), SCE Company Ltd (Hong Kong), Kocera International (Singapore), Pt Maha Keramindo (Jakarta), Shanghai Light Industrual (China), Hebei Light Industries (China), Puyoung Ind Co (Korea), Halimax (Hong Kong), Plus Point Marketing (Singapore), O-Ho Ying Fai (Hong Hong), SKJ Industries (Bangkok), Segi & Co (Japan) and Yantai Tri-circle (China).

7. That the matter be adjourned to 29 January, 2004."

Service was thereupon effected on the Appellant.

Subsequent Procedural Moves

On 31 December 2003 the Appellant filed several documents. First, a Statement of Defence with a bare denial and a plea that the Respondent's Statement of Claim did not

disclose a reasonable cause of action. It is to be noted that the Appellant did not at this stage move to set aside the Mareva injunction or Mr. Sen's affidavit.

Secondly a Motion to dissolve order 6 in the Judge's Order which relates to the requirement that the Appellant make an affidavit setting out the full details of the commissions received by him, on the ground that the said order did not constitute a Mareva injunction. No affidavit was filed in support. The Motion was given a hearing date on 21 January 2004. Thirdly an affidavit sworn by the appellant on 24 December 2003 purporting to comply with the Order of 17 December 2003 in which he deposed:

> *"3) That apart from personal items such as clothes, shoes, a watch, and other minor personal belongings worth $1000, I do not own any other substantial personal items."*

And fourthly, an affidavit from a Law Clerk sworn on the 31 December 2003 in the office of the then Solicitors for the Appellant in which the clerk deposed that there was a credit balance in the salary account of $886.32 as at 18 December 2003 and a credit balance in the second account of $3.98 as at 30 November 2003.

On 19 January 2004 the Respondent filed two Motions. The first motion sought the following orders: (i) striking out the Appellant's Statement of Defence (ii) for specific discovery; (iii) for fixing the time and date for the Appellant to appear to give evidence as to his assets and other properties and be cross-examined; (iv) for the Appellant to provide full details of withdrawals of $109,420 from second account and $20,650.00 from the salary account; and (v) for those sums to be paid into Court or alternatively that the Appellant provide security for the same. This Motion was given a hearing date on 4 February 2004.

The, second motion sought an order ex parte that the Respondent be granted leave to issue an order of committal for contempt of Court against the Appellant. On the same day Jitoko J made an order on the second motion granting the Respondent leave to issue

committal proceedings, under 0.52 r.1 of the High Court Rules 1988 against the Appellant. (We were informed that the contempt proceedings were heard by Jitoko J on 8 and 13 April 2004 and that judgment has not yet been given.)

The Respondent's motions were supported by a lengthy affidavit from Mr. Sen. He pointed out that the Appellant had not complied with any of the Orders contained in the Order of Jitoko J. of 17 December 2003. In particular he deposed (i) that the Appellant had not exhibited his bank statements to refute the allegation that the commissions had been credited to the account, (ii) he had not refuted the allegation that around $100,000 had been withdrawn from the second account; and (iii) he had not provided details of his assets.

On 27 January 2004 the Respondent filed yet another motion. It moved for an order striking out the Appellant's application to strike out order 6 in the Judge's order of 17 December 2003. The Respondents application was given a hearing date on 4 February 2004. It was supported by an affidavit from Mr Sen.

The Appeal

Notwithstanding the numerous applications from both the Appellant and the Respondent, on 2 February 2004 the present appeal was filed.

The notice of appeal raised 5 grounds of appeal which overlapped. Essentially, the Appellant complained:-

1. Jitoko J. was not justified, in the circumstances, in making a Mareva injunction ex parte

2. The affidavit of Mr Sen in support was defective and that there was therefore no proper evidential basis for the injunction and ancillary orders; and

3. The scope of the injunction and the ancillary orders unjustifiably and oppressively went beyond the bounds of what was necessary in all the circumstances and ought not to have been made in the form ordered.

Absence of Application to set aside

At the beginning of the hearing we raised with Mr Sahu Khan, counsel for the Appellant, the question of why the Appellant had not first applied in the High Court to set aside or vary the injunction or at least proceed with his application to set aside order 6. We drew counsel's attention to the observations of Sir John Donaldson MR in ***WEA Records Ltd. v. Visions Channel 4 Ltd***. [1983]1 WLR 721 at p.727;

> ***"This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see, S.C., Ord. 35, r.2 (1), and Vint v. Hudspith (1885) 29 Ch.D. 322 to which Mr Tager very helpfully referred us this morning."***

See also 1999 The Supreme Court Practice Vol. 1 p.977 paragraph 59/1/3.

In this case we did not have the benefit of any reasons from Jitoko J. In effect, this Court was being asked to consider the case as if the appeal was an application to set aside or vary the ex parte order. This was quite unsatisfactory.

Mr Sahu Khan responded to the Court by saying that there had been a change of a solicitor and that he was unable to assist the Court as to the reasons why the Appellant had not moved to set aside or vary the order of 17 December 2003 shortly after it was made or what happened on either 21 or 29 January 2004 (the first date of return of the Appellant's

application to dissolve order 6 and the adjourned date set out in the Order of 17 December 2003). We regard these answers to our questions as unhelpful.

Mr Sahu Khan submitted that once the period of 14 days, as stipulated in orders 2 and 6 had elapsed, the Appellant was in default and that had the Appellant applied after the expiration of that time to set aside or vary he would have been met by the plea that he had defaulted and was in contempt of Court.

We note that the Appellant took some steps within 14 days of the making of the order. He filed a statement of defence. As well he filed a less than full affidavit from himself as to his assets and, for some unexplained reason, an affidavit from a law clerk as to the credit balances in his two ANZ Bank accounts on the dates deposed to.

Quite clearly if the Appellant desired to challenge the making of any of the orders in the Order of 17 December 2003 then he ought to have applied to the Judge to set aside or vary that Order. Notwithstanding the expiration of the 14 days stipulated in orders 2 and 6 this step ought to have been taken by the Appellant. Such an application would have provided a hearing de novo with both parties present. The court could then, having considered the evidence adduced by both parties and the submissions of counsel, have rescinded varied or confirmed the ex parte order. *Carter Holt v. Fletcher Holdings Ltd* [1980] 2 NZLR 80 84; *D.B. Baverstock Ltd. v. Haycock* [1986] 1 NZLR 342 344.

It was therefore with considerable reluctance that we embarked on the hearing of this appeal.

Mareva Injunctions: Relevant Principles

Here, as a background to the Appellant's argument we refer to the relevant principles which govern the making of a Mareva injunction and orders in aid of such an injunction. We first cite three short passages from 1999 The Supreme Court Practice at

Vol. 1 pages 579 and 580. These passages succinctly summarise the essentials of this protective jurisdiction.

1. *"If a Mareva injunction is to be efficacious it must be swift and secret, in the sense that the injunction must always be granted ex parte, without notice to the defendant" paragraph 29/L/36.*

2. *"The Mareva injunction is a remedy which exists for the purpose of restraining a judgment debtor, or potential judgment debtor, from committing the abuse of dissipating or hiding assets that the judgment creditor might lawfully attach for the purpose of satisfying a judgment given, or likely to be given, in his favour (A v. C.(note) [1981] Q.B. 956). It is designed to prevent a judgment creditor being cheated out of the proceed of an action. It is an aid to justice. Assets up to a value sufficient to satisfy the plaintiff's claim in the action, should he be successful in obtaining judgment, may be "frozen" by such in injunction." Paragraph 29/L/37.*

3. *"A Mareva injunction takes effect against the defendant in personam and is not an attachment of the assets. It has its legal operation, not on the property itself, but on the defendant who is subject to the jurisdiction of the court. It gives the applicant no proprietary rights in the assets seized and no advantage over other creditors of the defendant".. paragraph 29/L/37.*

We also refer to the helpful statement in *Riley McKay Pty Limited v. McKay* (1982) 1 N.S.W.L.R. 264 at page 276 where the Court of Appeal of New South Wales explains that the basis of the jurisdiction to grant a Mareva Injunction:

> *"is founded on the risk the Defendant will so deal with his assets that he will stultify and render ineffective any judgment given by the Court in the Plaintiff's action, and thus impair the jurisdiction of the court and render it impotent properly and effectively to administer justice in New South Wales."*

The High Court of Australia in *Jackson v. Sterling Industries Limited* (1987) 61 A.L.J.R. 332 confirmed the correctness of this approach.

Appellant's Concession as to the Mareva Injunction

Mindful of these principles we put to Mr Sahu Khan the relevant factors which were before the court as at the date of the application for the Mareva Injunction on 17 December 2003:

1 In September 2003 the Respondent became aware of the unlawful payment of the commission to the Appellant by Saame Tools of China contrary to the terms of his employment,

2 On 24 November 2003 the Appellant admitted obtaining commissions unlawfully from supplier to the Respondent.

3 The Appellant was dismissed on 24 November 2003.

4 In early December the Respondent received written confirmation of the another lot of unlawful commissions being paid to the Appellant.

5 The Respondent was aware that the appellant had withdrawn around $100,000.00 from the second account and it was not known what had happened to the money

Plainly, given these factors the Respondent was entitled to fear that the Appellant would deal with his assets in such a way as to frustrate any judgment obtained by the Respondent and that he might leave the jurisdiction in the process. Accordingly the Respondent was, as a matter of utmost urgency, entitled to obtain orders of the court to prevent the appellant from taking these steps and to obtain information as to the Appellant's assets and the fate of the commissions which he admitted that he had unlawfully received.

Faced with these matters Mr Sahu Khan conceded that the Mareva Injunction had been properly made. In our view this was a proper concession. Although Mr Sahu Khan sought to continue to maintain his attack on Mr Sen's affidavit, that argument became untenable on his acceptance that the Mareva Injunction had been properly made. In any event, we do not consider that there was any substance in his attack on the affidavit.

The affidavit was in substantial compliance with O.41 rr. 4 and 5. The Appellant did not raise any objection to the affidavit in his affidavit of 24 December 2003. If he had considered that the affidavit was in an irregularity he could have moved under 0.2 r.2 before he took another step. Instead he did not do so. On 31 December 2003 he filed the statement of defence and the two affidavits referred to previously. It is now too late to raise such an argument even if it had any validity which we think it did not have.

In our view the Judge had more than sufficient evidence before him to make the Mareva Injunction. The circumstances of the case entitled the Respondent to the protection afforded by a Mareva injunction against the risk, and in our view the significant risk, given the evidence relating to the withdrawal of around $100,000.00, of the Appellant committing the abuse of dissipating or hiding his assets in order to frustrate the Respondent recovering from him in the event of obtaining a judgment.

The Scope of the Ancillary Orders

The concession made by Mr Sahu Khan therefore left only one complaint, that is, the appellant's attack on the scope of the various orders, that is orders 2,3,4, 5 and 6, in aid of the Mareva Injunction order 1(which counsel accepted was unchallengeable).

Before considering Mr Sahu Khan's arguments on this part of the case another citation from 1999 The Supreme Court Practice Vol. 1 p.585 paragraph 29/L/50 is in point.

> *"The customary Mareva injunction order is in very wide terms and restrains the defendant from removing or otherwise disposing of or dealing with (1) any assets, and (2) in particular, certain assets in so far as they can be*

specific. Where the Court grants a Mareva injunction at the commencement, or during the course of proceedings, it may be that it does so for the purpose of "freezing" assets of the defendant, the details of which (nature, location, etc.) are well known to the plaintiff. If, at the time of the plaintiff's initial ex parte application, such details are either not known, or imperfectly known, to the plaintiff the question arises whether the injunction may contain an order requiring the defendant to disclose assets. Where the plaintiff has established the existence of assets within the jurisdiction or at least established that it is highly probable that such assets exist, the Court may add a disclosure order to the injunction requiring the defendant to disclose to the plaintiff the precise form and whereabouts of his assets for the purpose of making it more difficult for the defendant surreptitiously to disobey the restraining order and to enable notice to be given to third parties who might have custody of the assets so as to bind them to the injunction; without such power it would be difficult, if not impossible, to operate the Mareva jurisdiction properly (A.J. Bekhor & Co. Ltd. v. Bilton [1981] Q.B. 923: [1981] 2 All E.R. 565, CA A v. C (Note) [1981] Q.B. 956: [1980] 2 All E.R. 347; see also Z Ltd. v. A.Z. and AA-LL [1982] 1 Q.B. 558;sub nom, Z Ltd. v. A [1982] 1 All E.R. 556, CA, and Campbell Mussells v. Thompson (1984) 8 L.S. Gax. 2140, CA."

Mr Sahu Khan argued that the ancillary orders in aid of the Mareva Injunction made by the Judge went beyond the normal reach of such orders and that they were both oppressive and unjust. In particular, he argued that as the result of the Judge's order:

1 the Appellant's freedom of movement was restricted and that the restriction was a breach of his Constitutional rights;

2 his privacy was affected.

3 he was being forced to give evidence as to the merits of the case.

Additionally, the Appellant complained that the Judge's order was in the nature of a final order.

We now consider these submissions.

The order made by the judge was an interlocutory order. It did not have the effect of a final order. A Mareva injunction has nothing to do with the issues between the parties.

As we have pointed out earlier if the Appellant was aggrieved with any one or more of the orders – for example in any of the ways now complained of – then he should have moved to set them aside or have them varied as we have earlier stated. He did not do so (other than in respect of order 6 which challenge he did not pursue).

We next examine the objections to each of the ancillary orders.

Order 2 deals with the disclosure of assets. That is a normal ancillary order where a Mareva injunction is granted and is unobjectionable. We do not regard this order as invasion of the Appellant's privacy.

Orders 3 and 4 concern the possibility of the Appellant going overseas. The Appellant's complaint is that order 3 is a restriction on the Appellant's freedom of movement. We reject this submission. Such an ancillary order was recognized in ***Bayer v. Winter*** [1986] 1 All ER 733. See also the discussion at p.103 in "Mareva Injunctions" by David Capper and in 1999 The Supreme Court Practice Vol. 1 page 792 45/1/52. In this case there was an evidential basis for such an ancillary order in Mr Sen's affidavit. See paragraph 14 of that affidavit which we have set out earlier. We therefore reject the Appellant's complaint in respect of order 3.

We turn next to order 4. In that order the Judge has made an order that a writ ne exeat regno do issue in the event of the Appellant attempting to leave or enter the jurisdiction of the High Court of Fiji. Mr Sahu Khan based his objection to this order on section 34 of the Constitution (as he had done in respect of order 3). Section 34 deals with the freedom of movement. We do not consider that section 34 prevents a court from ordering a writ ne exeat regno in a proper case. Mr Sahu Khan did not take his argument beyond his broad submission which rested on s.34.

A careful perusal, following the hearing, of some of the helpful text book references and authorities tendered by the Respondent's counsel has lead us to have some concern about order 4 which was not articulated by either counsel. We note that the Respondent's claim against the Appellant is based on a breach of contract and a breach of fiduciary duty (for present purposes we ignore the Respondent's reliance on unjust enrichment). These are claims both at law and in equity.

In ***Glover v. Walters*** (2950) 80 CLR 172 (HCA) Dixon J. said that a writ ne exeat colonia (The Commonwealth equivalent of ne exeat regno) was not available to a plaintiff suing in equity if he also had a claim at law arising out of the same facts. See also ***Felton v. Callis*** [1969] 1 QB 200 per Megarry J. and "Mareva Injunctions" by David Capper at p. 102 para 7.34.

Given the constitution of the court which heard this appeal it is not practical for us to call for further argument upon the point. We have therefore decided to vary order 4 to make it until the further order of the court and to remit the point to the High Court with leave being reserved to either party to apply on notice for any further or other order.

Order 5 was made under section 7 of the Bankers' Books Evidence Act Cap.45. It provides:

> *"On the application of any party to a legal proceeding the court may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings."*

Given the evidence before the Judge there were sound reasons for him to make order 5. That evidence disclosed, that the Appellant already had two bank accounts at ANZ Bank and that he had recently moved $100,000.00 from the second account to an unknown destination or destinations. Such an order as order 5 is a normal ancillary order in aid of a Mareva injunction and is not objectionable.

And finally as to order 6. It is in the nature, an order for discovery. The Appellant complains that under the order he is forced to give evidence as to the merits of the case. The fact that answers to an order for discovery might be self incriminatory is no objection to the order being made. The time for making such an objection is when making answer. *A J Bekhor and Co Ltd. v. Bilton* [1981] 2 All ER 565.

Conclusions on the Appeal and Costs

Apart from our reservation about order 4 the appeal must fail. We consider that on the facts of the case all the ancillary orders, other than order 4, made by Jitoko J. were justified and properly made. They were in accordance with the relevant principles applicable to Mareva injunctions and orders in aid of such injunctions.

We now turn to the question of costs. As we have said earlier there should have been an application to Jitoko J. to set aside or vary. This court should have not been called upon to deal with the matter essentially as a court of first instance. The appeal has failed apart from a potential point taken by the court and not by counsel for the Appellant. Further argument is required to resolve it. In our view this is a proper case for costs in favour of the Respondent with some allowance for the result on order 4. In the circumstances we propose to order costs against the Appellant in the sum of $750.00.

Result

The formal orders of the court are:

1. Order 4 in the Order of Jitoko J. of 17 December 2003 is varied by the addition of the words after "that" at the commencement of the order;
   "Subject to the further order of the court."

2. Order 4 is remitted to the High Court with leave reserved to either party to apply on notice for any further or other order;

3. The appeal is otherwise dismissed;

4. Costs are ordered against the Appellant in favour of the Respondent in the sum of $750 together with disbursements as fixed by the Registrar.

Penlington, JA

Scott, JA

Wood, JA

Solicitors:

Messrs. Sahu Khan & Sahu Khan, Ba for the Appellant
Messrs. Lateef & Lateef, Suva for the Respondent

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