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

CIVIL APPEAL NO. ABU0032 OF 2004S
(High Court Civil Action No: HBC 205/01S)

BETWEEN:

FAI INSURANCES (FIJI) LIMITED

Appellant

(Original Defendant)

AND

RAJENDRA PRASAD BROTHERS LIMITED

Respondent

(Original Plaintiff)

Counsel: F. Haniff for the Appellant

Ms. R.S. Devan for the Respondent

DECISION

On 17 May 2001 the Plaintiff commenced proceedings by way of Originating Summons. It sought declarations that an exclusion clause in its policy of insurance with the Defendant did not apply to loss and damage which it said it had suffered as a result of the 19 May 2000 Suva riots. It also sought F$3,512,036.00 in damages.

On 19 May 2004 the High Court (Pathik J) published a document entitled "Judgment". A copy is on the file. This Judgment does not reveal precisely how the hearing had proceeded but it is clear that affidavits were read and written submissions were filed. This is the normal procedure (see RHC O 28).

On page 13 of the Judgment part E appears. It is entitled "Consideration of the issues". The issues for determination by the Court were then listed. Only the penultimate issue "should the Court order payment of the admitted amount of $2,445,203.00?" related to damages. The Judgment does not include an assessment

of damages and it is obvious that no such assessment took place before the Judgment was delivered. The final sentence of the Judgment reads:

> "I shall now hear Counsel to set a date for hearing to determine the balance of quantum claimed."

After hearing counsel August 3, 4 and 5 were allocated for the assessment of the disputed damages. It appears that the balance referred to is the difference between the sum which was admitted ($2,445,203.00 – subject to liability) and the sum claimed ($3,512,036.00).

On 17 June 2004 the Defendants filed a Notice of Appeal. The five principal grounds suggested that the High Court had erred in finding that the exclusion clause did not apply. The question of damages was not mentioned.

On 28 June 2004 the Plaintiffs filed a "Notice of Opposition" to the summons for security for costs which the Defendants had issued in compliance with Rule 17 (1) (a) (ii) of the Court of Appeal Rules.

The Notice of Opposition reads as follows:

> "The Respondent is opposed to the making of Orders sought by the Appellant upon the following grounds:
>
> 1. The summons is premature in that there is no proper appeal filed in the matter.
>
> 2. The Notice of Appeal dated 17 June 2004 filed herein is invalid and of no effect because it was filed without obtaining the leave of the Court as required by Section 12 (2) (f) of the Court of Appeal Act.
>
> 3. Leave to appeal is necessary because the Judgment of Pathik J dated 19 May 2004 is interlocutory and not final.
>
> 4. Time for appeal against an interlocutory judgment has now expired."

On 8 July 2004 the matter was referred to me by the Deputy Registrar at the invitation of counsel. There is only one issue: was the Judgment of Pathik J final or interlocutory? My jurisdiction to decide that question is conferred by Section 20 (1) (k) of the Court of Appeal Act (Cap. 12).

Both counsel filed helpful written submissions and cited a number of authorities. I am grateful to them for their assistance.

It is important not to confuse two quite separate questions. The first is, what is the proper approach to be taken to decide whether any particular order or ruling is interlocutory or final? The second is whether there is any material difference between a split trial and a trial which takes place in two or more stages.

The answer to the first question is now quite straightforward, although until it was finally decided it gave rise to considerable difficulty. Two different approaches had been taken by the courts. The first was called the "application approach" while the second was called the "order approach". The approach which it has now been settled should be taken in Fiji is the "application approach" (Suresh Charan v Shah (1995) 41 FLR 65, 67).

In adopting the "application approach" the Fiji Court of Appeal followed White v. Brunton [1984] QB 570; [1984] 2 All ER 606. A very useful guide to the application of the approach to the various orders which the Courts may make is to be found at Order 59 r 1A of the 1991 White Book.

As explained by the Court of Appeal in Charan the "application approach" looks at the application rather than the order actually made. An order is treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application. .

While the answer to the first question is clear it is not, in my view, the answer to the real issue to which this appeal gives rise, as will be seen from an examination of the second question to which I have referred.

In some actions there is only one substantive issue before the Court (claims for ancillary relief may for the purposes of this discussion be disregarded). Thus, for example, in an action for declaratory relief there may be no other claim but for a declaration.

During the course of determining such a claim the court may make a number of interlocutory orders. It may sit in different stages, adjourning after each stage before reaching the point where the final order is delivered, either granting or refusing the declaratory relief. The grant or refusal will clearly be final.

In an action in contract, or an action in tort, on the other hand, it is usual for both liability and the damages said to flow from that liability to be substantively in issue. In Fiji the more usual practice is for liability to be determined first and, if found to exist then, if the matter is not settled, the Court will address the question of damages.

This method of dealing with the two substantive issues separately is what is referred to as holding a split trial. A split trial is clearly quite different in principle from a trial of one or more issues which happens to proceed in separate stages.

Split trials are the subject of RHC O 33 rr 4 (2) and (5).

RHC O 33 r 4 (2) reads:

> "In any ..... action different questions or issues may be ordered to *be tried* at different places or by different modes of trial and one or more questions or issues may be ordered to *be tried* before the others." (emphasis added).

O 59 r 1A (4) of the English Rules, already referred to, also deals with the matter. It provides that:

> "... where the trial of a cause or matter is divided into parts a judgment or order made at the end of any part shall be treated as if made at the end of the complete hearing or trial."

This Rule merely regulates the practice explained in White v Brunton (supra) and followed in Strathmore Group v Fraser [1992] 2 AC 173.

As explained by the Fiji Court of Appeal in Charan (supra – 67C):

> "..... it is generally helpful to the orderly development of the law in Fiji to follow decisions of the English courts unless there are strong reasons in any particular case for not doing so."

This reasoning is consistent with Rule 7 (a) of the Court of Appeal Rules which provides that:

> "When no other provision is made by these Rules or by any other enactment, the jurisdiction power and authority of the Court of Appeal and the Judges thereof shall be exercised –
>
> (a) In civil causes or matters, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Appeal in England."

In my opinion the law in Fiji is that where a split trial is held then at the conclusion of each part of the trial the order of the Court determining the issue in respect of which that part of the split trial was held is a final order.

The only remaining question is whether in the present case a split trial was in fact held.

It is not disputed that no formal order was made by the trial judge for a split trial to be held under the provisions of RHC O 33 r 4 (2). I would have been preferable if such an order had been made but the irregularity, in my opinion, is trivial by comparison with the fact that it is plain both from the issues placed before the court for trial, already referred to, and the subject matter of the judgment that both parties and the trial judge proceeded as if the trial had been split.

Obviously, as explained by the Privy Council in Strathmore (supra 179. C) there are advantages and disadvantages in holding split trials. I do not however think that it is for this court to interfere with a decision reasonably reached, and by consent, that a split trial should be held.

In all these circumstances I hold that the judgment delivered by Pathik J on 19 May 2004 was final and that therefore the Notice of Opposition must be dismissed.

M.D. Scott
Justice of Appeal

12 August 2004