A-51.

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

CIVIL APPEAL NO. ABU 0080 of 2004S
(High Court Civil Action HBC 442/03)

BETWEEN:

BDO SPICERS AUCKLAND TRUSTEE COMPANY LIMITED

Appellant

AND:

DILIP K. JAMANDAS

First Respondent

AND:

RENEE S. LAL

Second Respondent

Coram: **Smellie J.A.**
Penlington J.A.
Scott J.A.

Date of Hearing: **23 November 2005**

Counsel: **Mr. J.S. Kós & Mr. N. Barnes for the Appellant**
Mr. D. Sharma & Mr. L. Prasad for the Respondents

Date of Judgment: 16-1-06

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal from a decision of Singh J delivered in the High Court at Suva on 22 October 2004. In the High Court the Appellant's application to have the Respondents held guilty of contempt and appropriately punished, failed. The

Respondents are the principals of a law firm – Jamandas & Associates – with offices in Suva.

[2] There were multiple parties in the High Court proceedings but all Defendants were represented by one counsel. In this Court the parties are the Appellant and the Respondents. The circumstances in which the Appellant sought to have the Respondents condemned and punished for contempt of court were canvassed at some length at the hearing before this Court. They are summarized briefly hereunder.

[Because Scott JA had been involved at an earlier stage of the litigation, enquiry was made at the commencement of the hearing as to whether there was any objection to him sitting on this appeal. There was none.]

BACKGROUND

[3] The Appellant is the trustee of New Zealand investors who suffered substantial losses when a timeshare investment in Fiji collapsed as a result of the fraud and/or gross incompetence of the developer/proprietor.

[4] Subsequent to the collapse, however, the Appellant ascertained that $1.9m of monies which arguably had been invested in the timeshare by its beneficiaries were held pursuant to a settlement agreement in the trust account of the Respondents. As a consequence it sought a Mareva injunction from the High Court to freeze those monies and prevent them from being distributed until an action it had launched could be heard and determined. The initial *ex parte* order made on 6 February 2004 was subsequently discharged following an *inter partes* hearing by Scott J (as he then was). But the Judge, while dismissing the application, directed that his judgment should lie in court for seven days thereby giving the Appellant the opportunity to challenge the discharge. The Appellant on 2 March 2004 filed a Notice of Appeal and subsequently the Chief Justice on 25 March 2004 further extended the *ex parte* injunction. The terms of the order made by the Chief Justice were as follows:

> "It is hereby ordered that the interim injunction granted herein by the Honourable Mr. Justice Scott on the 6th day of February 2004 be extended until the Court of Appeal has heard and determined the appeal lodged by the Plaintiff against the judgment of the Honourable Mr. Justice Scott delivered on the said 6th day of February 2004."

It is for breach of the original *ex parte* order of 6 February 2004 as extended by the Chief Justice on 25 March 2004 that the Appellant seeks to have the Respondents found guilty of contempt.

[5] The Appellant, subsequent to filing its Notice of Appeal, applied to have security for costs fixed on the appeal. Unfortunately the lawyer responsible for the matter had to leave the jurisdiction urgently because of a death in his family in England. The consequence was that there was no appearance for the Appellant on the application. Counsel for the Respondents applied in those circumstances to have the application struck out. A Deputy Registrar so ordered and the order was sealed and served the following day, 26 March 2004.

[6] Almost immediately the Respondents advised the Appellant's solicitors that in their view the appeal had been abandoned and that the extension of the injunction which the Chief Justice had ordered no longer applied. They proceeded to distribute from their trust account some $1.3m and only desisted when the Appellant's solicitors indicated that they would apply to reinstate the appeal and threatened contempt proceedings. Those proceedings were brought and were the subject of Singh J's judgment.

THE JUDGMENT IN THE HIGH COURT

[7] In a short but complete and well-constructed judgment Singh J held that in view of the conclusion reached by Ward P in a ruling handed down on 7 September 2004 – of which more later – the only conclusion he could reach was that there was no appeal on foot before the Court of Appeal at the time of the

Respondents' distributions from their trust account. At page 3 of his judgment the Judge said:

> "Hence the Order made by the Chief Justice automatically came to an end and Jamnadas & Associates were released from the obligation under the Order. There was no injunction binding on them when they dispersed the funds."

[8] The Judge also dealt with another issue concerning the absence of a penal notice in the papers served on the Respondents' clients. Again at page 3 of his judgment Singh J noted that Counsel for the Appellant conceded that the order served on the Respondents did not contain a penal notice. On that issue the Judge recorded:

> "Order 45, rule 6 (4) (a) requires an endorsement of an Order with a penal notice. The purpose of the penal notice is to direct the attention of the person ordered to the consequences of disobedience. Simply because the alleged contemnor is a barrister and solicitor does not mean that the requirement for a penal notice can be dispensed with. The rule applies without exception. Its omission is fatal as was held by Pathik J in Shalini Vasanti v. Sandhya Subhashni Prasad HBC 36 of 1999 and by Fatiaki J (as he then was) in Postulka v. Postulka 34 FLR 29."

On those two grounds the application was dismissed.

WAS THE APPEAL DEEMED TO BE ABANDONED?

[9] The Appellant initially sought to have the application for security for costs reinstated. By an administrative, rather than judicial process, the Registrar purported to reinstate. The Respondent challenged the reinstatement when the appeal came on for hearing before Ward P in chambers on 6 July 2004 resulting in the judgment referred to above.

The Learned President rehearsed the factual matrix quoting from the faxed letters which passed between the Appellant's solicitors and the Respondents on or about 26 March 2004. At page 3 of his ruling on page 105 of the case the Learned President said:

> "The Respondents now apply to the court to set aside this decision of the Registrar. ... They point out that the decision of the Registrar to strike out the application to fix security for costs was a sealed order and the Registrar had no power to set such an order aside and reinstate the application. The order striking out the application meant that no application to fix security for costs had been made in the prescribed time and by the provisions of rule 17 the appeal was deemed to be abandoned. The remedy was to file a fresh Notice of Appeal within 21 days as the Applicants themselves appear to have accepted in their letter of 26 March 2004 or apply to the court by Notice of Motion to have the order set aside under rule 10."

[10] The decision then goes on to outline the Appellant's contention (repeated before us) commencing at the foot on page 3 of the judgment and onto page 4 – 105-106 of the record:

> "The Appellant's case is that the only obligation on the Appellants under rule 17 is to apply to have security fixed, to pay in the time specified. The application is for the Registrar to fix the amount of security for costs and/or the payment of all such costs as the Registrar may order. It is only the failure to do that which will result in the Appeal being deemed to be abandoned. Rule 17 (1) (a) (ii) requires the Appellant to apply within seven days of service of the notice and they did so. No further procedure is prescribed under the Rules."

[11] It is convenient at this point to set out rule 17, subrules (1) and (2) of the Court of Appeal Rules followed by the wording of the order as to security sought by the Appellant.

17-(1) The Appellant must

(a) Within 7 days after service of the Notice of Appeal –

(i) File a copy endorsed with a certificate of the date the Notice was served and

(ii) Apply to the Registrar to fix the amount of the security to be given by the Appellant for the prosecution of the Appeal, and/or the payment of all such costs as may be ordered to be paid;

(b) Within such time as the Registrar directs being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs.

17-(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh Notice of Appeal may be filed before the expiration of:

(a) In the case of an appeal from an interlocutory order – 21 days; or

(b) ...

calculated from the date the appeal is deemed to be abandoned.

[12] Purporting to follow that rule the wording of the Notice of Motion for security for costs read as follows:

> "... for an order that the requirement as to the amount and nature of security for costs to be given by the said Appellant for the prosecution of the said appeal be dispensed with or alternatively be fixed for payment thereof and for an order that the Appellant do deposit with the Chief Registrar of the Fiji Court of Appeal a reasonable sum ..."

[13] Referring to the Appellant's contention that all it needed to do was file the notice within the 7 days, Ward P observed at page 4 of his judgment, page 106 of the record:

> "The practice, following filing of the application, is that the Registrar then sets a hearing date for the parties to make any representation they wish before the sum is fixed. The Respondents argue that hearing is part of the application. If the Applicant fails to appear and thus fails to provide the Registrar with the information he may require, they have not fully complied with the requirements of rule 17 (1). As the Registrar is then prevented from carrying out his function under the rule, the application has been frustrated and the Registrar has the right to strike it out."

And later at the foot of the same page the judgment reads:

> "The situation that resulted in the present case was that the order was sealed, and as the Respondents correctly state, such an order cannot simply be set aside by an administrative process as occurred here. The order struck out the application. Once that had happened, there was no application and there was a failure to comply with the provisions of rule 17(1). By subrule (2) the appeal must have been deemed to have been abandoned."

[14] The argument advanced by Mr. Kós for the Appellant in this Court was rather more sophisticated than that advanced at first instance. It is set out in paragraphs 5.2 to 5.6 of the initial written submissions of the Appellant. In 5.3, it is submitted that Ward P did not correctly construe rule 17 (1). First it is submitted that all the rule requires is the filing of a "competent application within the 7 days period prescribed." Secondly, that it is highly unlikely that a party could do more than file in the 7 day window. Thirdly, the fact the application was dismissed does not mean that it was "not made". Fourthly,

there is no logical need, in the absence of the Appellant, for the application to be dismissed. The Registrar could have fixed the security at the level and within the timeframe as seemed to him appropriate. Finally, Order 32, rule 5(4) dealing with dismissal for non-appearance enables a court, if thought just, to restore.

[15] So far as the first and second points are concerned, we consider they represent an unrealistic approach to rule 17(1)(a)(ii) and (b). The objective is to have security fixed and paid within a specified time. Merely filing and nothing more potentially resulting in a strike-out for non-appearance frustrates, as Ward P. pointed out, the whole purpose of the application. Removed from the facts of this case, the third and fourth points may have validity, but the application was struck out and in this case no proper application was made to reinstate.

[16] In our judgment, Ward P's construction is correct and we reject the above alternative approach.

[17] In paragraph 5.5 of the same submissions, it is argued that Ward P's remarks were obiter. There is substance in this submission, because the issue before the learned President was whether the purported restoration of the application for security by the Registrar was valid. It was held that it was not, because the Registrar had no jurisdiction to act as he did in that regard. But the ruling inevitably involved a consideration of whether there was an extant appeal in relation to which security could either be dispensed with or fixed. Be that as it may, our conclusion is that the appeal, as from 25 March 2004, was "deemed to be abandoned" pursuant to rule 17(2) of the Court of Appeal Rules.

[18] In any event, in paragraph 5 (6) which follows, the Appellant concedes that nothing turns on whether the observations of Ward P were obiter or not – the only issue being whether the injunction was discharged.

WAS THE EX PARTE ORDER PURSUANT TO THE EXTENSION ORDERED BY THE CHIEF JUSTICE ON 25 MARCH 2004 STILL IN EXISTENCE ONCE THE APPLICATION FOR SECURITY WAS STRUCK OUT?

[19] At the outset, we record two observations on the issue to be addressed in this portion of the judgment.

[20] First Mr. Kós explicitly acknowledged that if the Appellant's arguments did not persuade the Court that the original *ex parte* order remained in force as at 26 March 2004 the appeal must inevitably fail.

[21] Secondly, given the conclusion of Ward P, which we uphold, that the appeal referred to in the Chief Justice's order was "deemed abandoned" at the time the moneys were disbursed, there is an air of illogicality and unreality in the proposition that an injunction which depended upon the prosecution of that very appeal was still in place. And of course, as the record shows, a fresh appeal was filed on 5 August 2004 pursuant to leave granted by Ward P on 4 August 2004.

[22] The Appellant's initial submission in support of the proposition that the injunction survived, even if the appeal must be deemed to be abandoned, was set out in Part 6 of the original submissions. Those submissions however were expanded considerably in *viva voce* debate during the hearing and by supplementary written submissions filed on 16 February 2005.

[23] The initial submissions acknowledged that "the ordinary principle is that if an action is dismissed, an interlocutory injunction within it *ipso facto* is discharged also: Bennerhassett v. Scanion (1826) 1 Hog. 362." The distinction was made however that it was not the action that had been dismissed, but merely an interlocutory appeal against an earlier refusal to grant a Mareva injunction. Next, an attempt was made to argue that, because under the Rules the application could (if the right procedure was followed – which was not the case here) be reinstated and a second appeal launched, the injunction could not be treated as discharged. It was submitted that the proper course was for the

Respondents to apply to the court. It was said "until the High Court itself dissolved its injunction, the injunction continued in effect, as there remained an appeal to be heard and determined against Scott J's judgment". The last part of that statement is, in our judgment, as explained above, factually incorrect and no authority was cited at that state to support the first part of the proposition. The argument advanced orally and in supplementary submissions however was rather different.

[24] First, counsel helpfully pointed out that the position of a non-party is different from that of a party or parties to whom the injunction is expressly directed. Here of course it was the Respondent's clients who were enjoined, but it was not disputed that the Respondents themselves were well aware of the existence of the original order and its terms.

[25] In those circumstances, it was submitted that the Respondents had the necessary intent- demonstrated by their actions – to subvert the effect of the order as extended by the Chief Justice.

[26] Counsel cited in support a portion of the speech of Lord Oliver in Attorney General v. The Times Newspapers Limited [1991] 2 All ER 398 at page 415, lines b and c where the judgment reads:

> "When however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a willful interference with the administration of justice by the court in the proceedings in which the order is made. Here the liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede

the administration of justice – an intention which can of course be inferred from the circumstances."

[27] We have no difficulty in accepting the principle enunciated in the above passage, but *The Times* newspaper case was fundamentally different from that before us. There, incontrovertibly, the Court's order was still in full force and the newspaper knew it. Attorney-General v. Punch & Anor [2003] 1 All ER 289 was also relied upon and is similarly informative, but in our judgment, distinguishable. There, *Punch* magazine with full knowledge of an injunction prohibiting the publication of the memoirs of a former member of the SAS nonetheless published an article relating to the member's experiences and was held guilty of contempt. Again, this was a contempt of an order undoubtedly still in full force and effect. The leading judgment in that case was delivered by Lord Nicholls, who at page 299 between lines d and g said:

> "If the Court orders that pending the trial the defendant shall not do certain acts the Court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the Court's determination on what interim protection is needed and is appropriate. Third parties are required to respect this determination as expressed in the Court's order ... third parties are in contempt of Court if they willfully interfere with the administration of justice by thwarting the achievement of its purpose in those proceedings.
>
> This is so, even if in the particular case, the injunction is drawn in seemingly wide terms. The remedy of the third party whose conduct is affected by the Order is to apply to the Court for the Order to be varied. Furthermore, there will be no contempt unless the act ordered has some significant and adverse effect on the administration of justice in the proceedings. This tempers the rigour of the principle".

[28] On the basis of those authorities it was contended it was not for the Respondents to decide whether or not the injunction fell with the appeal. What they should have done was apply to the court for clarification. As already pointed out, that course, however prudent and proper, was adumbrated in the *Punch* magazine case in circumstances where there was "without a doubt an injunction in place and known to be."

[29] A further case much relied upon was Isaacs v. Robertson [1984] 3 All ER 140 an appeal to the Privy Council from the Court of Appeal of St. Vincent and the Grenadines. In that case Respondent had sought an injunction to present Isaacs trespassing on his land. The application came before a Judge in Chambers in September 1977 and was adjourned to a date to be fixed. Thereafter no steps were taken until May 1979 when the case was brought on for hearing and an order granted. The terms of the order having been conveyed to Isaacs, he ignored them. As a consequence, committal proceedings for contempt were brought but dismissed. An appeal against that order was not heard until April 1981 and was successful, but there was no committal or other penalty. At page 141 between lines h and j the judgment of the Privy Council delivered by Lord Diplock recorded:

> "The appeal was allowed; the Appellant was found to be in contempt of the court for disobeying the interlocutory injunction of 31 May 1979 : no penalty by way of fine or imprisonment was inflicted because the Court of Appeal held that he would have been entitled to succeed in an application to have the injunction set aside if he had made such an application."

[30] The reason for this was a Rule of Court (Order 34, r 11(1)(a)), peculiar to the St Vincent jurisdiction, which provided inter alia that "A cause or matter shall be deemed to be altogether abandoned and incapable of being revived if ... any party has failed to take any proceeding or file any documents within one year of the last proceeding..."

[31] At page 142 between lines b and g the judgment reads:

> "The main attack by the Appellant on the Court of Appeal's judgment was based on the contention that as a consequence of the operation of Order 34, r 11(1)(a) of the Rules of the Supreme Court of St. Vincent, the Order made by the High Court granting the interlocutory injunction on 31 May 1979 was a nullity; so disobedience to it could not constitute a contempt of court. Glasgow J accepted this contention; the Court of Appeal rejected it, in their Lordships' view correctly, on the short and well-established ground that an order made by a court of unlimited jurisdiction such as the High Court of St Vincent, must be obeyed unless and until it is set aside by the court. For this proposition [the Court of Appeal relies upon a passage in] the judgment of Romer LJ in Hadkinson v. Hadkinson [1952] All ER 567 at 569: 'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void ...'. This in their Lordships' view is all that needs to be said on the topic. It is in itself sufficient reason for dismissing the appeal."

[32] The issue of void and voidable orders was also discussed in the judgment but at page 143 at line f it was said:

> "The contrasting legal concepts of voidness and voidability form part of the English law of contracts. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular.

> If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."

[33] This case is closer to the circumstances faced by us in this case. It supports the proposition that in respect of an irregular order a party affected should apply for its discharge and must obey it until it is discharged.

[34] But here the issue is not "regular" or "irregular". A regular order was made which in our judgment applied specifically to and drew its life and effect from an existing appeal. Once that appeal was deemed to be abandoned the regular order went with it. There was thereafter no irregular order which could still bind a respondent. Mr. Kós drew the attention of the Court to the decision of this Court delivered on 4 March 2005 in Civil Appeal No. ABU 0049 of 2004S BDO Spicers v. Lako Mai Island Resort Ltd & Ors (Ward P, Barker and Kapi JJA). That was an appeal against Scott J's decision refusing the initial Mareva injunction. It was of course the subsequent appeal launched in August 2004 pursuant to leave granted to appeal out of time. In the judgment at paragraph 4 the Court stated:

> "There was some debate before this Court over whether a fresh Notice of Appeal had been filed in time under r 17(2). In the event, Ward P, in Chambers, on the application of the Appellant, later ruled that the appeal could proceed. There was also an order made by the Chief Justice in the High Court on 5 March 2004 extending a holding injunction against disbursement of the funds, issued by Scott J on 6th February 2004. The injunction is to last until the determination of this appeal."

[35] With respect, the last sentence of that paragraph is obiter and inaccurate. The Chief Justice's order of 5 March 2004 related to the appeal that had been

launched on 2 March 2004, which was later deemed abandoned. It did not apply to the possibly out-of-time second appeal which was filed five months later, on 5 August 2004.

[36] Despite Mr. Kós's attractive argument, he has failed to persuade us that the burden resting on the Appellant to show that the decision of Singh J should be overturned has been discharged. Essentially we do not accept that the injunction survived the abandonment of the appeal filed on 2 March 2004 referred to in the Chief Justice's order. There was therefore no *actus reus*.

[37] That conclusion is fatal to the appeal. That being so we do not need to venture into the issue of *mens rea* and the standard of proof. Nor do we need to consider whether the original notice was so defective (because of the absence of a penal clause) as against the third party Respondents that the application to commit for contempt should fail anyway.

[38] The above conclusion is confirmed by our own researches.

[39] First, we refer to the New Zealand Court of Appeal case Hermans v. Hermans [1961] NZLR 390. This is a decision of a highly respected Bench (Gresson P, North J and Clearly J), concerning failure to comply with r 34 of the New Zealand Court of Appeal Rules 1955, which provided in express terms that if security on appeal is not given "the notice of motion of appeal shall be deemed to be abandoned ...". Having set out the circumstances (security had been ordered, payable within 14 days but paid long after time had expired), the Court quoted r 34 and said at page 393:

> "We think this wording is intractable, and that once a notice is deemed to be abandoned there is nothing before the Court which can be 'amended or otherwise dealt with' under r 69. Rule 34 itself declares that the consequence of non-compliance is abandonment of the appeal, and recognizes that the only remedy

then available is the giving of a fresh notice (of Appeal) if the time for appealing has not expired. [Counsel] referred to the course taken by the Court in M v. M [1958] NZLR 431, where r 69 was invoked to overcome a failure to serve a respondent within a prescribed time. In that case, however, the non-compliance with the rules did not entail the consequence which r 34 imposes – namely, that the appeal shall be deemed to be abandoned. We are unable to see how any application of r 69 can enable the Court to disregard the imperative terms of r 34".

[40] Hermans (supra) was followed by Tompkins J in Paterson v. Goodrick [1965] NZLR 177. There a Notice of Appeal had been given in time but security was lodged out of time. The issue in that case was whether the provisions of r 34(1) of the Court of Appeal Rules required the application to the Court of Appeal, to "otherwise direct", had to be made within the 14 days provided in subclause 1. His Honour answered that question in the affirmative. At page 179, line 42 he said "In my opinion once the appeal is 'deemed to be abandoned' under r 34 (2) there is no power to revive it by an order extending the time for lodging security under r 34(1)". To the same effect is the decision in Robert Jones Investments Limited v. Gardner [1994] 3 NZLR 241.

[41] In the High Court of New Zealand there have also been several cases dealing with security for costs on appeal from the District Court. The relevant provisions of the District Court rule read:

> "(3) If no such security as is required under the last preceding subsection is given within seven days of service of the Notice of Appeal, or within such further time as in special cases the Registrar of the Court appealed from may permit, that Registrar shall notify the Registrar of the High Court of the failure, and the Notice of Appeal shall be deemed to be abandoned".

[42] Those cases in the High Court are summarized in the unreported judgment of Hammond J in Gordon v. Registrar, (1994) 8 PRNZ 27. Commencing at page 5 of the judgment Hammond J discussed the case as follows:

> "In Harmos v. Laubert unreported, 1 November 1982, HC Auckland MC 626/82, Holland J was faced with an application for an extension of time to bring an appeal from a final judgment in the District Court. The appellant had timeously filed his notice of motion on appeal, and served it. But his solicitors had overlooked providing security for costs within 7 days of the service of the notice of appeal. The appellant applied to the Registrar of the District Court for an extension of time for giving security. That application was refused. The appellant subsequently applied twice to different District Court Judges to vary or rescind the Registrar's decision. Both District Court Judges refused to interfere. The appellant therefore applied to the High Court for an extension of time for giving a notice of appeal. It was apparently common ground that that application was within time.
>
> Counsel for the respondents in that case argued inter alia that the notice of appeal was still alive. At p. 3, Holland J said:
>
> > 'Mr. Williams submits first that there is a valid notice of appeal and that although security has not been provided, the abandonment provisions of subs (3) do not apply because the Registrar of the District Court has not notified the Registrar of this Court of the failure to provide security. I reject that submission. The appeal was deemed to be abandoned when the seven day period expired. It was capable of being revived by an extension of time for giving security by the Registrar but such resuscitative attempts failed. Although the District Court Registrar was under a statutory duty to

> advise this Court, his failure to do so cannot refloat an appeal which has already drowned.'

It will be noted that Holland J's judgment rests on a view that the appeal 'dies' if security is not properly given, regardless of whether the District Court Registrar gives notice to the High Court Registrar or not.

[43] Penlington J referred to Holland J's judgment in Rotorua District Council v. Shuter unreported, 24 August 1992, HC Rotorua AP44/91. His Honour said:

> 'Holland J has determined that the failure of the Registrar to carry out his statutory duty to advise the Registrar of the High Court of the appellant's failure to find security for costs cannot affect the abandonment of the appeal. Once the seven days has passed and the security for costs has not been found, the appeal is no longer. It is immaterial therefore whether the Registrar of the District Court advises the Registrar of the High Court as to the appellant's failure. Whether the Registrar of the District Court carries out his statutory duty, cannot put life back into the appeal. This construction accords with common sense. In my view it would be quite unjust to a respondent if the question of whether the appeal he is facing depends on the efficiency or inefficiency as the case may be, of the Registrar of the District Court from which the appeal is brought.'

Penlington J expressly said that he agreed with Holland J's construction of s 73(3).

[44] In King v. Barker unreported, 17 December 1990, HC Auckland M171/89, Thomas J also had to deal with an application to the Court for enlargement of the time for the giving of security. A notice of appeal had been given within the prescribed time. The appellant applied for legal aid at the time of lodging the

appeal. He assumed that such legal aid had been granted, or at least had no cause to believe that legal aid had not been granted.

At page 3 of his decision Thomas J said:

> 'The time limits for the bringing of an appeal and fixing of the security are specified in s 73 and are, as I apprehend the thrust of the various decisions in this area, regarded as being mandatory in the absence of any provisions enabling the Court to grant special leave.'

[45] We have also given further consideration to the characteristics unique to a Mareva injunction. The original purpose of such injunctions was to prevent defendants from removing from the jurisdiction or dissipating assets which might otherwise be available to satisfy the judgment of the court (see Mareva Compania Naviera SA v. International Bulk Carriers SA [1980] 1 All ER 213, 215 and Iraqi Ministry of Defence v. Arcepey Shipping Co. SA [1981] QB 65, 72).

[46] So a Mareva Injunction ensures that the defendant can meet his future legal obligations. Lord Mustill put it this way for the Judicial Committee of the Privy Council in Mercedes Benz AG v. Leiduck [1996] AC 284 in his judgment at p. 302 where he said a Mareva injunction:

> "decides no rights, and calls into existence no process by which the rights will be decided. The decision will take place in the framework of a distinct procedure, the outcome and course of which will be quite unaffected by whether or not Mareva relief has been granted. Again, if the application succeeds the relief granted bears no resemblance to an orthodox interlocutory injunction, which in a provisional and temporary way does seek to enforce rights, or to the kind of interim procedural measure which aims to make more effective the conduct of the action or matter in which the substantive rights of the plaintiff are ascertained. Nor does the

> Mareva injunction enforce the plaintiff's rights even when a judgment has ascertained that they exist, for it merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work".

[47] In this case the original ex parte Mareva injunction, extended by the Chief Justice, was to be in place until the Court of Appeal heard and determined the appeal which at that time the Appellant had lodged. Since the purpose of the injunction was merely to ensure that there were assets upon which the Court could effect judgment should it be given, it follows that once the appeal in respect of which the Mareva was granted "die(d)" (to use Holland J's expression) the Mareva injunction "die(d) with it" because the purpose for which it had been imposed no longer existed.

CRITICISM OF THE RESPONDENTS' CONDUCT

[48] There has been, in submissions and other rulings in this matter, criticism of the unseemly haste employed by the Respondents in dispersing the monies on minimal notice to the Appellant's solicitors. We do not disagree with it. But these are quasi criminal proceedings requiring proof beyond reasonable doubt of an intention to subvert the intention of a court order. The unbecoming conduct referred to does not satisfy the high standard required. It can however in our judgment affect the issue of costs.

DECISION

The appeal is dismissed. There will be no order as to costs.

Smellie, JA

Penlington, JA

Scott, JA

FIJI COURT OF APPEAL

Solicitors:

Munro Leys, Suva for the Appellant
Messrs R. Patel and Company, Suva for the Respondent

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