IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU121 OF 2005
(High Court Civil Action No. HBC 107 of 2002)

BETWEEN	:	**SURYA DEEP SINGH**	*Appellant*
AND	:	**PRADEEP SINGH**	*Respondent*

Coram : John E. Byrne - Justice of Appeal
D. Pathik - Justice of Appeal
I. Mataitoga - Justice of Appeal

Counsels : Ms A. Watkins for the Appellant
A. Patel & C. Harrison for the Respondent

Dates of Hearing: 28th, 29th August 2007
Date of Judgment: 22nd October 2007

JUDGMENT OF THE COURT

Practice and Procedure; Res Judicata, issue estoppel; whether Judgment of County Court of Victoria finally determinative of High Court Action in Fiji.

---

[1] As a general rule a party should not be allowed to litigate issues which have already been decided by a Court of competent jurisdiction. Also, where a matter

becomes the subject of litigation, parties to that litigation should bring forward the whole of their cases. This is because it is desirable that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all. This has become known as the rule in **Henderson v. Henderson** (1843) 3 Hare 100. The policy that underlies that rule is based on the considerations that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do.

[2] The question which arises in this appeal is whether a judgment of the County Court of Victoria between the same parties but in which the Appellant was defendant and the Respondent, plaintiff was finally determinative of issues raised in the High Court of Fiji in Civil Action No. HBC 107 of 2002 in which the Appellant was plaintiff and the Respondent defendant.

[3] On the 16th of December 2005 Finnigan J. gave what he termed a Final Ruling in which he struck out the Appellant's Fifth Amended Statement of Claim and, with it, the Appellant's action. His reason for taking this course was because he held that the fundamental fact upon which the Appellant relied in the High Court had

already been decided against him by the County Court of Victoria, Australia, in proceedings between himself and the Respondent. The Appellant now seeks leave to appeal against that Final Ruling.

[4] To strike out any pleadings is a very drastic action which a court should take only in a clear case or as Megarry V. C. said in **Gleeson v. J. Wippell and Co. Ltd.** 1977 3 ALL ER 54 at p.62(g):

> ***"In plain and obvious cases that are clear beyond doubt".***

Finnigan J. considered that this was such a case.

[5] The basis for the application by the Respondent to the High Court was a claim that the Appellant's claim arose out of an assertion that the Appellant and Respondent were both 50% shareholders in a company called Integer Computing (Fiji) Limited and that the issue of shareholding in Integer had already been litigated and determined in proceedings before the County Court at Melbourne in Victoria and that the Fiji proceedings were an abuse of process as the issues had already been determined.

[6] The Writ of Summons in the High Court was issued on the 28th of March 2002. In the proceedings in the County Court of Victoria which were issued on the 8th of April 2003 the Respondent sought declarations as to the beneficial ownership of a land and house situated thereon in a suburb of Melbourne.

[7] The trial began before Judge Howie in the County Court on the 19th of May 2005 and extended over twelve sitting days from the 19th to the 27th of May and from the 11th to the 15th of July 2005. Judgment for the present Respondent was given on the 9th of September. It is pertinent for the purpose of this appeal to quote the first two paragraphs of the Judgment of Judge Howie:

1. ***"In this proceeding the Plaintiff seeks a declaration that the Defendants hold the land described in Certificate of Title Volume 8179 Folio 830 and known as 63 Gallipoli Parade, Pascoe Vale South on trust for him in proportion to his contribution to the purchase price. He alleges that pursuant to an oral agreement made with the defendants, they agreed that they would hold the land on trust for him and for the first Defendant and their***

mother Mrs Singh, in proportion to their respective contributions towards the purchase of the land. He claims further that pursuant to the agreement he contributed a sum of money, which he alleges was $180, 860.75, to purchase the land, and that by reason of the agreement and the contribution made by him the defendants hold the land in trust for him in proportion to his contribution to the purchase price, which he alleges was 50.75%. The Plaintiff alleges that the trust was an express trust, or a resulting, implied or constructive trust.

2. *The defendants deny the Plaintiff's claim. Their position is most conveniently explained by reference to the summary given by their counsel, Mr Salpic, in his written outline of closing submissions and by reference to his submissions. The defendants' position is as follows:*

   (1) They deny the plaintiff's claim. They deny the agreement as alleged by the

plaintiff, and say that prior to the purchase of the land it was agreed between the three of them and Mrs Singh that the Defendants would purchase the land and become the legal and beneficial owners of it.

(2) If they entered into an agreement giving rise to an express trust, then:

(i) such an agreement is unenforceable in that there is no note or memorandum in writing signed by the defendants recording the terms of the agreement and acknowledging the existence of the agreement as required by S126 of the Instruments Act 1958 and/or S53(1)(a) of the Property Law Act 1958;

(ii) Such an agreement is unenforceable in that there is no writing manifesting and proving the agreement signed by the defendants as required by S53(1)(b) of the Property Law Act.

(3) All moneys to purchase the land were provided by Mrs Birmati Singh and the first defendant. The first defendant had a 50% entitlement to moneys held in a bank account by Integer Computing (Fiji) Ltd. ("Integer Fiji") with the Hong Kong and Shanghai Banking Corporation in Hong Kong from which the sum of $149,995 was transferred in March 1988".

[8] **The Proceedings in the High Court**

In these proceedings the Appellant seeks to recover from the Respondent half of a sum of money said to have been taken by the Respondent. The Respondent claimed that the foundation of the Appellant's claim is a pleading in the Statement of Claim that the Appellant and the Respondent were 50/50 shareholders in a limited liability company and thus the Appellant was a 50/50 owner of funds banked by the company. The Respondent claimed that this fundamental claim arose for decision in proceedings brought by the Appellant in the County Court of Victoria and was decided in favour of the Respondent. The Judgment of the County Court rejected the Appellant's claim to a 50/50 shareholding in the company. The Respondent therefore claims that the issue has been litigated and cannot be tried again. He submits that with the rejection of that claim the whole of the Appellant's present claims collapses and within the terms of High Court Rule O.18 r18 should be struck out. In doing so it is submitted the learned Judge of the High Court was correct. To decide whether this is so requires a consideration of the relevant parts of the Statement of Claim in the High Court and then in the County Court. The latter are summarized by Judge Howie and we set them out later in this Judgment.

The High Court

(1) The Plaintiff then in May 1986 at the defendant's request resigned his teaching position and became an equal partner/equal shareholder/ director of Integer Computing (Fiji) Limited as promised by the Defendant.

(2) That in or about May 1986 the plaintiff was admitted, accepted and made an equal partner/shareholder with the defendant in Integer Computing (Fiji) Limited. Initially each of the Plaintiff and the Defendant had 45% shares but shortly it was increased to 50% each.

(3) That as from May 1986 the plaintiff discharged his duties and functions as partner/shareholder and Director of Integer Computing (Fiji) Limited. The plaintiff had all the power and authorities equal and or same as the defendant in respect of all transaction

dealings and or matters relating to and or connected with Integer Computing (Fiji) Limited.

(4) That money was firstly deposited in the bank account of Integer Computing (Fiji) Limited with Hong Kong Shanghai Banking Corporation Limited and later transferred into the personal joint accounts of plaintiff and the defendant with the Banks aforementioned. The funds so deposited in the joint Bank accounts of plaintiff and defendant belonged to plaintiff and defendant in equal shares.

[9] The Appellant and the Respondent are brothers. In 2003 the Respondent commenced proceedings in the County Court at Melbourne against the Appellant and a third person who is another brother. In that action the Respondent sought a declaration that he was part owner of a residential property in Melbourne, which was registered in the names of the Appellant and the other brother. The Appellant and his brother defended that action on the footing that they had each provided about

half of the purchase price from their own funds and had become the legal and beneficial owners of the land. The Appellant gave evidence in support of his defence in the trial. The relevant parts of the Appellant's Further Amended Defence are:

(d) **"As to the balance of the purchase price, namely the amount of $180,860.75, this amount was paid by the first defendant (Surya) on or about 3 September 1990 to S & Z (solicitors for the vendors) on behalf of the vendor of the land:**

Particulars

(i) **In or about the late 1987/early 1988 the first defendant (Surya) applied to migrate to Australia.**

(ii) **It was a condition of the first defendant (Surya) obtaining a visa to migrate to Australia that he transfer to Australia the sum of at least $184,000.00 ("the condition").**

(iii) In order to satisfy the condition in or about early 1988 the first defendant requested ("the request") the plaintiff (Pradeep) to transfer moneys, in the amount of $150,000 from the first defendant's (Surya's) share of moneys held in a bank account by Integer Computing (Fiji) Limited ("Integer Fiji") with the Hong Kong and Shanghai Banking Corporation ("HSBC") in Hong Kong ("the Hong Kong account") to a passbook account held with the Australian and New Zealand Banking Group ("ANZ"), Nicholson Street Branch bearing number 788807175 ("the ANZ passbook account").

(iv) The plaintiff (Pradeep Singh) transferred the amount of $150,000.00 less a bank fee of $5.00 making a net transfer of $149,995.00 ("the transferred

amount") pursuant to the request from the Hong Kong account.

(v) The plaintiff and the first defendant were, inter alia, signatories on the account held by Integer Fiji with HSBC in Hong Kong.

(vi) The first defendant had a 50% entitlement to the moneys held in Hong Kong in the name of Integer Fiji".

[10] <u>The Grounds of Appeal</u>

Three grounds of Appeal were argued before us but most attention was directed by the Appellant to ground (1) which reads as follows:

> **"That the learned Judge was wrong in ordering that the plaintiff's Statement of Claim be struck out, and action dismissed on the basis of decision made by County Court of Victoria <u>BECAUSE</u> in the action heard by County Court in**

Victoria the Appellant and his brother had a counterclaim in respect of moneys deposited in the name of (Integer Computing (Fiji) Limited) whereas the civil action before the High Court in Fiji being Civil Action No. 107 of 2002 is in respect of moneys deposited in the joint personal names of the Appellant and the Respondent and apparently different cause of action. The holdings of the learned Judge could not be upheld".

[11] It is submitted by the Appellant that the learned Judge in the High Court first did not appreciate the differences in the fundamental issues in the Victorian proceedings and the Fiji proceedings. The Victorian proceedings were brought by the present Respondent against the Appellant and their other brother, seeking a declaration that the Respondent had a beneficial interest in a residential property and a counter-claim alleging inter alia, that the funds transferred from an account of ***"Integer Computing (Fiji) Limited"*** at approximately the same time as the purchase of the land in question to an account in the ANZ Bank in Melbourne in the name of the Appellant were beneficially his. But on the other hand it is said, the Fiji proceedings are in relation to

whether the Appellant has a beneficial interest in four offshore bank accounts held in the joint names of the Appellant and the Respondent, these accounts having been opened after the ceasing of operation of Integer in 1993.

[12] It is then submitted that the learned Judge did not consider that the basis for the Appellant's claim in Fiji does not depend upon an assertion that he is entitled to a 50% shareholding in Integer and that paragraphs 3,4,5 & 9 of the Statement of Claim in the High Court are merely a background to the Appellant's beliefs but do not form the basis for his claim. That is to be found in paragraphs 14,15 & 16 of the Amended Statement of Claim dated the 1st of July 2005. We quote those paragraphs here:

"14.1 That up to the year 2000 the defendant displayed a very compassionate relationship of being the elder brother and a senior member of the family, a Trustee of the Estate of Jaswant Singh (the father of the plaintiff and the defendant), a man of fifty-five years of age, not being married and was regarded by the entire family as man upon whom the whole family could

rely on. Subsequent to this period, the defendant established a relationship with a lady, had a child out of that relationship and took upon himself to distant himself from his immediate family and drifted towards his new found family to the detriment of his blood relations. Thereafter the defendant between February 2000 and November 2000 without knowledge or consent of the plaintiff acted furtively and or discreetly and dishonestly:

(a) Caused the joint personal accounts closed.

(b) Caused funds transferred to his personal name.

(c) Thereafter siphoned and or dealt with funds alone and unknown to plaintiff.

(d) The defendant improperly took advantage of authority to each of the Banks.

14.2 That the Defendant had $USA4 million transferred wrongfully and in breach of

agreement with plaintiff from the joint accounts of plaintiff and the defendant to his personal name of $USA4, $USA2 million dollars belonged to and or the plaintiff was lawfully entitled to $USA2 million dollars. The plaintiff was and is entitled to $USA2 million dollars and interest accrued thereon.

14.3 That the defendant in having the plaintiff's share of $USA2 million transferred to his personal account has wrongfully converted the plaintiff's money to his own use and or deprived the plaintiff of his entitlement to $USA2 million dollars and interest. The plaintiff has suffered loss and damages.

14.4 That because funds deposited in the joint names of plaintiff and the defendant in the Banks accounts were held in the joint names of both with the Banks aforementioned and the funds so deposited belonged to each in equal shares but either the plaintiff or the defendant had unrestricted authority with each of the Banks to (inter alia) withdraw the funds, each became trustee to the other in respect of the power and or funds of the

other. The defendant in breach of the trust withdrew all moneys including plaintiff's shares and failed to pay and or account to the plaintiff of the plaintiff's shares namely $USD2 million and interest.

14.5 The defendant wrongfully and or unlawfully withdrew the total funds in breach of agreement and or arrangements with the plaintiff and or in breach of the trust and confidence reposed in him which includes plaintiff's property and or money amounting to $USD2 million and interest but failed to pay or account to the plaintiff of the plaintiff's shares. The defendant has wrongfully and or unlawfully converted to his own use plaintiff's moneys and or property amounting to $USD2 million and interest, and has deprived the plaintiff of it. The Plaintiff has suffered loss and damages.

15. Alternatively funds earned by effort of the plaintiff and the defendant were eventually deposited in the joint Bank accounts of the plaintiff and the defendant in the names of the plaintiff and the defendant. The funds

belonged to the plaintiff and the defendant in equal shares and or the plaintiff and the defendant each was entitled to 50% of it. The defendant having furtively withdrawn the entire funds and has failed or refused to pay the plaintiff's share of it which amounts to $USD2 million and interest. The defendant unjustly retains $USD2 million and accrued interest which is the property of and or belong to the plaintiff. The defendant is under express duty and or implied obligation to make restitution of plaintiff's share. The plaintiff will invoke an implied term to efficacy and or presumed intention of the parties and or inferred promise on the part of the defendant to pay plaintiffs share having regard to all acts facts and circumstances based on facts briefly set out herein.

16. *The plaintiff repeats the foregoing and says that the defendant is liable to pay to plaintiff $USA2 million dollars and interest as plaintiff's fund converted to defendant's own use and or as moneys had and received by the defendant to the use of the plaintiff.*

> ***Alternatively the plaintiff claims $USA2 million and accrued interest from the defendant as unjust enrichment made by the defendant at the expense of the plaintiff".***

[13] It is then submitted that the learned Judge wrongly concluded that the Appellant's current claim is founded on the same grounds as his defence in the Victorian proceedings. The learned Judge held himself unable to find that the Appellant had a novel issue of fact, which should go to trial. The numerous paragraphs of the defence may be summarised as follows:

> ***The Appellant denied the Respondent's claim. He and his brother denied the agreement as alleged by the Respondent, and said that prior to the purchase of the land it was agreed between them and their mother Mrs Singh that the Appellants would purchase the land and become the legal and beneficial owners of it.***

[14] If they entered into an agreement giving rise to an express trust, then:

(i) Such an agreement was unforceable in that there was no note or memorandum in writing signed by the Appellants recording the terms of the agreement and acknowledging the existence of the agreement as required by the Instrument Act 1958 and/or the Property Law Act 1958 of Victoria.

[15] Other alternative claims are made but these relate to the land in Victoria and do not concern us here.

[16] The Appellant states that it was open to His Lordship to order under Order 18 Rule 18 that part of the Statement of Claim be struck out such as any reference to the Appellant being a part shareholder in Integer Computing (Fiji) Limited. This is true but in fairness to the Judge, Mr Shankar who then appeared for the Appellant did not suggest any such course to him. This however is no reason why this Court should not give leave to the Appellant to amend his Statement of Claim if we consider it desirable in the interests of justice. Lastly, on this question, Ms Watkins submits that the learned Judge did not even consider the claim in relation to the four bank accounts held in the joint names of the Appellant and Respondent. It is also very relevant to

note in our view that the prayers for relief in the Appellant's Statement of Claim are a clear indication that no order is being sought in relation to the shareholding of Integer or a right to the funds in Integer's accounts. It is also significant in our judgment that His Lordship made no comment on annexures P1 and P2 to the Appellant's affidavit in opposition. P1 is a document entitled Verification of the Beneficial Owner's identity prepared by the Clariden Bank in Singapore. This lists the contracting partners as Pradeep Singh and/or Surya Deep Singh. Their account number in the bank and then, the following words:

> **"The undersigned hereby declares:**
>
> > **That the contracting partner is the beneficial owner of the assets deposited with the bank".**

Then there is an undertaking in the following terms:

> **"The contracting partner undertakes to inform the bank immediately of any changes".**

The document is dated the 10th of August 1999 and is signed by both the Appellant and the Respondent.

[17] P2 is a copy letter dated the 22nd of January 2002 to the Appellant in 63 Gallipoli Parade, Pascoe Vale South, Victoria, Australia, that address being the house on land bought for the parties' mother. The relevant part of the letter is the second paragraph which reads:

> ***"According to the account mandate for the above joint account, any of the account holders can operate the joint account. On 28 April 2000 and upon the instructions of Mr Pradeep Singh, all the funds in the account were withdrawn and the account was closed on the same day. I understand that you wish to seek legal advice from the bank's in-house counsel in respect of the foregoing transactions as they were said to be done by Mr Pradeep Singh without your knowledge. I regret to advise that the bank's in-house counsel is not authorised to advise external parties. As such, I would suggest that you contact***

your own lawyers if you wish to know your legal position in the matter".

[18] **The Issues before Judge Howie in the Victorian Proceedings**

In a very comprehensive judgment of some 31 pages Judge Howie made a number of comments which in our view demonstrate that the Victorian proceedings are dealing with substantially different issues, these being:

- **Whether the Respondent had a beneficial interest in a residential property pursuant to a monetary contribution to its purchase using the funds from an Integer account.**

- **Whether the funds in the Integer account were beneficially the Respondent's and if the transfer to the ANZ Bank account of the Appellant was considered merely an advance to assist the appellant migrate to Australia and not a payment to him pursuant to a shareholding.**

- **Whether the Appellant was a shareholder of Integer and therefore only half of the funds in the Integer account are beneficially those of the Respondent.**

- **The Judge refers briefly to the evidence of joint bank accounts and states at page 104 of the record after mentioning that the parties conducted some financial activities together.**

[19] **The Respondent's Reply**

The Respondent's answer to the Appellant's submissions is straight-forward. He says that Judge Howie in the County Court rejected the Appellant's evidence that there was an oral agreement between him and the Respondent that the Respondent would transfer to him half of his shares in Integer Fiji. It follows therefore, according to the Respondent, that since the moneys in the joint accounts are and were always belonging to Integer the Appellant has no claim to 50% of those moneys. It was submitted to Finnigan J. by the Respondent that the cause of action in each of the Victorian and Fijian proceedings is not identical and thus

no cause of action estoppel arises. However it was submitted both before the High Court and by Mr Harrison in this Court that there has been prior adjudication between the same parties by a Court of competent jurisdiction on the same issues giving rise to an issue estoppel.

[20] Halsbury's Laws of England Volume 16(2) para 980 gives this meaning to the term:

> ***"Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies. Issue estoppel will only arise where it is the same issue which a party is seeking to re-litigate. This principle applies whether the point involved in the earlier decision, and***

> ***as to which the parties are estopped, is one of fact or law, or one of mixed fact and law".***

[21] The principle applies to a former proceeding between the parties in a foreign Court - **Carl Zeiss Stiftung v. Reyner & Keeler** (3)(1970) Ch. 506 at 546 per Buckley J. The problem we see with the Respondent's argument here is that the issue of the joint bank accounts was never directly put in issue in the Victorian proceedings, nor was the entitlement to the funds in those bank accounts **"solemnly and with certainty determined against him".** In **Stephenson v. Garnett** (1898) 1QB 677 at 680-681 A.L. Smith LJ stated:

> ***"The Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent jurisdiction".***

We have emphasised the words **"identical question"** because we are not satisfied that the identical question

in the High Court was decided in the Victorian proceedings.

[22] Before an issue estoppel can arise, the issue must have been both clearly identified and clearly resolved against the party said to be estopped - **Joseph Lynch Land Company Limited v. Lynch** (1995) 1 NZLR 37 at p44. In our judgment the fact that the four bank accounts were opened at different times after Integer ceased operation raises the question as to who was entitled to the money in those accounts. As the Victorian proceedings show, after Integer ceased operations in 1993 before these accounts were opened, the parties engaged in other financial activities that would undoubtedly have earned funds. The Appellant claims an entitlement to one half of those funds. There is nothing in the evidence to suggest that the entirety of the funds in these accounts was from the past profits of Integer. The cause of action is essentially that the Respondent without the knowledge or consent of the Appellant transferred funds earned by both of them from accounts in their joint names to his own personal account, wrongfully converted the money to his own use and was thus unjustly enriched.

[23] It is always prudent in cases where some injustice is claimed to remember the words of Megarry J. in **John v. Rees** (1970) 1Ch. 345 at p402:

> ***"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change".***

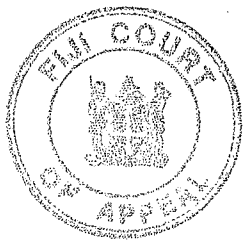
[24] In our judgment this was not a case where it was a clear and obvious abuse of process warranting the Court to use its discretion to order that the Appellant's claim be struck out. For the reasons we have given we hold that there are two distinctly different issues between the Fiji proceedings and the Victorian proceedings and there will not be a re-litigation of issues raised and determined in the Victorian proceedings. Accordingly we grant the appeal and order that the case be re-instituted in the High Court and an order given in that Court to amend the Statement of Claim so as to delete

any reference to the Appellant's entitlement to a shareholding in Integer.

[25] The orders of the Court are that the appeal is upheld and the Respondent must pay the Appellant's costs of $1,000.00.

.....

Byrne J A



.....

Pathik J A

.....

Mataitoga J A

At Suva

22nd October 2007