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

CIVIL APPEAL NO. ABU0105 OF 2005S
(High Court Civil Action No. HBC 0370 of 2000L)

BETWEEN:

SOUTH PACIFIC ADADEMY OF BEAUTY THERAPY LIMITED

Appellant

AND:

CORAL SURF RESORT LIMITED

Respondent

Coram: Ward, President
Scott, JA
Ford, JA

Hearing: Wednesday, 14th March 2007, Suva

Counsel: S.K. Ram for the Appellant
R. R. Gordon for the Respondent

Date of Judgment: Friday, 23rd March 2007, Suva

JUDGMENT OF THE COURT

Background

[1] The appellant is in the business of providing beauty therapy and massage services at tourist resorts in Fiji. The respondent operates a hotel business trading as "The Warwick Fiji". In about January 1999 a representative from the appellant approached the respondent with a proposal to operate a beauty therapy salon/spa at

The Warwick Hotel near Sigatoka. The hotel was then in the process of undergoing refurbishment. The litigation giving rise to this appeal centred upon whether the parties ever reached an agreement in relation to the January 1999 proposal.

[2] In the High Court, Justice Finnigan concluded that the parties did enter into an oral contract under which the appellant provided certain massage and beauty services at the respondent's hotel but his Lordship specifically rejected the appellant's claim that it had a five-year contract with the respondent based on the January 1999 proposal. It is against that finding that the appellant now appeals to this Court.

Nature of the appeal

[3] There are nine grounds of appeal and they are virtually all directed at his Lordship's findings on matters of fact. In ***Ragwhan Construction Ltd v Wormald Security Services Ltd*** [1988] 34 FLR 124, this Court accepted that in relation to such appeals, the relevant principles are those stated by the House of Lords in ***Benmax v Austin Motor Co Ltd*** [1955] 1 All ER 326. The Court cited the following statement by Lord Reid (p 328):

> ***"Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of the evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of the witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression but an appeal court is, and should be slow to reverse any findings which appears to be based, on any such considerations."***

[4] In ***Mahedo Singh v Chardar Singh*** [1970] 16 FLR 155, 159, this Court stated:

> ***"Much has been written as to the position of an appeal court which is invited to reverse on a question of fact the judgment of a judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal court will do so."***

That observation has particular relevance in a case like the present where the evidence relevant to the contractual issues was given by one witness only from each side. Although his Lordship made no specific findings as to credibility, he did make certain observations about the two witnesses which he could only have discerned from their demeanour while giving evidence.

The grounds of appeal

[5] The first ground of appeal, which can conveniently be considered together with grounds three, six and nine, is, for reasons which will readily become apparent, pivotal to the outcome of the appeal. The appellant claims that the trial judge erred in law and in fact in holding that there was no five-year contract established between the appellant and the respondent. Grounds three and six are variations of that same ground. In ground nine, the appellant claims that the trial judge erred in failing to find that the respondent had promised the appellant a five-year contract and that the appellant had relied upon that promise to its detriment. The appellant goes on to submit that if such a finding had been made then under the principles of promissory estoppel, his Lordship should have upheld its claim to a five-year contract.

[6] The essence of the appellant's case as pleaded was that it had a contract with the respondent, based on the January 1999 proposal. The proposal in question was set out in the form of a computer-generated document headed "Agreement" dated 28 January 1999 (hereinafter referred to as "the draft agreement"). The draft agreement had been prepared by the appellant for one of its other outlets. Although the

respondent's name had been inserted in the body of the document, the proposed signatory parties were named as the plaintiff company and another enterprise described as "Treasure Island Resort". At the foot of the first page of the draft agreement there was a provision which read:

> ***"This agreement shall be for a period of five (5) years commencing. . . ."***

No commencement date was inserted. There followed a provision allowing either party, on 60 days notice in writing, to terminate the agreement.

[7] Although the reason for the delay is not apparent from the record, the appellant did not forward the draft agreement to the respondent until March 1999. It was then forwarded to the respondent's General Manager, Mr Jamal Serhan, under cover of a letter dated 26 March 1999. After setting out certain operational requirements or suggestions, the covering letter dated 26 March 1999 continued:

> ***"Please be advised that I will be in Australia from 3rd of May for two weeks. I would appreciate confirmation or your approval before this date to enable me to purchase my electrical equipment in Australia.***
> ***If you agree, a suitable time for me to open the beauty spa would be mid to end of May.***
> ***I will look forward to your favourable response at your earliest convenience.***
> ***If you require any further information please do not hesitate to contact me.***
> ***Yours sincerely,***
> ***Debra Gersbeck***
> ***Director/Principal"***

[8] The draft agreement was never signed by the parties and the respondent never confirmed its approval of the agreement by the 3rd of May as requested in the covering letter (or at any time). The evidence of Mr Serhan was that he simply filed the document in a drawer and effectively forgot about it. When asked in examination in chief if there were any subsequent discussions regarding the draft agreement, Mr Serhan responded: "I did not know I had a draft agreement. I thought it was a proposal or just information about her company." He was not

challenged on that statement. There is no evidence that the respondent's attention was ever drawn to the draft agreement again prior to the events giving rise to the present litigation.

[9] There were no further developments in the relationship between the two parties until December 1999. The unchallenged evidence was that Mr Serhan approached the appellant just prior to December because he wished to establish a beach massage facility from a bure on the beach connected to the hotel by a deck. He offered Debra the opportunity to provide the service because he was aware that she was in the beauty therapy services business. They discussed the proposal and it was agreed that the appellant would provide the service with the hotel receiving a 30% commission. The appellant began to provide beach massages at the hotel from approximately the second week in December 1999. Regular invoices for the service were sent to the respondent and they were duly paid. There is no evidence that the draft agreement was referred to at any stage of the discussions regarding the provision of the beach massage facility. The trial judge found that although the services were provided and the payments made largely in terms of what had been envisaged in the draft agreement, the beach massage service was provided pursuant to an oral contract on standard terms for beach massage services.

[10] The next development came towards the end of January 2000. Since 1997 the respondent had operated a massage service from a small room on the second floor of the hotel. Around January 2000 the individual who had been operating that service left and Mr Serhan, aware that many of his guests preferred indoor massages to massages on the beach, again approached Debra to see if she would agree to also provide massage services from the hotel room. She agreed and the appellant began providing that additional service from early February 2000. Prior to then, Debra had written to Mr Serhan seeking his permission to sell beauty products from the bure on the beach and that permission was forthcoming. The appellant had also issued brochures advertising its beauty therapy services from the hotel but it was not suggested that the respondent had ever specifically approved or endorsed those

publications. Once again, there is nothing in the evidence to indicate that reference was made at any stage of those various developments to the draft agreement.

[11] In the meantime, as part of its renovation programme, the respondent was engaged in building, in another part of its resort, a much larger beauty salon which would include a spa or jacuzzi. That had been part of the respondent's master plan prior to the two parties becoming acquainted. The jacuzzi room was not completed until May 2000. It was the appellant's alleged interference in the construction of the jacuzzi room, however, which led to the severance of the relationship between the parties. As his Lordship expressed it:

> ***"The defendant meanwhile was preparing his proposed salon in another part of the resort, which was to include spa therapy. The plaintiff had asked if she could have some input and the defendant, taking this to be input of ideas readily agreed. The defendant went away for some time (overseas) and returned to find that little or no progress had been made by the construction team on the new beauty therapy salon. As a result of his inquiries he believed that the work had stopped because of confusion caused by the plaintiff's input. The workmen said she had been giving directions about their work. He decided to terminate the relationship."***

[12] On 29 March 2000, the respondent wrote to the appellant demanding that it vacate the premises by 3 April 2000. The appellant contended that in issuing this eviction notice, the respondent had breached the draft agreement. On 20 October 2000 it issued proceedings based on the alleged breach claiming judgment in the sum of $287,137.38, which included a figure of $270,000.00 for loss of anticipated income over the alleged five-year term.

[13] In its pleading, the appellant claimed that the respondent had represented that the draft agreement would be executed after completion of the jacuzzi room but it did not specify when and how the respondent had made that representation. The thrust of the appellant's submissions, however, was that in allowing the appellant to operate the beach massage facility and the small massage room in the hotel as well as its incidental activities, the respondent had either implicitly agreed to all the

terms of the draft agreement or promised to bind itself to the terms of the draft agreement, in particular the five-year term.

[14] As noted above, his Lordship concluded that what the parties had was an oral contract on standard terms under which the appellant provided, first, the beach massage services and, secondly, the beauty salon services but he specifically rejected the appellant's claim that it had a five-year contract to operate the beauty therapy salon once the defendant had completed construction of the jacuzzi room. Commenting further on the term, his Lordship said:

> ***"I do not believe there was ever any agreement reached about the plaintiff staying for five years, but even if there were the defendant would have been entitled to withdraw from it at any time either without notice for sufficient cause or else upon reasonable notice."***

His Lordship held that the six-day notice of termination given in the respondent's letter of 29 March 2000 was reasonable.

Discussion

[15] We have not been persuaded that his Lordship erred in reaching the decision he did. On the contrary, we consider that his factual findings on this issue were entirely proper conclusions on the evidence before him. There is simply no persuasive evidence that the respondent at any time agreed to, or by its conduct allowed the appellant to believe that it had agreed to, bind itself to the terms of the draft agreement. Nor was there any promise or action taken by the respondent that could reasonably be construed as a promise that the appellant had a five-year term. In this regard it cannot be without significance that before us counsel for the appellant was unable to direct us to any part of the cross examination of the respondent's witness where it had been put to him that he had expressly or implicitly agreed to a five-year term. Against that evidence, grounds one, three, six and nine simply cannot succeed.

[16] The remaining grounds of appeal challenge factual findings which are of insufficient significance in themselves to warrant this Court interfering with his Lordship's judgment, even if they were upheld. For the record, however, we confirm again that we have not been persuaded that the findings made by his Lordship, were wrong. As with ground one, there was ample evidence to support the trial judge's findings of fact and the inferences his Lordship drew from those primary facts.

Result

[17] For the foregoing reasons, the appeal is dismissed. The respondent is awarded costs in the sum of $1,000.00.

Ward, President

FIJI COURT OF APPEAL

Scott, JA

Ford, JA

Solicitors:

Samuel K Ram Solicitors Ba, for the Appellant
Gordon and Company Solicitors Lautoka, for the Respondent

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