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

CIVIL APPEAL NO. ABU0075 OF 2007S
(High Court Civil Action No. HBC 299 of 2003S)

BETWEEN:	THE NEW INDIA ASSURANCE COMPANY LIMITED	*Appellant*
AND:	FIJI DEVELOPMENT BANK	*First Respondent*
	BRIGHTSPOT FASHIONS LIMITED	*Second Respondent*

Coram: Hickie, JA
Bruce, JA
Khan, JA

Hearing: Monday, 10th November 2008, Suva

Counsel: A.K. Narayan for the Appellant
D. Sharma for the First Respondent
R. Prakash and P. Kenilorea for the Second Respondent

Date of Judgment: Friday, 21st November 2008, Suva

JUDGMENT OF THE COURT

Introduction

1 Brightspot Fashions Ltd was the registered proprietor in Native Lease 16714, Lot 3, Vaileka Commercial Subdivision Stage 3, Rakiraki, Ra. There was a substantial double storey building on the land. Brightspot Fashions Ltd operated its business from their building. It mortgaged to the premises to the Fiji Development Bank.

2 There was a fire insurance policy in connection with the premises. The policy was for total sum insured of $420,000. The policy covered damage by fire and other events in respect of the building, stock, business furniture and fixtures, plant and machinery and household contents. The insurer was the New India Assurance Co Ltd. In this judgment, that company is preferred to as "the Insurance Company". The Fiji Development Bank is referred to as "the Bank".

3 By reference to the schedule to the policy which appears as an Annexure to the affidavit of Jitendra Kumar, an officer of the Bank, it would appear that the insured under the policy were Brightspot Fashions Ltd and the Bank. Perhaps significantly, the schedule declares "Loss if any payable to the Fiji Development Bank (Rakiraki) as Mortgagee whose discharge shall be sufficient and binding to the company." (See: Record of the High Court, page 85) The policy of insurance would appear to have been renewed from time to time on the same terms. We were informed that in accordance with ordinary commercial practice, that the Bank paid the premium at the outset and on renewal and then debited that to the account of Brightspot Fashions Ltd.

4 On 20 May 2000, the building was destroyed by fire.

5 Brightspot Fashions Ltd made a claim under the policy. In respect of that claim, it was paid $133,000. Brightspot Fashions Ltd signed a discharge voucher dated 8 May 2001 "in full satisfaction, compromise and discharge of all claims for loss and expense sustained to the properly insured". Brightspot Fashions Ltd admits receipt of the money and that it signed the discharge. This voucher, which is headed "Loss and Subrogation Receipt" also includes the words "in consideration of which the undersigned hereby assigned and transfers to the [the Insurance Company] each and all claims and demands against any person, persons, corporation or property arising from or connected with such loss or damage and said [the Insurance Company] is subrogated in the place of and to the claims and demands of the undersigned against

the said person, persons, corporation or properly in the premises to the extent of the amount of above named." A copy of the receipt can be seen at High Court Record page 47.

6 The Bank made a claim against the Insurance Company on the insurance contract in respect of loss and damage to the building. In the result, the Bank and the Insurance Company could not resolve the situation and the Bank commenced proceedings in the High Court in Civil Action No. HBC 299 of 2003. The Bank was the plaintiff and the Insurance Company was the defendant.

7 It would appear that shortly before the trial of the action was to be heard, Brightspot Fashions Ltd applied to be joined and/or added as a second Plaintiff to this action. (Summons dated to May 2007 (record of the High Court, page 77) The affidavit that grounds that application asserts that despite the terms of the Loss and Subrogation Receipt that there was no settlement by Brightspot Fashions Ltd in relation to the destruction of the building. The position of Brightspot Fashions Ltd was that it was perfectly appreciated by the Insurance Company that the settlement was in respect of chattels and stock only. The affidavit (paragraph 18) concludes "the Defendant was aware that the settlement was for stock and chattels only. The double storey building has not been compensated for and the Defendant is well aware that the Plaintiff has not agreed to the $17,000 offered to the building in which the defendant had offered." (*sic*) The affidavit asserts that Brightspot Fashions Ltd is an interested party in the proceedings. In the concluding paragraph of the affidavit, it is asserted "It seeks leave to join as a Second Plaintiff or as an Interested Party."

8 The application for joinder came on before Singh J on 4 June 2007. He noted the competing contentions of the parties. He noted that one of the defences raised by the Defendant to the action concerned the discharge via the Loss and Subrogation Receipt. The learned judge indicated that, in his view, if that was valid then there could be no further claims against the Insurance Company including by the Bank. His Lordship added: "If that is so, then the sound commercial sense dictates that Brightspot has an interest in these proceedings. If the Bank is not entitled to anything

from the defendant, then obviously it would be exercised its powers of sale under the mortgage and may even sue for residual balance. In the final analysis, the Brightspot (*sic*) has to pay the bank what is due under the mortgage. In the event, the bank were to settle its claim for a low sun, then again Brightspot will suffer. Even if this case were to be settled, I believe the sanction of Brightspot is necessary for it to protect its interest."

9 The learned judge noted the objections of the Defendant. The first objection was that if there were to be co-plaintiffs, they would be a disparity of interests and two firms of lawyers would be acting for the different plaintiffs. The second complaint was that on the basis of this was a claim in contract, the limitation period for actions in contract had expired. The third objection was that the Defendant would be denied its limitation defence. A fourth objection was that there would be a delay caused by a need to re-plead the case.

10 Singh J considered as the terms of Order 15 Rule 6 of the High Court Rules. He considered that the rule was a facilitative or enabling rule and that the "paramount consideration is to have before the court all necessary parties." The learned judge concluded:

> The issue really boils down to this - Will Brightspot's rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any judgment which may eventually be made in this case.

The learned judge answered his own question: "I think so." He added:

> If I dismissed the plaintiff's claim, then Brightspot has to pay that much more to the plaintiff. If the judgment goes in favour of plaintiff, Brightspot gains. Further this being a policy of indemnity insurance, the presence of the owner of the property would assist should the value of the property become an issue as it is very likely. The owner would be able to give relevant evidence.

Singh J recited the competing contentions in relation to the Limitation Act issue. He reserved his position in relation to that issue as something to be determined at the trial. Without finally deciding the matter, he took the view that the argument of Brightspot was tenable.

11 The judge was clearly alive to the issue of prejudice. In this regard, he indicated that he proposed to make orders in such a way that there was no postponement of the trial. He thought given the time delay was already such that no postponement of the case was warranted. He considered that joining Brightspot as a co-plaintiff was not a prudent course. He decided to join Brightspot as an "interested party" with "liberty given to it that if the plaintiff fails to bring in satisfactory evidence about the value of the building, then it could do so. It is also given liberty to cross-examine the defendant's witnesses relating to this aspect with leave of the court."

12 Brightspot Fashions Ltd was also given liberty to call evidence as to the circumstances in which the fire occurred and to cross-examine the Defendant's witnesses with leave. The basis of the grant of leave was upon the basis that if the plaintiff's cross-examination is not sufficient then leave for Brightspot Fashions Ltd to further cross-examine would be granted.

13 The plaintiff was dissatisfied with this ruling and now appeals against it. This being an interlocutory ruling, leave to appeal was sought before Singh J. He refused leave. The matter went to a single judge of the Court of Appeal. There, Byrne J granted leave. The basis of the appeal was that Brightspot Fashions Ltd should not have been joined as a party. His Lordship broadly agreed with the sentiments of Singh J in his ruling on joinder. However, Byrne J was concerned that if, as Singh J had indicated he was prepared to do, Brightspot Fashions Ltd was at liberty to bring evidence relating to the circumstances in which the fire occurred and cross-examine the defendant's witnesses with the leave of the court, that this had the potential to extend the scope of this litigation to an unwarranted degree. Further, Byrne J was concerned about the impact that the absence of pleadings on the part of Brightspot Fashions Ltd would have. As he observed: "The virtue of pleadings is, as has been said time and again, that they narrowed the issues between the parties."

Appeal

14 The Appellant Insurance Company's contentions are:

(a) There was no procedure under the Rules of the High Court for joining Brightspot Fashions Ltd as a party;

(b) Brightspot Fashions Ltd failed to meet the criteria for joinder under Order 15 Rule 6 of the Rules;

(c) The learned trial Judge failed to consider the complete discharge given by Brightspot Fashions Ltd and its subrogation of rights.

(d) The learned trial Judge gave inadequate directions in the circumstances if joinder was permissible.

15 The 1st Respondent, the Bank contends:

(a) While the 2nd Respondent has an interest in the outcome of the litigation, the company had already given a complete discharge of its interests;

(b) There is merit in the position of the Appellant.

16 The 2nd Respondent, Brightspot Fashions Ltd, contends:

(a) The Court should not interfere with the exercise of discretion of the learned trial Judge;

(b) An interlocutory decision should rarely be interfered with on appeal;

(c) There was a discretion to join Brightspot Fashions Ltd even though there is an issue of limitation of actions;

(d) The affidavit in support of the application to be joined as a party was sufficient disclosure of Brightspot Fashions Ltd's case and no one could have been caught by surprise;

(e) Order 15, Rule 6 of the Rules of the High Court gives the High Court a wide discretion;

(f) Brightspot Fashions Ltd was the natural and proper Plaintiff because it is the most affected party;

(g) The issue of the effect of the Loss and Subrogation Receipt is a matter to be determined at trial;

(h) The Appellant is estopped from contending that there is a discharge.

(i) The directions as to the future conduct of the case of the learned trial Judge were adequate.

17 We say at the outset that Singh J was placed in a very difficult position. He was obviously trying to reconcile claims in relation to the issue of joinder which are virtually irreconcilable. Moreover, it is plain that he was anxious not to lose time. He was anxious that the trial date not be lost. As he noted, enough time had been lost

already. Each of these sentiments is to be heartily endorsed. That is especially so where there are egregious delays in the resolution of litigation.

18 There are number of difficulties which arise by reason of the orders that were made. The first and most obvious is the absence of pleadings on the part of Brightspot Fashions Ltd. This was a matter picked up by Byrne J in granting leave to appeal. Pleadings in civil cases are no mere technicality. They are fundamental to the administration of justice in relation to civil causes. They set out the position of the parties. They define the scope of the litigation. Pleadings identify with precision who is making the claim and who is said to be liable. While modern reforms of the rules of civil procedure have progressively alleviated some (but by no means all) of the harshness of the English civil law. Now there is a good deal of flexibility provided through amendment of pleadings and the addition, substitution and removal of parties and other matters. Nevertheless, at the core of the operation of this important aspect of the administration of justice is the requirement of something in writing.

19 The absence of pleadings in this case meant that no one knew precisely what Brightspot Fashions Ltd's case was. Little was known as to what they admitted. Little was known as to what they contested. Something of the case for Brightspot Fashions Ltd is set out in the grounding affidavit supporting the application for leave to appeal. On no account was that an adequate substitute for pleadings. Of fundamental interest in that regard was how Brightspot Fashions Ltd would deal with the two major difficulties which faced it.

20 The first difficulty was the impact of the Loss and Subrogation Receipt. It was said in argument that Brightspot Fashions Ltd had a case to get around this. It was said that everyone knew that the *ex gratia* payment was only for stock. That is very interesting but the Loss and Subrogation Receipt is very plain in its terms. While there are some who might rate the chances of getting around this document as something akin to wishful thinking, it is possible that such a contention might succeed. However, a case would have to be pleaded which was sufficiently cogent to demonstrate precisely how Brightspot Fashions Ltd proposed to do this. Given the delay on the part of

Brightspot Fashions Ltd and the last-minute nature of the application by Brightspot Fashions Ltd, it seems to us that before a judge could properly join Brightspot Fashions Ltd, the judge ought to have insisted that in addition to a cogent and clear pleading, the prospect of success would have to be demonstrated, possibly by way of evidence on affidavit.

21 The second difficulty was that, on the face of it, Brightspot Fashions Ltd was out of time. While it is undoubtedly true that, in more modern times, a litigant who seeks to commence proceedings out of time may be granted permission to proceed and that in these more modern times that discretion is somewhat more likely to be exercised in favour of such a litigant than in the past, there was absolutely no explanation of how this litigant proposed to explain the delay. There was real no information, let alone information in a proper form, to justify the exceptional course of permitting a litigant to either commence or join in proceedings. There was no pleading of a proper case as to why the limitation period should be extended. There was nothing of any substance on affidavit to explain this course. It is true that on a provisional basis Singh J seemed to indicate in his ruling that there was or may be no prejudice to the Defendant. That is, in reality only one component of any debate on extension of time. Before the issue of absence of prejudice to a defendant could be engaged, there has to be a case made for an extension of time.

22 In our view, unless and until Brightspot Fashions Ltd explained in clear and cogent terms why it should be a party to the litigation against the background to which we have just referred, it seems to us that permission to add Brightspot Fashions Ltd as a party to the litigation was premature.

23 A further difficulty is that there had been no process of discovery on the part of Brightspot Fashions Ltd. It seems to us that while discovery may be something of an empty form in many cases, in this case it had at least the potential to be critical to the litigation.

24 The grant of permission to join Brightspot Fashions Ltd as a party to the litigation was based on the premise that somehow the Bank would not push as hard as Brightspot Fashions Ltd in securing the appropriate level of recompense from the Insurance Company. Plainly, the level of the award had an impact on Brightspot Fashions Ltd's interests. If a low sum was awarded to the Bank then that was adverse to the interests of Brightspot Fashions Ltd because less money would be available to reduce the sum owing by Brightspot Fashions Ltd to the Bank. The opposite might be said to exist if a higher sum was awarded. We are far from convinced of the validity of the underlying assumption that the bank would somehow not strive for a realistic valuation. While it is true that the Bank still had its security by way of mortgage to fall back on, it is a commercial reality that a Bank may well be likely to prefer to have the highest amount of cash on hand to diminish liability rather than having to face the vicissitudes of the property market on a mortgagee sale.

25 Further, nothing was known about any valuation of the property which Brightspot Fashions Ltd proposed to tender. If problems with the formal pleadings were overcome, the actual value of the property seemed to be the critical issue. Anyone with the remotest experience of litigation which depends on expert evidence of valuation knows that some valuations are highly reliable and some are not worth the paper that they are written on. It seems to us that in the particular circumstances of this case, before permission should have been given to add Brightspot Fashions Ltd as a party to the proceedings, the court ought to have been satisfied that they had something realistic and cogent to offer in relation to what would almost certainly have been the critical issue in the case (again, assuming that Brightspot Fashions Ltd could have got over its procedural problems which we have outlined above).

26 In connection with the concern that the Bank may not present its case with the interests of Brightspot Fashions Ltd being protected two further points need to be made. The first is that it was always conceivable that the litigation might be settled. The obvious concern of Brightspot Fashions Ltd was that the Bank might settle at too low a figure. Settlement often involves very fine judgment by counsel for the parties

as to the exigencies of litigation and it may be that a settlement is based on those perceived exigencies. That might become even more acute if there was some form of offer in existence which might have had an impact on costs. The second point, which is connected with the first, is that Brightspot Fashions Ltd when faced with the realities of settlement may wish to press on to obtain a higher settlement whereas the Bank might adopt a more conservative cost-sensitive approach. It might be objected in these circumstances that why should the Bank be exposed to risks in this area? Again, it seems to us, that these are significant issues which needed to be considered before granting permission to Brightspot Fashions Ltd to become a party to the litigation.

27 Permission was given by the learned judge to Brightspot Fashions Ltd to cross-examine where that was appropriate. On the face of it, no valid objection could be taken to this. However, consonant with the point that we sought to make in the preceding paragraph, before permission to cross-examine should be given to Brightspot Fashions Ltd, the judge should have been satisfied that, in reality and substance, Brightspot Fashions Ltd had something to cross-examine about.

28 We are far from saying that once proper steps have been taken that a judge, certainly a judge of the eminence and experience of Singh J, could not be satisfied that it would be appropriate for Brightspot Fashions Ltd to be a party. What we are saying is that in fairness to the existing parties to the litigation; a great deal more should have been established before Brightspot Fashions Ltd was added to the list of parties. In this regard, we are in no doubt that Brightspot Fashions Ltd was in every respect the author of its own misfortune. It chose, so it would seem, to do precisely nothing about a claim in respect of losses concerning the building for a substantial period of time. In many respects, what is worse is that Brightspot Fashions Ltd sought to impose itself on the litigation at virtually the last moment. As we say, this placed the learned judge in a virtually impossible position. In our judgment, the learned judge should have insisted on more stringent requirements before acceding to the request of Brightspot Fashions Ltd. If those requirements could not be met between the time of

the application and the date for the trial of the action then it was for Brightspot Fashions Ltd to insure that the existing parties did not suffer in relation to their interest in the outcome of the litigation (and, possibly, as to costs). If that could not be achieved, Brightspot Fashions Ltd should never have been joined as a party. Accordingly, the intent of this judgment (subject to costs and certain other matters to which we will shortly refer) is to place the parties back at the position when Brightspot Fashions Ltd made its application to be joined. It seems to us that a judge hearing the application would almost certainly need to be satisfied of the matters to which we have made reference before joining Brightspot Fashions Ltd. There may be other relevant matters which arise at the time of any such application. Some of the concerns which we have raised may not be as relevant at the time of such application. In addition, we think that it would not be appropriate for a judge to order that Brightspot Fashions Ltd be joined as a party until it has discharged the liabilities which are consequent on this judgment. We see no reason why the original parties to the litigation should be out of pocket for their costs of this interruption to the litigation when Brightspot Fashions Ltd, should it be so advised, renews its application. We have not overlooked that the reality of the outcome of this appeal in terms of costs probably far exceeds any benefit that Brightspot Fashions Ltd could have hoped to have achieved if it had properly prepared the ground for joined along the lines we have outlined above. However, as we have already pointed out, given that in all material respects, Brightspot Fashions Ltd has been the sole author of its own misfortune it is a little difficult to evince any sympathy for the company in that regard.

29 In coming to this view we have not overlooked the exceptional nature of an appeal against an interlocutory order in civil proceedings. We came to this view with much hesitation, but in the end we concluded that these circumstances were sufficiently exceptional to justify the course we are taking.

30 Accordingly, the orders of this court are as follows:

(1) Appeal allowed;

(2) Brightspot Fashions Ltd to pay the costs of and incidental to the proceedings before the High Court so far as they related to the application by Brightspot Fashions Ltd to be joined as a party to the litigation in relation to both the Plaintiff and Defendant in that action;

(3) Brightspot Fashions Ltd to pay the costs of the appeal in relation to both the Appellant and the first Respondent.

Hickie, JA

Bruce, JA

Khan, JA

Solicitors:

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