IN THE COURT OF APPEAL
FIJI ISLANDS
CIVIL JURISDICTION

Civil Appeal No. ABU 83 of 2007

BETWEEN : COVEC (FIJI) LIMITED

Appellant (Original Defendant)

AND : ATENDRA SINGH

Respondent (Original Plaintiff)

JUDGMENT

Of: **J. Byrne, President**
S. Inoke, JA
W. Calanchini, JA

Counsel Appearing: **Mr K Qoro with Ms T Rigsby for the Appellant**
Mr G O'Driscoll for the Respondent

Solicitors: **Messrs Qoro Legal for the Appellant**
O'Driscoll & Co for the Respondent

Date of Hearing: **13 November 2009**
Date of Judgment: **03 December 2009**

INTRODUCTION

[1] This is an application by the Respondent for leave to appeal out of time and leave to appeal to the Supreme Court.

PROPOSED GROUNDS OF APPEAL

[2] The Notice of Motion lists 4 grounds. In reality, there are only two.

[3] The first is that the Court of Appeal erred in finding that the agreement of 5 April 2003 was a lease rather than a licence.

[4] The second is that the Court of Appeal erred in finding that the default judgment by Coventry J was an interlocutory order.

THE FIRST GROUND OF APPEAL

[5] In respect of the first ground of the proposed appeal to the Supreme Court, I find no reason to disagree with the Court of Appeal, comprised of the learned and experienced Justices of Appeal Pathik, Powell and Lloyd, in finding that the agreement was a lease of land within the definition of "land" under the **Land Sales Act**. I would also add that the definition of "land" in section 2 of the **Land Sales Act** includes any "estate or interest" in a quarry.

[6] Mr O'Driscoll argued that the Court of Appeal was wrong in holding that the agreement of 5 April 2003 was a lease and not a licence. Again, the Court of Appeal at paragraph 13 of the Judgment examined the provisions of the agreement and came to that conclusion. We too find no reason to disagree. There are copious references in the agreement to "lease", "lessee", "lessor" and other terms normally found in a lease. Further, the agreement allowed the lessee (Appellant) to install "crushers, plants machinery and necessary facilities such as a work-shed and toilets for the purpose of quarrying, processing and removal of such materials extracted from the land." Such a provision, in our view, is inconsistent with the issue of a mere licence.

[7] It cannot be disputed that the Appellant, Covec, is not a resident. Therefore Ministerial consent is required under section 6 of the Act. That in the absence of such consent any contract entered into is null and void ab initio and of no effect is now clear following the decision of the highest Court in this country, the Supreme Court, in **Gonzales** v **Akhtar** [2004] FJSC 2. The law is now settled.

THE SECOND GROUND OF APPEAL

[8] In respect of the second ground, the law is also now settled following the decision of this Court in **Goundar** v **Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008), a decision of the learned President and Justices Powell and Khan. It is not wise to reopen the debate in this regard. The Court of Appeal correctly held that the default judgment was an interlocutory judgment.

[9] When this decision was pointed out to Mr O'Driscoll, who said that he was counsel in that case, he conceded the point and withdrew this ground of appeal.

QUESTION OF GENERAL PUBLIC IMPORTANCE

[10] Much of the hearing was taken up by Mr O'Driscoll's submission that this matter raised a question of general public importance requiring determination by the Supreme Court.

[11] With respect, when the appeal is reduced to the fundamental issue, it is none other than a question of interpretation of the terms of a private agreement. It does not raise any issue relating to the rights of land owners who may wish to use or offer their land for quarrying purposes. Each case will depend on the terms of the private agreement between the land owner and the other interested party. There is no issue of public importance involved.

[12] In fact the only issue is s 6 of the Land Transfer Act and the law in that area has been comprehensively decided by the Supreme Court and there is no reason for that Court revisiting its previous decision in **Gonzales** v **Akhtar** (supra). Indeed, in our view, the public interest requires that all agreements for quarrying purposes must require Ministerial consent.

[13] The application fails.

COSTS

[14] This is an application that was doomed to failure from the start. It is one of those special cases in which indemnity costs are justified. However, Mr Qoro generously submitted that he was not asking for such costs. I think an award in the high end of the normal scale of $6,000 is justified.

ORDERS

[15] The **Orders** that I propose are therefore as follows:

1. **The Application is dismissed.**

2. **The Respondent shall pay the Appellant's costs of $6,000 within 21 days.**

FIJI COURT OF APPEAL

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John E. Byrne, President

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William Callanchini , J.A.

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Sosefo Inoke, J.A.