IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 256 of 2015

BETWEEN : JAYSON RAFFE

Plaintiff

AND : KENNETH NORMAN RAFFE AND BRIAN GREGORY KIRSCH

Defendants

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 325 of 2016

In the estate of REGINALD RONALD RAFFE

BETWEEM : KENNETH NORMAN RAFFE AND BRIAN GREGORY KIRSCH as Executors of the Estate of REGINAL RONALD RAFFE

Plaintiffs

AND : JAYSON RENDELL RAFFE

Defendants

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr I. R. Coleman, Mr V. Prasad with him for the Plaintiff
Ms J. Needham, Mr J. Apted and Ms Chen with her, for the Defendants

Date of Hearing : 24 July 2017
Date of Decision : 5 September 2017

INTERLOCUTORY JUDGMENT

1. This is the Defendants' Application to adduce fresh evidence. Before I go into the Application proper, it is necessary for the Court to set out the background of this matter.

2. The substantive hearing of the suit had been completed on 6 October 2016 and thereafter written submissions were filed. Subsequently a third party had on or about 13 December 2016, lodged a Caveat on the title of the property concerned. This resulted in the Defendants filing on 14 March 2017 the instant application.

3. It is relevant to the Court's determination of this Application to state the third party here is a stranger to these proceedings.

4. The Court's desire to fix an early date for hearing the Application could not be achieved as Counsel for both sides had prior commitments in their home jurisdictions. The Court had to finally decide it could no longer accommodate any further requests from those Counsel and the above date was fixed.

5. At this juncture it is expedient for me to quote from Clarke v. Edinburgh And District Tramways Company, Limited : The Scottish Law Reporter Vol. LVI at page 303, where Lord Buckmaster said "It is impossible to avoid, regretting that this action, which involved no uncertain principle of law nor any complicated combination of facts, has been the subject of such prolonged and costly litigation". For "action" I would substitute "Summons".

6. I shall now get down to brass tracks.

7. The Summons to adduce fresh evidence filed by the Defendants in the first action who are the Plaintiffs in the Second states the following grounds for seeking this:

(1) The new evidence is sufficiently material that the interests of justice require its admission.

(2) The new evidence if accepted would probably affect the results of these proceedings.

(3) The new evidence relates to matters which occurred after the trial and could not by reasonable diligence have been discovered earlier.

(4) No material prejudice would ensue to the Plaintiff/Defendant by the admission of the new evidence.

8. The affidavit of Brian Gregory Kirsch, the Second Defendant/Second Plaintiff sworn on 13 March 2017 states, inter-alia, as follows:

(i) He was informed on or about 1 March 2017 by the Estate's lawyers that it had been served by the Registrar of Titles with a notice to the effect that one, Mrs Gabrielle Wendy Sont had lodged a caveat against the land held under Certificate of Title No.14003, described as the Resort Block.

(ii) The Executors are advised and believe the caveat proceedings has implications for these proceedings and the question of whether the Estate remains in administration.

(iii) This evidence could not have been disclosed during the hearing in October 2016 because it did not exist.

(iv) The Executors are aware this application will delay the issue of a judgment in these proceedings but do not believe any prejudice will arise to the Plaintiff/Defendant.

(v) There is an Australian taxation issue (approximately A$10,000) which was brought to their attention after the hearing had ended.

9. The affidavit in opposition by Jayson Raffe sworn on 6 April 2017 states, inter alia, as follows:

(i) Any issues between Mrs Sont and the Estate have no bearing upon the basis of this Application.

(ii) An undertaking was provided by Mrs Sont that she would abide by any order made by this Court and uplift the caveat to give effect to any orders made.

(iii) The issues raised by Brian Kirsch are an attempt to delay the Court issuing the judgments, which would cause prejudice to him and the other beneficiaries.

(iv) The tax bill would not cause the Court to allow new evidence to be adduced as the Estate can pay the tax bill as it has sufficient funds.

10. The affidavit in reply of Brian Gregory Kirsch sworn on 28 April 2017 states, inter-alia, as follows:

(i) The cost and effort involved in issuing proceedings against Mrs Sont to remove the caveat will be material.

(ii) The caveat is based on Mrs Sont's claimed interest in a small part of the Resort Block (a 2 room unit out of more than 100 rooms and hotel facilities on a 23 acre Resort Block).

(iii) The Estate is awaiting advice from PwC Australia on its tax liability.

11. The hearing commenced with Ms Needham submitting. She said she was relying on the decision in : Ladd v Marshall and on s.52 of the Trustee Act. She confirmed she has abandoned the Australian tax issue. She was relying on the caveat and whether the estate is still being administered. It is one more factor to take into consideration in the Court's judgment.

12. Mr Coleman then submitted. He said the caveat was lodged after the judgment was reserved. The caveator is not a party to these proceedings. There was no use to admit new evidence.

13. Ms Needham in her reply said the caveat is new evidence. It is an impediment and its removal is a substantial matter.

14. At the conclusion of arguments I said I would take time for consideration and for both Counsel to put in further written submissions by 28 July 2017. I now deliver my decision.

15. The leading case regarding the principles on which further evidence is received is the English Court of Appeal decision in : Ladd v. Marshall [1954] 3 All E.R. 748. Denning L.J. (as he then was) said "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown

that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

16. At the outset I found that instead of the 2 arrows in their quiver which the Defendants started with they were at the hearing left with only one when their Counsel abandoned the tax issue.

17. In my view to have even contemplated that a miniscule tax bill could have been an ostensible reason to reopen a hearing that had been completed, regarding an estate of a great monetary value could only mean when it was abandoned, that the remaining reason would prove to be nothing other than a straw that the Defendants were clutching at.

18. It should have also been crystal clear to Counsel that this application did not have a leg to stand on for the following reasons:

(1) The caveat was not evidence of something that could have been obtained at the hearing for the simple reason it did not come into existence until after the completion of the trial.

(2) It could not have had an influence let alone an important influence on the result of the case because it had nothing to do with the parties on both sides, emanating as it did from the action of a third party, who is a stranger to these proceedings.

(3) The existence of the caveat is credible and thus it satisfies the third condition but this is negated by its failure to satisfy the first 2 conditions. In any event, the credible fact of the caveat is irrelevant to the adjudication of the real issues at hand.

19. The reductio ad absurdum of the Defendants' proposition is if the caveat were removed that would make the adducing of fresh evidence otiose.

20. It seems to have escaped the notice of Counsel on both sides but not of this Court that the decision in Ladd v. Marshall is not authority for reopening a concluded trial but for the fresh evidence to be adduced in the appeal before the Appellate Court or in a new trial if one be ordered and the other cases cited do not refer at all to concluded hearings. I am grateful for this opportunity for this to be made known.

21. In the result I dismiss the application to adduce fresh evidence with costs in the cause.

Delivered at Suva this 5th day of September 2017.

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David Alfred

JUDGE

High Court of Fiji