RAJENDRA PRASAD BROTHERS LTD v FAI INSURANCES (FIJI) LTD

HIGH COURT — CIVIL JURISDICTION

PATHIK J

7 May 2002

[2002] FJHC 213

Evidence — affidavit — originating summons — sufficiency of evidence — conversion of originating summons into writ — High Court Rules 1988 O 28 r 9, O 41 r 5(1), O 41 r 5(2).

Defendant sought an order for the conversion of originating summons into writ. Defendant alleged that the affidavits filed in support and in opposition to the originating summons contained seriously disputed issues of fact and therefore the originating summons procedure was not appropriate.

Held — There is sufficient evidence to determine the substantive issue under the originating summons procedure. The affidavit evidence exhibited certain admissions by the Defendant and facts including those which can be judicially noticed.

Summons dismissed.

Cases referred to

Auckland City Council v Hapimana [1976] 1 NZLR 731; *Chandrika Prasad v Republic of Fiji and the Attorney-General of Fiji* (High Court of Fiji Action No HBC 0217/00L, 15 November 2000); *Dharam Singh and Ors v Hardayal Singh and Ors* [1994] 40 FLR 156; *Re JL Young Manufacturing Co Ltd* [1900] 2 Ch 753; *Re New Brunswick Electric Power Commission and Local Union No 1733* (1976) 73 DLR (3d) 94; *Woodcock v State Insurance General Manager* (1990) 3 PRNZ 707, cited.

Holland v Jones [1917] 23 CLR 149; [1917] HCA 26; *Eng Mee Yong v Letchumanan* [1980] AC 331; *R v Wood* [1982] 2 NZLR 233; *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Ors (No 2)* [1988] Ch 422, considered.

Suresh Kumar Singh v Sun Insurance Co Ltd Civil Action No 382/2000S; *Yatulau Company Limited v Sun Alliance* Civil Action No 380/2000, followed.

B.C. Patel for the Plaintiff

F. Hannif for the Defendant

Decision

Pathik J. By summons dated 16 October 2001 the Defendant Fai Insurances (Fiji) Limited (hereafter referred to as the Defendant) is applying to court for an order that the proceedings commenced by originating summons filed herein by the Plaintiff Rajendra Prasad Brothers Limited (hereafter referred to as the respondent) on 29 May 2001 continue as if begun by writ.

I have before me for my consideration the various affidavits filed by the parties and their respective counsels oral and written submissions.

Defendants/Applicants contention

The grounds on which the Defendant makes the application under O 28 r 9 of the High Court Rules are as follows (as stated in the counsels written submission):

(a) The affidavit filed in support of the Plaintiff's application ought not to be relied on as establishing the factual circumstances of the events of 19 May 2000.

(b) The affidavits filed in support and in opposition to the Plaintiff's originating summons contain seriously disputed issues of fact that make the determination of the orders sought in the summons inappropriate on the evidence contained in the affidavits.

The Defendant argues that if the court were to grant the two declarations sought by the Plaintiff in its summons based on the affidavit alone filed herein that would effectively be the end of the matter as the rights of the parties would have been determined in respect of the substantive matter.

Mr Haniff attacks the Plaintiff's affidavit (Rajendra Prasad's) sworn on 16 May 2001 particularly paras 14–18 on the ground that the contents of those paragraphs offend against O 41 r 5(1) of the High Court Rules in that … an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. He argues that the deponent deposes to events of 19 May 2000 which he cannot prove from his own knowledge.

He further argues that O 41 r 5 (2) requires that an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the grounds thereof. He says that the said affidavit does not comply with this requirement as the deponent does not disclose the source of his information and the grounds of his belief.

In support of his argument the learned counsel for the Defendant referred to a number of authorities and concluded on this aspect that, as no foundation is laid and source of information is not given for establishing the facts contained in the paragraphs referred to hereabove, these paragraphs ought not to be relied upon as establishing the factual circumstances of the events of 19 May 2000. The learned counsel says that it is not a matter of interpreting the policies. It can only be ascertained by findings of facts. He says that in this case all the facts relating to the march, the entry of persons into parliament and the civil commotion in the streets or acts which surrounded the events which occurred throughout the day on 19 May 2000 need to be carefully considered and evaluated to determine whether they fall within the categories of occurrences which gave rise to the exclusions contained in clause 5.1 of the policies.

The Plaintiff's submissions

The Plaintiffs case is set out in its written submission and argued by Mr BC Patel. As stated therein the Plaintiffs case is:

(a) Material facts supporting the Plaintiffs case on originating summons are admitted and Judicial Notice can be taken of the many facts deposed in paras 14, 15 and 18 of first Prasad Affidavit even if O41 r 5 is breached. Those facts which are not admitted or judicially noticed and which fail to comply with O 41 r 5 are not material facts and need not be relied upon. Yet the substantive proceeding can be determined without resort to those non material facts.

(b) The burden of proof is on the Defendant to show that the exclusion clause 5.1(b) applies. The Defendant must proffer affidavit evidence on that issue to discharge that burden. (*Woodcock v State Insurance General Manager* (1990) 3 PRNZ 707).

(c) There is no serious dispute of facts on affidavits filed. Dispute, if any, is such that it can be resolved on affidavits by applying the principle laid down by the Privy Council in *Eng Mee Yong v Letchumanan* [1980] AC 331.

(d) A substantial issue of fact is not likely to arise so as to require directions under O 28 r 9.

(e) The originating summons procedure is appropriate to determine the question of Defendant's liability under the policy and to seek interim payment pending resolution of the quantum issue.

(i) Admission of material facts

The learned counsel submits that material facts are admitted by the Defendant, in that, inter alia, that this is a valid insurance cover on 19 May 2000 for risks, inter alia, against malicious act, riot, civil commotion and terrorism; that the Plaintiffs shop at the corner of Struan and Robertson Roads, Suva was looted and destroyed by fire on 19 May 2000 which caused the Plaintiff substantial loss; a claim was made for loss but this was declined by the Defendant; that a request for interim payment was also refused on the ground that liability had been denied under the policy of insurance. On these facts the Plaintiff is seeking a declaration as to liability and says that it is entitled to seek interim payment in these proceedings.

(ii) Facts which can be judicially noticed

The learned counsel for the Plaintiff urges the court to take judicial notice of facts surrounding the events of 19 May 2000. He referred to a number of authorities touching on the subject of judicial notice. He outlines certain facts which can be judicially noticed, such as the march, storming of parliament by George Speight and seven armed men taking the then Prime Minister and many of his parliamentary colleagues hostages, the Fiji Military Forces and the Fiji Police Force were in place and carrying out their lawful duties, the Judiciary was functioning, the 1997 Constitution was in force and there was widespread looting and damage of shops in the City of Suva on the said 19 May 2000.

(ii) Facts which can be judicially noticed

The learned counsel for the Plaintiff urges the court to take judicial notice of facts surrounding the events of 19 May 2000. He referred to a number of authorities touching on the subject of judicial notice. He outlines certain facts which can be judicially noticed, such as the march, storming of parliament by George Speight and seven armed men taking the then prime minister and many of his parliamentary colleagues hostages, the Fiji Military Forces and the Fiji Police Force were in place and carrying out their lawful duties, the Judiciary was functioning, the 1997 Constitution was in force and there was widespread looting and damage of shops in the City of Suva on the said 19 May 2000.

(iii) Burden of proof

The Plaintiff says that its claim comes within the policy of insurance and therefore it is entitled to the declarations sought in the originating summons unless the Defendant can prove that the general exclusion in clause 5.1(b) applies.

Counsel submits that the burden of proof is on the Defendant to prove that the exclusion clause applies (*Suresh Kumar Singh v Sun Insurance Co Ltd* Civil Action No HBC 382/2000S per Scott J at 3).

The Defendant has to satisfy by evidence that the two limbs of exclusion clause 5.1(b) are satisfied, namely that the events of the day in question amount to one or more of: a mutiny, rebellion, revolution or insurrection; and that the Plaintiffs loss or damage was occasioned by or through or in consequence of or indirectly due to one or more of the occurrences referred to above. Therefore, he says that it is for the Defendant to prove that what happened on that day was a mutiny, a rebellion, revolution or insurrection. He says that the arguments as stated here by the Defendant were rejected by the High Court in *Suresh Kumar Singh (above) and Yatulau Company v Sun Alliance* (Suva, Civil Action No 380/2000) and that no new facts have been disclosed by the Defendant in this case.

Counsel says that the Defendant tried to prove the applicability of exclusion clause through two Fiji Sun newspaper articles which are exhibits to Mr Fimone's affidavit. He says that the Defendant's evidence does not comply with O 41 r 5 of the High Court Rules 1988.

(iv) No substantive issue of fact likely to arise

Mr Patel submits that there is no conflict of evidence, or that there is none which cannot be resolved on affidavit evidence. He says that the question is whether "a substantial issue of fact is likely to arise" for which reason the proceeding should continue as if begun by writ because "oral evidence will be required".

(v) Originating summons procedure appropriate

Finally, Mr Patel submits that the Plaintiff is within the Rules to issue these proceedings and he says that as there is no serious dispute of facts on affidavits filed and no substantial issue of fact is likely to arise, in terms of the Rules the adopted procedure is appropriate.

He submits that two similar cases referred to hereabove have been determined by the High Court at Suva on originating summons procedure on identical facts and there is no reason for not allowing the Plaintiff's case to proceed on the same basis. He says that the issue essentially is one of law based on facts admitted or judicially noticed.

Determination of the issue

The application here is made under O 28 r 9 of the High Court Rules 1988 which provides as follows:

> 9(1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.
>
> (ii) Where the court decides to make such an order, O 25, rr 2–7, shall, with the omission of so much of r 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.
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> (iii) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.
>
> (iv) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun.

It is with the above background to the case in mind that I propose to consider the issue before me. In short, it is the Defendant's contention that the affidavits filed in support and in opposition to the originating summons contain seriously disputed issues of fact and therefore the originating summons procedure is not appropriate in this matter.

The learned counsel for the Defendant submits that disputed facts surround the events of 19 May 2000. He says that these disputes cannot be resolved on affidavit evidence. It is the Defendant's contention that what happened in the Plaintiff's premises and other premises in the Suva central business area on 19 May 2000 was occasioned by, or through or in consequence of, or indirectly as a result of events that took place in parliament on that day, which acts amounted to, one or more of the occurrences set out in clause 5.1(b) of the insurance policies held by the Plaintiff. Counsel says that if the Defendant were to establish this fact, then, depending on the specific findings of fact, would decline to indemnify the Plaintiff on the basis of one or more exceptions contained in clause 5.1(b) of the policies.

The said clause 5.1 reads as follows:

> (a) War, invasion, act of foreign enemy, hostilities of war like operations (whether war be declared or not), civil war.
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> (b) Mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising, insurrection, rebellion, revolution, military or usurped power, or any act of any person or persons acting on behalf of or in connection with any organisation, the objects of which include the overthrowing or influencing or any de jure or de facto government by terrorism or by any violent means.
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> (c) Expropriation, that is lawful seizure, resumption, confiscation; nationalisation or requisition either permanent or temporary by order de jure or de facto Government, or any Lawfully constituted authority.
>
> (d) The use, existence or escape of nuclear weapons material, or ionizing radiation from, or contamination by radioactivity from, any nuclear fuel or nuclear waste from the combustion of nuclear fuel or nuclear waste; including any self sustaining process of nuclear fission or fusion

The Plaintiff is seeking an order for payment of $3.512 million to its mortgagee. The Defendant says that not only is there a dispute on liability, but there is also a dispute on quantum; it says that these disputes cannot be resolved on affidavit evidence alone.

Actually, the issue for the court's decision essentially is whether on the facts and circumstances of this case the institution of proceedings by way of originating summons is appropriate or not. The Plaintiff says it is but the Defendant says that it is not. I have already outlined here above the arguments put forward by the parties for their respective opinions.

The application by the Defendant involves the applicability of O 28 r 9 under which the application is made. The order does give the court a discretion to make an order that an action commenced by way of originating summons to continue as if begun by writ.

In the matter of *discretion* and in the matter of an apparent conflict in affidavits the court can determine it by applying the principle laid down by the Privy Council in *Eng Mee Young v Latchumanan* [1980] AC 331. There it is stated.

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every

> statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

I have very carefully looked at the facts of this case and have borne in mind the affidavit evidence put before me, and I find, as I agree with the learned counsel for the Plaintiff in this regard, that no substantial issue of fact is likely to arise on which oral evidence will be required for which the ordinary procedure is more suitable. (see *Dharam Singh and Ors v Hardayal Singh and Ors* [1994] 40 FLR 156, per Pathik J).

Although it is not for me to deal with the substantive issue on the originating summons, nevertheless in considering the issue, one cannot lose sight of the fact that the court is bound to take judicial notice of the events of 19 May 2000 as argued by Mr Patel, it will still be possible for the Defendant to put forward its defence to the claim in the form of affidavits under the originating summons procedure. The court will be able to evaluate the affidavit evidence and arrive at a decision whether the Plaintiff is entitled to its claim or not and whether the said exclusion clause applies in favour of the Defendant.

In the circumstances of this case, in the exercise of my discretion, I disallow the Defendant's application as it would be an exercise in futility and a sheer waste of time; it will unnecessarily prolong the determination of the issue. In short the issue can be determined quite easily on affidavit evidence alone and without having to call oral evidence which the Defendant wants.

The following passage from the judgment of Isaacs J in *Holland v Jones* [1917] 23 CLR 149 at 153; [1917] HCA 26 and referred to by Mr Patel on the aspect of judicial notice is apt to be borne in mind in relation to this case:

> *The only guiding principle — apart from statute — as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it the court "notices" it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.*

On this aspect the following extract from the case of *R v Wood* [1982] 2 NZLR 233 at 235 NZ Court of Appeal is also pertinent bearing in mind the affidavit evidence before the court:

> *Judicial notice is the cognisance taken by the Court of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary — Phipson on Evidence (12th ed, 1976) para 10, 46. Judicial notice is available to both Judges and juries, Phipson, para 47. There are at least two reasons for the taking of it. First, it expedites the hearing of many cases by dispensing with the proof of matters which, if they had to be the subject of evidence, might be costly to prove. Secondly, it tends to produce uniformity of decision on matters of fact where a diversity of findings might otherwise result. But this very matter requires that before judicial notice is taken of any fact it must be so well-known as to give rise to the presumption that all persons are aware of it — Cross, p 160; Holland v Jones* (1917) 23 CLR 149 at 153; [1917] HCA 26; *Auckland City Council v Hapimana* [1976] 1 NZLR 731. *Before a Court "notices" a fact it must be fully satisfied of its existence and it must be cautious*

*to see that there is no reasonable doubt as to its existence — Holland v Jones*at 153, *per Issacs J. The fact in question must be so notorious that it cannot be the subject of serious dispute.*

The learned counsel for the Defendant dwelt at length on the desirability of complying with the provisions of O 41 r 5(2) when preparing affidavits. He says that there has been non-compliance with the provisions of that order and he has referred the court to a number of authorities on the contents of the affidavits. In the case of *Chandrika Prasad v Republic of Fiji and Attorney-General of Fiji* in the High Court at Lautoka Civil Action No 217/2000L, Gates J dealt with the necessity to comply with O 41 r 5 which provides:

5 (1) Subject to O 14 r 14, rr 2(2) and 4(2), to O 86, r 2(1) to para (2) of this rule and to any order made under O 38, r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

Be that as it may, looking at the affidavit evidence as a whole, it is still open to the court to accept what is not objectionable and reject those parts of affidavits which offend against the Order. When I state that, I have not lost sight of what Alverstone CJ and Rigby LJ had to say in *Re JL Young Manufacturing Co Ltd* [1900] 2 Ch 753 on the practice of the admissibility of evidence by affidavit particularly as in this case on the deponent's information and belief. No doubt the strict rule is that when a deponent makes a statement on his information and belief, he must state the ground of that information and belief (Rigby LJ in *Young* (supra)].

In the outcome therefore, as stated in the Canadian case of *Re New Brunswick Electric Power Commission and Local Union No 1733* (1976) 73 DLR (3d) 94 at 97 by Hughes CJ in answer to the counsel's submission that an affidavit which contains some facts within the deponent's personal knowledge must be wholly rejected because it contains other facts based solely on information and beliefs, his Lordship said:

Where such an affidavit is tendered the court has a complete discretion to decide whether the affidavit should be rejected or whether only the inadmissible portions thereof should be struck out.

In this regard on the aspect of exercise of "discretion" and interest of justice I refer to the statement of Purchas LJ in *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2)* [1988] Ch 422 at 429C where he said:

There are, therefore, ample residual powers in the court to exclude any particular part or parts of any affidavit evidence which might otherwise be admissible under Or 41 r 5(2) and, of course, ultimately it is for the court to determine what weight should be attached to any particular piece of hearsay evidence.

And at p 436C (ibid) his Lordship said:

The danger of admitting hearsay evidence in the case of some interlocutory motions may be avoided by the exercise by the Court of its discretion to exclude it; and its admission in others may be very much in the interests of justice. (Emphasis mine)

Conclusion

To sum up, on the affidavit evidence before me, bearing in mind certain admissions by the Defendant and the facts including those which can be judicially noticed there is sufficient evidence to determine the substantive issue under the originating summons procedure.

The court is not satisfied that there is any serious conflict of evidence, for if there will be any it could be overcome by the application of the principle in *EngMee Young* (supra).

On the affidavit evidence before me, insufficient reason has been advanced to show that the proceedings commenced by originating summons be continued as if begun by writ.

It is pertinent to note, and the courts attention has also been drawn, to the two cases on *identical facts* which were determined by the High Court on originating summons procedure namely *Suresh Kumar Singh* and *Yatulau Company* (above).

In *Suresh Kumar Singh* after having heard the originating summons, Scott J came to the following conclusion on identical facts as in the case before me relating to the events of 19 May 2000 and that is pertinent to be borne in mind in deciding upon this interlocutory application, although this court will have to make its decision after hearing the originating summons in this matter:

> *In my view the Defendants have failed to place any evidence before me that the looting which damaged the Plaintiff's premises was Apart of an attempted coup. In particular, there is nothing to show that the looting was planned or orchestrated by Speight or any of his lieutenants. While doubtless some of the looters may have sympathised with Speight the looting was directed not at the organs of the State such as government offices or agencies but was directed at private businesses. The main object of the looting as was obvious from the television footage was to steal as much as possible as quickly as possible whether what was stolen was gold watches or frozen chickens. Some of the businesses looted were Indian owned but some were not.*
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> I agree with Mr Sabidi when he describes what happened as a free for all. While this free for all might have been prompted by Speight's takeover I do not find that it was part of it or that it was motivated by revolutionary ideals.

Similarly, on identical facts of the same day namely 19 May 2000 Byrne J (in the earlier case) came to the same conclusion. Scott J agreed with Byrne J when he said that:

> *Byrne J … had no hesitation in finding that the insured's premises were destroyed on 19 May as a result of rioting and civil commotion. In this case I have no hesitation in arriving at the same conclusion.*

The point that I am emphasizing by referring to the above passages from my brother judge's judgment is to point out that the originating summons procedure is quite appropriate and there is no need to grant the order sought, namely, that these proceedings continue as if begun by writ under O 28 r 9 of The High Court Rules 1988.

For the reasons given the summons is dismissed with costs against the Defendant in the sum of $500 payable to counsel for the Plaintiff.

Summons dismissed.