SHELL (FIJI) LTD v MURGESSA (ABU0014 of 2004)

COURT OF APPEAL — APPELLATE JURISDICTION

5 SCOTT, STEIN and FORD JJA

21, 24 March 2006

Practice and procedure — discovery — Appellant dismissed Respondent from work 10 due to larceny — whether application to discover additional documents should be granted — whether Respondent's admission formed part of trial — High Court Rules O 24 r 16, O 34 r 2 — Supreme Court Act s 7(3).

The Appellant learned that the Respondent was stealing from him. The Appellant's director (Mr Scott) investigated the incident which resulted to the Respondent's signed 15 written confession (admission) to Mr Scott. The Respondent admitted defrauding the Appellant by supplying fuel free of charge to one Ram Pyare (Pyare). The Appellant dismissed the Respondent and reported the matter to the police. The Respondent stood trial on three counts of larceny by servant in the Magistrates Court but was acquitted. The High Court also dismissed the appeal against the acquittal. The High Court's judgment 20 stated that there was no mention of an admission since the Respondent conceded supplying fuel free of charge to Pyare as compensation for fuel lost. Both the Magistrates Court and the High Court said that the Respondent raised reasonable doubt for an acquittal. For appeal purposes, the actual documents tendered in the Magistrates Court were lost excluding the admission. The admission was not disclosed to the defence and 25 was left to Mr Scott who died later. Just under 12 months after the dismissal of the criminal appeal, the Respondent commenced civil proceedings in the High Court and sought damages for his summary dismissal. The Appellant contended that no notice for the Respondent's dismissal was required since the latter's action initiated his dismissal. No particulars of the contention were offered or sought. A pre-trial conference was held wherein no specific facts and matters were addressed, no admission was presented and no 30 discovery and inspection of documents were mentioned. The trial commenced in the High Court and the Appellant applied for leave to adduce copies of their documents relative to the investigation and the original of the admission. The Respondent opposed the Appellant's application claiming that there was no admission. The issues were whether: (1) the application was to discover additional documents; and (2) whether Respondent's 35 admission formed part of trial.

Held — (1) The application was not for a retrial to be held since the trial was still in progress. It was an application made during the course of the trial to refer to documents which might, or might have been admissible and which had not been located by the Appellant until after discovery had taken place.

40 (2) The documents which the Appellant wished to adduce, the originals of some of which had been tendered in the Magistrates Court and certified true copies of which were still on the court's file, went to the heart of the Appellant's defence. Furthermore, with the exception of the admission itself (which may or may not, following Mr Scott's death now be admissible) the Respondent could not be heard to say that he was unaware of their existence, not only because they were tendered at his trial, but also because they 45 apparently formed part of the record of those proceedings. In those circumstances, they should have been disclosed by the Respondent himself.

Appeal allowed.

No cases referred to.

50 *Gibson* and *Co* for the Appellant

Kohli and *Singh* for the Respondent

Scott, Stein and Ford JJA.

Introduction

[1] Pursuant to leave being granted, the Appellant, Shell (Fiji) Ltd (Shell) appeals against an order made on 28 August 2003 by the High Court at Labasa (Pathik J) refusing leave to adduce documentary evidence which had not been discovered.

[2] The relevant provision is O 24 r 16 of the High Court Rules, the material parts of which are as follows:

> 16-1 If any party who is required by any of the foregoing rules or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection, fails to comply with any provision of this rule or with that order, as the case may be then …
>
> (a). that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court …

Background

[3] In October 1993, Shell received information which suggested that the depot manager at its Labasa Branch, Murgessa (the Respondent to this appeal) was stealing from his employer. A director of Shell Mr John Scott, went to Labasa and carried out an investigation.

[4] According to Shell, the investigation concluded with Murgessa confessing to John Scott and signing a written admission that he had defrauded Shell by supplying fuel free of charge to one Ram Pyare. A copy of what is said to be the admission is exhibited to the affidavit of Satya Singh dated 21 May 2002.

[5] Following the investigation, Murgessa was dismissed by Shell and the matter was reported to the police. In due course Murgessa stood trial on three counts of larceny by servant in the Labasa Magistrates Court but in May 1996 he was acquitted. An appeal against the acquittal was dismissed by the High Court at Labasa in October 1996.

[6] As it happens, a member of this bench, Scott JA, was the High Court judge who dismissed the appeal. As appears from the High Court judgment, there was no mention of an admission: Murgessa conceded supplying fuel free of charge to Ram Pyare but stated that he did so as compensation for fuel lost. Both the Magistrates Court and the High Court took the view that Murgessa had raised a reasonable doubt and therefore was entitled to be acquitted. In view of the previous involvement of Scott JA in this matter, we asked counsel whether they had any objection to him hearing this appeal: they did not.

[7] Although copies of the record of the proceedings in the Magistrates Court were prepared for appeal purposes, the actual documents tendered in the Magistrates Court have been lost. The copy documents did not include the admission. Why this is so is not entirely clear. It seems however that the admission had not been disclosed to the defence and the original had been left by Mr John Scott in Suva. Whether consideration was given to the admissibility of the admission (more properly in criminal proceedings termed a confession) in view of Mr Scott's status as a person in authority, we do not know. Unfortunately, Mr John Scott died in about 2001.

Commencement of proceedings in the High Court

[8] On 7 September 1997, just under 12 months after the dismissal of the criminal appeal, Murgessa commenced civil proceedings in the High Court seeking damages for his summary dismissal.

[9] In October 1997, a defence was filed. Shell admitted dismissing Murgessa on 18 October 1997 but denied that any notice was required in the circumstances. In para 4 it was pleaded:

> that the Defendant denies that the Plaintiff has suffered loss and damage because of any action on the part of the Defendant, rather than it was the action of the Plaintiff, *which he admitted*, which led to his dismissal and he was therefore the author of any loss or damage he may have suffered, whether from loss of earnings or otherwise. [Emphasis added.]

No particulars of that pleading were offered or sought.

[10] On 7 March 2000, Counsel for the parties held a pre-trial conference as is required by RHC O 34 r 2. It was a singularly indifferent effort by counsel concerned. Almost none of the specific facts and matters which the rules require to be considered was even addressed. In particular, no mention at all was made of discovery and inspection of documents. Neither of the lists prepared by solicitors in January and April 1998 mentioned any of the documents tendered in the Magistrates Court, nor the existence of an admission. According to Murgessa's own affidavit of June 2002, his solicitors had received a copy of the record of the criminal proceedings in October 1996. Apparently no thought was given to the possible relevance of those proceedings to the High Court civil action.

[11] On 23 April 2002 the action came on for trial in the High Court at Labasa. Counsel for Shell obtained an adjournment until 22 May 2002 on the ground that its sole witness was unavailable. On 22 May Counsel for Shell filed an application for leave to adduce copies of the Shell documents relevant to the investigation into the alleged thefts at the Labasa Depot which were tendered in the Magistrates Court. He also sought to adduce what was said to be the original of the admission. In a supporting affidavit it was stated that the admission and the other documents had been "stumbled upon" in May 2002 by an employee of Shell who was searching Shell's archives for another file.

[12] In his affidavit opposing the application, Murgessa denied making any admission and suggested that the admission and other documents had been "stumbled upon" as a result of "some divine intervention or ghostly guidance". He denied that any of the documents had been produced at his trial.

The High Court's ruling

[13] Unfortunately, the judge was unable to deliver his ruling in which he dismissed Shell's application until over a year after the application was made. While we fully appreciate the difficulties under which the civil judges of the High Court have been labouring, the delay in handing down the decision was doubly unfortunate. First, it further prolonged proceedings which had already been on foot for 5 years and secondly, it indirectly led to the trial having to be abandoned because of the judges personal commitments. The trial will therefore have to be commenced again, de novo. We note, however, that the trial had only reached part of the way through the Plaintiff's evidence before it was abandoned.

[14] As will be seen from the judge's ruling, he regarded Shell's application as being comparable with an application for an order for a new trial to be held on the ground of discovery of fresh evidence. In our view, this approach was mistaken. The application was not for a retrial to be held since the trial was still in progress. It was rather an application made during the course of the trial to refer to documents which might or might not have been admissible and which had not been located by Shell until after discovery had taken place.

[15] A common purpose which is designed to be served by proper pleadings, full discovery and the conscientious conduct of the pre-trial conference is the prevention of injustice occurring as a result of a party not knowing the nature of the case to be presented by his opponent. The exclusion of admissible evidence which is importantly relevant to the presentation of a party's case will however not serve the ends of justice.

[16] In the present case, the crux of Murgessa's claim was that his summary dismissal was wholly without justification. Shell's case, albeit incompetently pleaded, was that it was Murgessa's defalcations which, when he was confronted with them he admitted, which justified his instant dismissal.

[17] In our view, the documents which Shell wished to adduce, the originals of some of which had been tendered in the Magistrates Court and certified true copies of which were still on the court's file, went to the heart of Shell's defence. Furthermore, with the exception of the admission itself (which may or may not, following John Scott's death now be admissible) Murgessa could not be heard to say that he was unaware of their existence, not only because they were tendered at his trial, but also because they apparently formed part of the record of those proceedings supplied to his solicitors in October 1996. In those circumstances it is at least arguable that they should have been disclosed by Murgessa himself.

[18] Where documentary evidence which already existed at the time that discovery was made is omitted from that discovery as a result of a want of reasonable diligence, the party making late application to adduce that evidence can be penalised in the costs incurred by granting the other party such adjournment as may be necessary to take instructions and in order to prepare to meet the previously undisclosed material. In our view, such a course should have been followed in this case. Had this occurred been done so then the trial would have been able to proceed with only minimal delay. The consequence of not dealing with the application in that way was, as has been seen, that the trial had to be abandoned.

[19] The fact that a document is discovered does not, of course, make it admissible. Whether each of the documents which came to light in May 2002 is admissible or not, we do not know. That question will be for the trial judge. The documents are however clearly highly relevant to the issue being litigated and as such should, in our view, be discovered.

Result

(1) Appeal allowed.
(2) Application to discover the additional documents granted.
(3) Appellant to have its costs which are assessed at $1000.

Appeal allowed.