PROFESSIONALS WEST REALTY (FIJI) LTD v ROBERT MAURICE FACCIOLA AND RATU TIMOCI NASAU (ABU0017 of 2011)

COURT OF APPEAL — CIVIL APPELLATE JURISDICTION

CHITRASIRI, CHANDRA, KOTIGALAGE JJA

8, 30 November 2012

Interest on judgment — costs — whether orders regarding interest on judgment and costs were correct — rate of interest — exercise of discretion — Law Reform (Miscellaneous Provisions) (Death and Interest) Act s 3 — High Court Rules O 62 r 3.

The appellant sought to have certain orders set aside. The relevant orders directed that the appellant pay interest on a judgment and costs to the first respondent. The interest related to the period between the date on which the cause of action arose and the date of the judgment.

Held –

(1) The determination of the rate of interest under s (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act is entirely in the hands of the trial judge. That discretion must be exercised in a judicious manner.

(2) Litigation is not for profit making, hence the lending rate for commercial transactions should not be used to determine the rate of interest in litigation. The rate of interest granted to the first respondent is varied from 10% to 8%.

QBE Insurance (Fiji) Ltd v Ravinesh Prasad Supreme Court CBV 0003 of 2009, 18th August 2011, followed.

(3) The High Court judiciously exercised its discretion in its award of costs, considering circumstances such as expenses to obtain legal assistance, the attitude of the appellant in resolving the issue, the air fare and accommodation of the first respondent, and criteria such as the indemnity basis and standard basis.

(4) The decision as to both the general and special damages claimed by the first respondent had been made in accordance with the law.

Appeal against interest on judgment allowed. Appeal against costs dismissed. Cross appeal dismissed.

Cases referred to

Attorney-General v Charles Valentine [1998] FJCA 34; ABU 19/98S; *Lok v Singh* [2001] FJHC 7; *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, not followed.

Ms Mereseini Vanua for the Appellant.

Mr Armish Pal for the Respondent.

[1] Chitrasiri, Chandra, Kotigalage JJA. The Appellant filed the Notice of Appeal dated 4th May 2011 seeking to set aside only the Orders bearing numbers 2 & 3 from among the five orders dated 10th March 2011 made by the learned High Court Judge sitting at the Lautoka High Court. This fact is evident by the first paragraph of the said Notice of Appeal. In that it is stated:

> *"Take Notice that the Fiji Court of Appeal would be moved after expiration of Fourteen (14) days from the date of service upon you of this notice or so soon thereafter as Counsel can be heard, by Counsel for the Appellant for an Order that the ruling delivered by his Lordship Sosefo Inoke on the 10th March 2011 and* ***the Orders numbered 2 and 3 on 10th March 2011 and sealed on the 14th March 2011 be set aside****."*

The two orders that are being canvassed and are referred to above, read thus:

1. …

2. The First and Second Defendants, jointly and severally, shall pay to the plaintiff, Robert Maurice Facciola, or at his direction, the sum of $117,500 as interest on the above sum.

3. The First and Second Defendants, jointly and severally, shall pay to the plaintiff, Robert Maurice facciola, or at his direction, the sum of $20,000 as costs within 28 days.

4. …

5. …

[2] Hence, it is clear that the Appellant is not complaining of or rather it is satisfied with the other orders bearing Nos 1, 4 and 5 made by the learned trial Judge despite the fact that those are in favour of the First Respondent namely Robert Maurice Facciola (Plaintiff in the original action in the High Court)

[3] Even though the Appellant has not complained of the orders other than the orders, 2 and 3 which are on the interest and on the costs of the action, the grounds of appeal seem to have been drafted in such a way so as to indicate that the Appellant is canvassing the other orders namely 1, 4 and 5 as well. Such a conclusion is evident by the grounds of appeal advanced by the Appellant. Those grounds are reproduced herein below as drafted by the Counsel for the Appellant.

1. That the learned trial judge erred in law and in fact not considering the true position of the Appellant as being an agent for the Second Respondent.

2. That the learned judge erred in law and in fact in finding that Mark Slattery was an agent or employee of the Appellant and had the express or implied authority to bind the Appellant.

3. The trial judge erred in law and in fact in making the Order that the Appellant and Second Respondent jointly and severally pay the Plaintiff the sum of $117,500.00 as interest together with $20,000 as costs in that,

(a) the Appellant was at all times the agent of the Second Respondent;

(b) the Appellant carried out the instructions of the Second Respondent and at all times was the victim of the fraud or misrepresentation of the Second Respondent;

(c) the Appellant was under no obligation to ascertain the truth or otherwise of the representation made to the First Respondent and its agents and employees by the Second Respondent.

4. The learned judge erred in law and in fact and not considering the true position of the Appellant as being the agent of the Second Respondent and being subject to the Second Respondent's instructions.

5. The trial judge erred in law and in fact holding that the counterclaim of the Second Respondent had no merit.

6. The learned judge erred in law and in fact in awarding interest on monies paid into the Appellant's trust account.

7. The learned judge erred in law and in fact in awarding interest of $117,500 against the Appellant and Second Respondent jointly and severally.

8. That the learned trial judge erred in law and in fact in finding that the Appellant had misrepresented and was negligent and had induced the First Respondent to enter into the Agreement and that the First Respondent had relied upon the advice given by the Appellant as professional real estate agents.

9. The learned trial judge erred that the Appellant had a duty to ensure that the Agreement could be performed by the First Respondent and that the only concern the Appellant had was in having the First Respondent sign an agreement which would have ensured the Appellant received its commission.

10. The learned trial judge erred in fact and in law in not properly considering the terms of the Agreement including but not limited to the provision at clause 4 requiring the First Respondent to have his lawyer approve the terms and conditions of the Agreement.

11. The learned trial judge erred in fact and in law in giving the director of the Appellant "leave" not to attend the trial.

12. The learned trial judge erred in fact and in law by not giving proper weight to the evidence that Mark Slattery was the person primarily responsible for the First Respondent executing the Agreement.

13. The learned trial judge erred in fact and in law by finding that the Appellant held the deposit payable under the Agreement for its own benefit.

14. The learned trial judge erred in fact and law by not giving due weight and credit to the evidence of Carol West a director of the Appellant.

15. The learned judge erred in fact and in law in not specifying precisely or at all the basis and reason for Orders 2 and 3 in the judgment of the Honourable Court.

[4] From among the aforesaid grounds of appeal, only ground 3 and grounds 6, 7 and 15 are on the issues of costs and of the interest respectively. Appeal grounds 1, 2 and 4 seem to challenge the Principal–Agent relationship between the Appellant and the 2nd Respondent. Appeal grounds 8 to 14 also do not relate to the awarding of costs or interests. Ground No 5 is completely on the counter claim made by the Appellant in its Statement of Defence.

[5] This Court at the hearing of this appeal, having informed both Counsel of the position described in the preceding paragraphs, it was decided to have this appeal heard in the manner stated in the first paragraph of the notice of appeal, limiting it to the awarding of costs and interest, payable to the First Respondent. Indeed, the concluding paragraph namely Para 14 of the Appellant's written submissions show that its request is to reverse and set aside the judgment in relation to the interest and costs only. Therefore, this Court is not inclined to inquire into the merits of the appeal grounds 1, 2,4,5,8 to 14.

[6] Before I venture into the awarding of costs and interest, it is necessary to refer to the three orders that are being challenged in this regard. Those three orders are found in paragraphs 80, 81 and 82 in the impugned judgment. Those are namely:

[80] The Plaintiff asks for interest on the $940,000 paid into Professionals trust account. This was a commercial case so I will apply a rate higher than the 6% pa normally used under the Law Reform (Miscellaneous Provisions)(Death and Interest) Act. I think 10% pa is fair (the current lending rate is about 12%) to be calculated from the date the contract came to an end, around 21 December 2009, to the date of this judgment which is approximately 15 months. That computes to $940,000 x 10% x 15/2 = $117,500.

[81] This matter should have never come to Court. I do not know whether both the Defendants have been wrongly advised or just mere stubbornness but in any case both of them are fully responsible for firstly, this matter coming to Court and secondly, for dragging it out. The deliberate refusal of Ms Carol West to pay the money into Court when first ordered is another factor which I take into account in deciding costs. It necessitated several court appearances and argument by Counsel as set out above. Had the Plaintiff asked for indemnity costs I would have granted in line with the cases cited in my judgment in *Lok v Singh* [2010] FJHC 7; HBC 321.2000L (20 January 2010). In any event, I think costs on the high side of the party-party scale is warranted.

[82] Robert Facciola has given evidence that he spent $19,000 on his previous lawyer. I assess the costs of his current solicitors based on the attendance and the history as outlined above. I will include also a third of the cost of airfares and accommodation for the Plaintiff and his partner to attend this trial. Taking all these into account I assess costs as $20,000 to be paid by both Defendants, jointly and severally, within 28 days.

[7] I will first examine the issue in respect of the awarding of interest in favour of the First Respondent. Hence, it becomes necessary to refer first, to the pleadings concerning the interest claimed since the Court is not empowered to go beyond the matters that had not been pleaded when it comes to the issues of facts. In this connection, I may cite the relevant paragraph from the fourth edition of Halsbury's laws of England. In that it is stated

> *"Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise. Particulars enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial.* ***A party is bound by the facts included in the particulars, and he may not rely on any other facts at the trial without obtaining the leave of the court."*** [at para 38 in page 28] [*Philipps v Philipps* (1878) 4 QBD 127 at 133]

[8] Therefore, it becomes necessary to look at the pleadings namely, the statement of claim of the plaintiff filed with the originating summons and to the statements of claim filed by the two defendants in order to ascertain the way in which the pleadings had been settled for the claim in respect of the interest. In paragraph (37) of the statement of claim of the First Respondent he avers that:

> *37. The plaintiff claims interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.*
>
> The Appellant as well as the second respondent being the two defendants had merely denied the said paragraph 37. Therefore, it is clear that the claim as to the interest is directly on the Law Reform (Miscellaneous Provisions (Death and Interest) Act (Cap 27) and nothing else. Hence, the provisions contained in the said Act are applicable to the First Respondent's interest claim.

[9] Section 3 is the only section in the said Law that was available in respect of the interest on judgments at the time the impugned judgment was delivered. The said s 3 of the Law Reform (Miscellaneous Provisions (Death and Interest) Act (Cap 27) stipulates:

> *3. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of* ***the period between the date when the cause of action arose and the date of the judgment****:*
>
> *Provided that nothing in this section –*
>
> *(a) shall authorise the giving of interest upon interest; or*
>
> *(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or*
>
> *(c) shall affect the damages recoverable for the dishonour of a bill of exchange.*

[10] The above s 3 deals with the interest on judgments only for the period between the date on which the cause of action arose and the date of the judgment. Hence, the claim in this instance, as referred to in Paragraph (37) of the First Respondent's statement of claim, restrict it to the ambit of s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. Therefore, it is clear that the First Respondent's claim is only for the period between the date on which the cause of action arose and the date of the judgment. There is no difficulty of determining the said two dates. As the learned High Court Judge has stated in Para [80] of his judgment those dates are: the date on which the contract between the parties came to an end namely 21 December 2009 and 10.03.2011, it being the date of the judgment.

[11] Accordingly, s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act which had been pleaded by the First Respondent entitles him to a statutory right to recover interest as stipulated therein. Then the issue arises as to the manner in which the rate of interest should be decided. Learned Counsel for the respondent in his written submissions, cited the case of *Attorney-General v Vallentine* [1998] FJCA 34, which has referred to the criteria on which the rate of interest is determined. Learned trial judge had decided to apply 10 % as the rate of interest having considered the nature of the action and the lending rate that was in place then.

[12] Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act itself refers to the manner that is to be adopted when determining the rate of interest under the Act. It stipulates thus:

> "*…the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit…"*
>
> Therefore, it is seen that the determination of the rate of interest under the said s (3) is entirely in the hands of the trial judge. However, when the courts are empowered to make a decision exercising its discretion, it is always determined in a judicious manner. In other words, a Judge should show cogent reasons for the decision and/or should indicate an acceptable basis for the decision that he has arrived at when exercising the discretion.

[13] Learned High Court Judge had considered the applicable lending rate for the commercial transactions prevailing then, when he decided as to the rate of interest. Hence, it is seen that the learned trial Judge had made an effort to equate a rate, close upon to the interest charged in money lending transactions with that of a rate that should be applied to a litigant. Unlike in litigation, when monies are lent, the borrower is in a position to make a profit out of it. Litigation is not for profit making. Therefore, it does not make sense to depend on the lending rate to determine the rate of interest in litigation. However, in this instance, the First Respondent could have been compensated by considering the losses caused to him for the loss of opportunity in making use of the money that was given to the Appellant in anticipation of purchasing land in Fiji. No such criteria had been adopted by the learned High Court Judge to determine the rate of interest in this instance. Therefore, the manner in which he decided the rate of interest may not be the best as far as this matter is concerned.

[14] His Lordship the Acting president of this Court brought to our notice, of a judgment delivered recently by the Supreme Court on levying interest upon judgment which is almost similar in nature to the issue at hand. It is the case of QBE Insurance (Fiji) Ltd v Ravinesh Prasad [Civil Appeal CBV0003 of 2009 decided on 18.08.2011] In that, Their Lordships have decided the rate of interest as 8%, when the claim of interest is for the period between the delivery of judgment and until the same is satisfied. The reason being that there was no written law in Fiji then, to cover the period commencing after the delivery of judgment. Therefore, on that point, the judgment in that case has to be distinguished from the case at hand. The said decision had been made taking into consideration of the laws of England, making use of s 22 (1) of the High Court Act (Cap 13).

[15] However, it is interesting to note that soon after the delivery of the said judgment, a Decree had been published to cover the interest component even for the post judgment period. It was published in the gazette bearing No 112 dated

28.10.2011. By this Decree No 46 of 2011, the new s 4 was inserted to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. This new Section reads thus:

> *"4.-(1) Every Judgment Debt shall carry interest at the rate of four cents per centum per annum from time of entering up the Judgment until the same shall be satisfied, and such interest may be levied under a Writ of Execution on such Judgment.*
>
> *(2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).*
>
> *(3) Notwithstanding anything contained in this section, the State Proceedings Act or any other written law, no interest shall be payable on any Judgment Debt entered in any proceedings against the State, or the Attorney-General".*

[16] However, the decision of the Supreme Court in QBE Insurance (Fiji) Ltd v Ravinesh Prasad (supra) was the applicable law in relation to interest due upon judgment, until the said new s (4) came into operation. Even though the decision in that case is not directly applicable to the issue at hand, it could well be followed as a guide line. Accordingly, I am inclined to apply the rate of interest decided by the Supreme Court to this case as well.

[17] Hence, I decide that the First Respondent is entitled to have 8% interest for $940,000/- for a period of 15 months. In the circumstances, the amount of interest referred to in the impugned judgment should be varied accordingly. The appeal filed challenging the interest component is allowed to that extent.

[18] The next issue is the awarding of costs in favour of the First Respondent for the action filed in the High Court. Awarding of costs is governed by r 3 of the High Court Rules in O 62. It stipulates that:

> *"if the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs".*

The event that followed the order of costs in the case at hand was the decision made by the learned High Court Judge finally in favour of the First Respondent.

[19] Paragraphs *[81]* and *[82]* of the impugned judgment that is mentioned hereinbefore which refers to the costs of the action show that the costs amounting to $20,000 had been awarded after due consideration of the circumstances by the learned trial Judge. However, as mentioned in r 3 of the High Court Rules referred to above, again the awarding of costs is entirely in the hands of the judge. Such discretion vested in court always being exercised in a judicious manner. As mentioned earlier in this judgment, one way of ascertaining whether the judge had looked at the issue judiciously is to look at the reasons attached to the conclusions that he had arrived at.

[20] In this instance, learned High Court Judge in his judgment has set out the reasons for his findings in the following manner.

> *"I do not know whether both the defendants have been wrongly advised or just mere stubbornness but in any case both of them are fully responsible for firstly, this matter coming to Court and secondly, for dragging it out. The deliberate refusal of Ms Carol west to pay the money into Court when first ordered is another factor which I take into account in deciding costs. It necessitated several court appearances and argument by Counsel…*
>
> *Robert Facciola has given evidence that he spent $19,000 on his previous lawyer.* ***I assess the costs of his current solicitors based on the attendance and the history as outlined above. I will include also a third of the cost of airfares and accommodation for the plaintiff and his partner to attend this trial."***

[21] When the learned High Court Judge came to the decision as to the costs of the action, he has referred to a previous decision pronounced by him. It is the case of *Lok v Singh* [2001 FJHC 7]. In that decision, he has referred to other authorities found in the common law jurisdictions as well. Learned Counsel for the respondent also has brought to the notice of Court of many judicial pronouncements in this connection. In his written submissions, he has referred to the case of *Colgate-Palmolive Co v Cussons Pty Ltd[@fffd]* (1993) 46 FCR 225 which had been cited by the learned trial Judge as well. In that decision, Sheppard J has set out the principles and guide lines that could be made use of when awarding costs. Therefore, I am not inclined to re-state those principles and guide lines in this judgment. However, in this instance I would like to refer to a passage in Halsbury's laws of England. At para (22) in page 22 in its fourth edition, it is stated thus:

"Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs on the standard basis or on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue and will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. Where the court makes an order about costs without indicating the basis on which the costs are to be assessed, or makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the cost will be assessed on the standard basis.

The court is to have regard to all the circumstances in deciding whether costs were proportionately and reasonably incurred or were proportionate and reasonable in amount, if it is assessing costs on the standard basis. If it is assessing costs on the indemnity basis, it must also have regard to all the circumstances in deciding whether costs were unreasonably incurred or unreasonable in amount. In particular the court must give effect to any orders which have already been made. The court must also have regard to:

1. the conduct of all the parties, including in particular conduct before, as well as during, the proceedings and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.

2. the amount or value of any money or property involved.

3. the importance of the matter to all the parties.

4. the particular complexity of the matter or the difficulty or novelty of the question raised.

5. the skill, effort, specialized knowledge and responsibility involved.

6. the time spent on the case; and

7. the place where, and the circumstances in which, work or any part of it was done.

On an assessment of the costs of a party the court may also have regard to any estimate previously filed by that party or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others when assessing the reasonableness of any costs claimed. Additionally, the Supreme Court Act 1981 provides that where a person has commenced proceedings in the High Court but those proceedings should, in the opinion of the court, have been commenced in a county court, the person responsible for determining the amount which is to be awarded to that person by way of costs must have regard to those circumstances."

[22] Finally, upon considering the contents in the two paragraphs of the impugned judgment which contain the reasons and the award as to the costs of the action, it is clear that the learned High Court Judge has looked at the issue carefully in accordance with the statutory provisions in place in Fiji. He also has addressed his mind to the circumstances such as expenses to obtain legal assistance, attitude of the Appellant in resolving the issue, air fare and the accommodation of the First Respondent etc. Also, it is clear that the learned trial Judge has considered the criteria such as indemnity basis and the standard basis as referred to in the authorities and had exercised his discretion in a judicious manner as mentioned in r 3 of the High Court Rules.

[23] Accordingly, it is my considered view that the leaned High Court judge is correct when he decided to make an order as to the costs amounting to $20,000. Hence, I am not inclined to interfere with his findings in this regard.

[24] I will now turn to the cross appeal filed by the First Respondent. In that, first three grounds are on the general and special damages. The full amount of money paid by the First Respondent to the Appellant in order to purchase the land had been awarded as general damages. No evidence was led claiming any special damages. Therefore, it is clear that the decision as to both the general and special damages claimed by the First Respondent had been made in accordance with the law. Accordingly, I do not see any error on the part of the learned High Court Judge when he decided on the claim as to the general and special damages. The last ground of appeal is on the costs of the action. I have already dealt with the issue of awarding costs in the preceding paragraphs of this judgment. Therefore, it is not necessary to look at the aspect of costs once again. Accordingly, the cross appeal of the Appellant is dismissed.

Chandra JA. I agree with the reasoning and the judgment of Chitrasiri JA.

Kotigalage JA. I also agree with the reasons given by Chitrasiri JA and with his conclusions.

Orders of Court

1. The First Respondent is entitled to have 8% interest on $940,000/- for a period of 15 months. The appeal filed challenging the interest component is allowed to that extent.
2. Order made as to the costs of the action is to remain as decided by the learned High Court Judge. Accordingly appeal against the costs is dismissed.
3. Cross appeal of the First Respondent is dismissed.
4. Having considered the nature of the aforesaid orders, costs of this appeal to be borne by the parties concerned.

Appeal Dismissed.