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IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 57 OF 1990
(Suva Civil Action No. 329 of 1989)

BETWEEN:

GEELONG HOLDINGS LIMITED — APPELLANT

-and-

MAXWELL HITCHINS — RESPONDENT

Mr. S. Parshotam for the Appellant
Mr. V. Maharaj for the Respondent

Date of Hearing : 2nd June, 1992
Date of Delivery of Judgment : 4th June, 1992

J U D G M E N T

This is an appeal against the orders made by a Judge of the High Court on 3rd October 1990.

It is desirable to record the present position of this matter in the hopes that it may result in the matter being disposed of as soon as it conveniently can be.

By writ dated 5th September 1989 the Plaintiff (Respondent to this Appeal) commenced proceedings in the High Court claiming damages for breach of contract. He is a licensed real estate agent carrying on business in Australia. The Defendant (Appellant) is a company which at the time of the commencement

of proceedings was the registered proprietor of the land on which was situated the Reef Resort Hotel Fiji. He claims that he was engaged by the company operating the business of the hotel to find a purchaser for the hotel for an agreed commission of 3% of the purchase price. He claims that he did find a purchaser, Chelmsford Company Ltd, for a purchase price of $4.8 million, that he was entitled to a 3% commission on this sum, viz $144,000.00, that the Defendant has refused to pay him, and that he is entitled to this sum by way of damages for breach of contract.

After filing a statement of defence on or about 18th October 1989, the Defendant, which is said also to be resident in Sydney, took out a summons for security for costs; the affidavit in support is dated 23rd October 1989. It appears that nothing further was done at that stage, probably the matter was simply left in abeyance.

Documents lodged with the Registry of Land Titles appear to disclose the following. By transfer registered on 6th June 1968 the Defendant became the registered proprietor of the land in question. On 8th August 1989 Chelmsford Company lodged a caveat on the title; the caveat discloses that it "claims an estate or interest as Purchasers pursuant to an Agreement to lease dated 28th June 1989 of the subject land". The caveat was lodged by Parshotam & Co, Solicitors of Suva, and it stated that Mr S R Parshotam, solicitor, did so as agent for Chelmsford Company. The caveatee was shown as the Defendant. A letter from the

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Registrar of Titles to the Defendant notified it of the lodging of the caveat by Chelmsford Company. The register also shows the lodgment on 29th November 1989 and registration on the same date of a mortgage by the Defendant as mortgagor in favour of Westpac Banking Corporation as mortgagee of the subject land. One would assume that the consent of the caveator had been obtained.

On 8th May 1990 the solicitors for the Plaintiff sought to obtain a copy of the lease agreement from Parshotam & Co. They noted, in effect, that production of such a document might well resolve the proceedings between the parties in which the Plaintiff sought commission. However, this request was refused. The solicitors for the Defendant refused, claiming that the matter of their application for security for costs should be dealt with first. This prompted an affidavit from the Plaintiff dated 29th May 1990, and filed on 1st June, resisting the application for security. There that matter has rested.

On the same day 1st June 1990, the Plaintiff filed a summons supported by a further affidavit of the Plaintiff annexing copies of the documents lodged and registered in the Land Titles Office and referred to above. The summons stated that it was made pursuant to Order 24 of the High Court Rules, and sought an order that the "Defendant be ordered to produce to the Plaintiff a certified copy of an agreement to lease dated 28th June 1989" and which is referred to above (recited in the caveat).

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The Defendant filed no affidavit in reply to the summons and affidavit. The summons came on for hearing before a Judge of the High Court on 29th August 1990. He gave a ruling on 3rd September 1990, and ordered that the lease agreement of 28th June 1989 be produced by the Defendant. From that order the Defendant has appealed to this Court.

It is clear that before the learned Judge it was submitted on behalf of the Defendant (i) that the Defendant's application for security for costs should be dealt with before the summons for production and (ii) that the summons sought an order that could not be made by the Court. The same matters have been submitted on this appeal.

Order 24 of the High Court Rules, which is headed "Discovery and Inspection of Documents", contains four rules relating to orders which the Court may make and which touch upon the summons for production under review here.

Rule 3, headed "Order for discovery", provides that subject to two other rules not relevant at this stage, the Court may order any party "to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question...."; it may at the same time order an affidavit verifying such list.

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Stopping there, the Court in this application was not asked to make an order for discovery under this rule. No amendment of the summons was sought in order to do so. So an order for production could not be made relying on this rule.

Order 24 rule 7, headed "Order for discovery of particular documents", provides that the Court may make an order "requiring any other party to make an affidavit stating whether any document specified or described in the application..... is, or has at any time been, in his possession, custody or power, and if it is not then in his possession, custody or power, when he parted with it and what had become of it".

Stopping there, the Court was not, in this application, asked to make any such order. In addition, there is a requirement for an affidavit in support which is not present. The rule would give the Court no power to order production as sought in the summons.

Rule 11 enables a party to apply for an order for production of a document in circumstances where a reference to the particular document is made in the pleadings or affidavits of the other party. There is no such reference in this case, at least so far as it has proceeded. No power to make an order for production arose under this rule.

Finally, there is rule 12. This provides that at any stage of the proceedings the Court may order any party to produce to the Court a document in his possession, custody or power, subject to certain safeguards.

One difficulty concerning the application of this rule in the present instance is that the summons did not seek production to the Court, but to the Plaintiff; so far as the record and ruling of the Judge discloses, there was no application to amend the summons. Another difficulty is that at the time the order to produce was made, there was no evidence that a certified true copy of the lease of 28th June 1989, nor the lease itself, was in the possession custody or control of the Defendant. One might be entitled to draw a legitimate inference that there was such a document, and to assume that the Defendant had it. But an order could not properly be made until the Defendant at least had been given an opportunity to make submissions about the matter, and perhaps to file evidence. Besides, the Judge did not purport to base his decision upon this rule; it was not mentioned in his ruling.

Because proof of the lease and its terms could very swiftly dispose of this whole action, the Plaintiff and the Judge were no doubt trying to short cut what might otherwise be a protracted and costly legal wrangle. If that can be done, it cannot be done in the manner sought by the Plaintiff and adopted by the Judge.

The Plaintiff has sought leave to amend the summons so as to seek an order pursuant to rule 7 (supra). The Defendant has very sensibly agreed to file an affidavit in accordance with that rule.

However, it is necessary to dispose of this appeal.

Before doing so we would indicate that a search of the Court file does not reveal that the Chief Registrar has heard or disposed of the summons for security for costs. It does appear that it was at one stage referred by the Chief Registrar to a Judge who appeared to refer it back to the Chief Registrar. The parties will know where the matter rests at present. All this Court wishes to do is (i) indicate that it is the Court, ie a Judge, that may deal with matters of ordering security to be given; (ii) that although the Registrar has power to deal with such matters under Order 32 rule 9, there has been no direction by the Chief Justice that the Registrar alone should deal with all applications for security for costs; (iii) that if the matter of security is currently and technically before the Registrar, he has power to refer it to a Judge; (iv) that, in the circumstances it might be proper for a Judge to deal with the application for security as well as the amended summons for discovery, and (v) that it would seem to this Court that expedition at least of the amended summons for discovery, would be most appropriate.

We should also mention that we reject any submission that the summons for security has to be dealt with before the matter

of discovery. Whether it should be is a matter for any Judge dealing with that matter.

In the result the appeal is allowed.

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Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Justice Gordon Ward
Justice of Appeal