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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0023 OF 2000S
(High Court Civil Action No.HBC0335D of 1996L)

BETWEEN:

RAM PADARATH HOLDINGS LIMITED

Appellant

AND:

USMAN ALI F/N DILDAR ALI

Respondent

Coram: Reddy J R, President
Eichelbaum, JA
Gallen, JA

Hearing: Thursday, 9 May 2002, Suva

Counsel: Mr. C.B. Young for the Appellant
Mr. G.P. Shankar with Mr M. K. Sahu Khan for the Respondent

Date of Judgment: Friday, 17 May 2002

JUDGMENT OF THE COURT

On 18 December 1995 the respondent suffered an accident in the course of his employment by the appellant. While cleaning the windows of the Ba Hotel, owned by the appellant, his left hand slipped and went through the louvre blades of the window resulting in injuries to his hand. The respondent consulted solicitors who in October 1996 issued a writ in the High Court at Lautoka claiming from the appellant unspecified damages, interest and costs. Normal pleadings followed and on 28 February 1997 there was the hearing of a summons for a directions at which usual orders were made. The time

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required for trial was estimated at one day and the case then awaited a fixture.

The next step in the proceedings was the filing of a notice of intention by the respondent to act in person, and a notice of "discontinuation", both dated 23 June 1998. Next there was a notice of motion, filed by solicitors for the respondent seeking to set aside the notice of discontinuance. When filed this was given a tentative date of hearing of 25 September 1998. It was heard in 1999 and resulted in a reserved ruling in which the application was granted. This appeal is against that ruling.

In support of the application to set aside the discontinuance the respondent filed an affidavit to the following effect. He said that some time in June 1998 a person by the name of "Teddy Matawalu" introduced himself as a private investigator for the National Insurance Company, the appellant's insurer. He informed the respondent that Mr A. K Narayan the solicitor on the record for the appellant wanted to see him regarding the case. According to the deponent he was assured that if he accepted a sum of $2,583.36 he would be re-employed by the appellant company.

The respondent maintained that on or about 23 June 1998 he called at the offices of A K Narayan and Company and met Mr Narayan personally. He deposed that Mr Narayan advised him it would be 5 to 6 years before his case was heard in the High Court, he should accept the sum mentioned earlier in full settlement, and that there were slim chances for him succeeding in his claim.

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The respondent told Mr Narayan that he owed fees to his solicitors for the work they had done on his behalf. According to the respondent Mr Narayan advised him "in no uncertain terms" if he accepted the sum and filed notice of intention to act in person and notice of discontinuance, he need not pay any fee at all to his solicitors.

Mr Ali deposed that on or about the same day A K Narayan and Company prepared the notice of intention to act in person and notice of discontinuance and asked him to sign them which he did. He said that ever since the accident he had been unemployed and was in "desperate" need of money to support his family and himself. He further said Mr Narayan maintained his claim was frivolous and if it was dismissed he would have to pay exorbitant costs.

The next matters appear from other affidavits but we mention them now so as to keep events in chronological order. On 29 June the respondent went to another firm of solicitors where he signed a form of discharge which had been prepared by A K Narayan and Company. This released the appellant and its insurer from any claims the respondent might then or thereafter have relating to injuries suffered on 18 December 1995. Shortly afterwards the respondent received the agreed sum.

Returning now to the respondent's affidavit, he deposed he was "flabbergasted" when on 24 August 1998 he received a bill of costs from his former solicitors for $1,430.00. When he called on the solicitors he discovered that the pleadings

had been completed. He was also told that in no circumstances would it take 5 to 6 years for the matter to be heard but more a matter of months, and that if successful the damages would be in excess of the amount he had received.

A number of affidavits were filed in opposition. Mr Teddy Matailevu deposed that on 4 June 1998 the respondent called at his office without an appointment. He had not called the respondent nor met him previously. Mr Matailevu had carried out an investigation into the circumstances of the accident, on instructions from the insurer. He interviewed the plaintiff and informed him that he would contact him again later if required. He deposed that on 22 June the respondent called again without any request or appointment and asked whether the insurer could settle his claim in the sum of $2,583.36 which had initially been offered to his solicitors. When he asked the respondent why he wanted to accept an offer previously declined he said he had discontinued the services of his solicitor and needed money for his family. Mr Matailevu spoke to the manager of the insurer and at his suggestion spoke to Mr Narayan. When the latter said that Mr Ali should deal through his solicitors Mr Matailevu informed Mr Narayan that the respondent had discontinued their services and wanted to settle personally. Mr Narayan then said he could only deal with the respondent if he gave notice to act in person. He also said the original offer was still open, and could be accepted in full settlement. Mr Matailevu relayed this information to the respondent who asked him to type the necessary documents. Mr Matailevu obtained the wording from the clerk at A K Narayan and Company, had the papers typed up, and arranged for the respondent to sign them in his presence. Mr

Matailevu categorically denied telling the respondent that Mr Narayan wanted to see him. He further deposed that the respondent did not at any time mention he had been given advice by Mr Narayan. He repeated that he himself ascertained from Mr Narayan whether the offer was still open for acceptance. Mr Matailevu said the respondent knew exactly what he was signing as he had told him he wanted to take the offer.

The next affidavit was from Mr Yasin a law clerk employed by A K Narayan and Company. He deposed that Mr Matailevu rang him on 22 June 1998 advising that the respondent had visited him and wanted to settle his claim for $2,583.36. He transferred the call to Mr Narayan. Later Mr Matailevu asked him for the wordings of a notice to act in person and notice of discontinuance, which he gave him over the telephone. On 23 June the respondent came to the firm's office with the notice of discontinuance already signed, asking for execution of the consent, so no costs would be payable. He took the documents to Mr Narayan for execution, but he told Mr Yasin to tell the respondent to produce the documents to the Deputy Registrar of the High Court. As Mr Narayan was to be in the High Court the next day he could sign the consent there. The deponent passed this on to the respondent who then left. We note that the discontinuance as filed contained an endorsement by the solicitors for the defendant dated 24 June consenting to the discontinuance with no order as to costs. It is date stamped by the High Court as filed on 24 June.

On 24 June the respondent came to the offices of A K Narayan and Company

with the documents and served a copy of each. He said he had served copies on his previous solicitors, and enquired when he could receive payment. When the insurer forwarded its cheque the deponent prepared a form of discharge to be executed by the respondent. He signed it before another solicitor in Ba and the deponent instructed one of his firm's staff to take the cheque to the solicitor's office for payment on execution.

Mr Narayan confirmed the affidavits of Mr Matailevu and Mr Yasin so far as the content referred to himself. Commenting on the respondent's affidavit Mr Narayan denied instructing Mr Matailevu or anyone else to convey any message or request to the respondent to see Mr Narayan. He denied having seen the respondent on 23 June, but recalled Mr Yasin saying the respondent was present to obtain his consent to the discontinuance. He instructed Mr Yasin to tell the respondent to attend the Deputy Registrar the next day as he wanted the respondent to confirm his intention to the Deputy Registrar before he signified his consent. The next day he met the respondent at the High Court. The respondent had with him the notice of intention to act in person together with the notice of discontinuance both of which had already been signed. Mr Narayan told him to see the Deputy Registrar to confirm what he was proposing. Mr Narayan than spoke to a court officer and requested him to confirm with the respondent that he had negotiated settlement with the investigator, and that although he had a solicitor on record he had discontinued his services and wanted to act in person to file a discontinuance. After the court officer had confirmed this with the respondent Mr Narayan executed his consent to the discontinuance. Apart from a brief discussion with the respondent later

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in the day when he told him that the cheque would be available within a few days he had no further discussion with the respondent. He gave an instruction that upon receipt of the sum from the insurer an appropriate discharge was to be obtained from the respondent which could be witnessed by a solicitor of the respondent's choice. On 29 June the respondent was provided with the discharge and given the names of solicitors whom he could consult in Ba. One of the staff accompanied the respondent to the office of another firm where the discharge was read and explained to the respondent who executed the document and receive a cheque for the agreed amount. Mr Narayan denied having any other discussions with the respondent and in particular denied saying his claim was frivolous and he would have to pay exorbitant costs. The respondent did not seek his advice nor did he volunter any advice to him.

The respondent filed an affidavit in reply in which he denied all those parts of the appellant's affidavits which conflicted with his version of events. He denied having any conversation with the court officer. Annexed to this affidavit was a letter from the insurer to the respondent's solicitors dated 15 August 1996 stating that the wages benefit under the Workers Compensation Act had been paid or was being paid from the date of the accident down to 26 June 1996. The letter also said the insurer had been advised that an assessment of permanent injury should be deferred until June 1997. The letter did not make any reference to the respondent's claim for damages at common law.

An amended notice of motion dated 8 February 1999 set out as grounds in

support of the motion that the purported discontinuance was filed without leave of court, and was filed under undue influence, that the respondent was wrongly advised by the appellant's agents, advisers and representatives, that the notice of discontinuance was executed while the respondent was labouring under the influence of the appellant or its agents when the parties did not have equal bargaining power, and that the course of conduct of the appellant its agents advisers or representatives was unconscionable.

In his ruling the Judge referred to the conflict of evidence on whether the respondent approached the investigator or vice versa.. He said that whichever version was preferred it was clear that on 23 June 1998 the respondent filed a notice to act in person and a notice of discontinuance, and on 29 June he executed the discharge before another solicitor and was paid the agreed sum of money. In regard to undue influence the Judge referred to National Westminister Bank v. Morgan [1985] 1ALL ER 821 and Smith v. Kay (1859) 7 H.L. Cas 750 at 779. He also referred to a passage in Halsbury recording the rule of equity that where there is a particular confidential relationship the existence of undue influence will be presumed unless the other party shows it did not exist. Citing Lord Scarman in the National Westminister Bank case he also referred to the requirement that the applicant must show a disadvantage sufficiently serious to require evidence to rebut the presumption.

Applying these principles to the facts the Judge, noting that the respondent was acting in person, said that unlike the appellant's solicitors he had no legal expertise.

"All the plaintiff knew was that he would be receiving a certain amount of money in return for withdrawal of the action. He would not have been expected to understand the conclusive nature of the notice concerning any future proceedings he might contemplate." On the other hand, the Judge said, the solicitors acting for the appellant would have been well aware of the 3 year limitation period for personal injuries actions. "They had by virtue of their legal knowledge a dominating relationship over the plaintiff. In such circumstances there was a duty to ensure he had independent legal advice before he signed and filed the notice." However, nothing was done, and "a manifestly disadvantageous transaction" then ensued. The Judge held the appellant's solicitors had not rebutted the presumption and he had no hesitation in determining the application on the basis that undue influence had been brought to bear. In regard to the discharge, and responding to an argument that it was a complete bar to any fresh proceedings, the Judge expressed the view that this was a separate matter to be raised at an appropriate time in the future. Accordingly he set aside the notice of discontinuance.

In the High Court neither side chose to exercise their right under order 38 r. 2 (3) to apply to have any deponent cross-examined. The Judge was conscious of the conflict of evidence but considered he could decide the case without resolving it.

On the appellant 's version of events Mr Narayan understood Mr Ali had discontinued the services of his solicitors. Mr Narayan's firm, through Mr Matailevu informed Mr Ali that if he wanted to deal with the appellant would have to give notice to

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act in person, that the offer previously made was still available, and he could accept it in full settlement, on discontinuance of the proceedings. Mr Narayan's firm then provided the wording for a notice of intention to act in person, and a notice of discontinuance. We interpolate that the appearance of these documents, which did not have a backing sheet and contained mistakes, tends to confirm Mr Matailevu's account that he had them typed in his office in accordance with wording provided by telephone. Mr Narayan declined to sign the consent on the discontinuance until Mr Ali had confirmed to a court official that he wanted to proceed in this way. Mr Narayan denied giving Mr Ali any advice, or exercising any persuasion.

This account of events, if accepted, would be insufficent to establish the kind of relationship required to raise a presumption of undue influence. It was not a situation where "influence is acquired and abused, where confidence is reposed and betrayed" (per Lord Kingsdown in Smith v. Kay (1859) 7 H.L. Cas 750 at 779) unless one takes the view that the necessary relationship arises whenever a lay person is involved in a legal transaction where the other party is represented by a lawyer. Such a proposition clearly is untenable. We know from the cases coming before this Court that litigants often represent themselves, and when the Court put it to Mr Shankar in argument that it was relatively commonplace for litigants in Fiji to circumvent their solicitors and deal with the defendant's lawyers directly, he did not dispute it. To hold that in every such situation a presumption of undue influence arose, rebuttable only, as the Judge indicated, by insisting that the plaintiff obtained independent legal advice, would create an impossible position.

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People are entitled to represent themselves and by definition do not wish or are not in a position to engage a lawyer.

For these reasons we conclude that the outcome in the court below cannot be supported on the reasons the Judge gave. We therefore need to address the problem not resolved below, the conflict in the affidavit evidence.

In assessing the affidavits it is notable that the respondent's initial affidavit ended with events said to have occurred on 23 June. The next event mentioned was on 24 August 1998 when he was stunned to receive a bill from his solicitors for $ 1430.00.Yet there is extraneous evidence establishing matters of significance between 23 and 29 June. The Notice of intent was countersigned by Mr Narayan, and the Notice and the Discontinuance were filed. It is conceivable that they were filed by the solicitors, but the only evidence is to the contrary. Also, it is unlikely solicitors would have tendered documents without backing sheets. The respondent signed the discharge on 29 June and received the money.

Collectively Mr Narayan, Mr Matailevu and Mr Yasim have given a detailed account of how the documents were prepared and signed, and that they were served by the appellant. Their affidavits are consistent with one another, and there is a degree of direct corroboration. A striking feature of the respondent's affidavit in reply is that for the main part it did not go into the events covered by the appellant's affidavits. The respondent

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answered assertions with blanket denials, and by referring to his initial affidavit, which as noted did not deal with the 24 – 29 June period at all. He denied any conversation with a court officer. As to the signing of the discharge, he said A K Narayan & Co failed to inform Mr Ram, the solicitor before whom the discharge was signed, that a High Court action had been commenced. We do not understand why the respondent could not have informed Mr Ram of that himself; it would be incredible that he had allowed more than 2 years to elapse after his accident without finding this out. The discharge contained the following certificate, signed by Mr Ram:

> ***SIGNED by the said USMAN ALI in my presence after the contents thereof had been read over and explained to him in the Hindustani language and he appeared fully to understand the meaning and effect thereof.***

The discharge was not a complex document. After Mr Ram's explanation the respondent could have been in no doubt that on signing the document and receiving the money, he had no further claim of any kind against his former employer or its insurer in respect of his accident. Indeed we consider he understood that even beforehand. In his affidavits he did not contend otherwise, and in referring to his disputed conversation with Mr Narayan, he said he was advised to accept $ 2583.36 *in full settlement.*

It is indeed curious that at a time when, in his own words, the respondent was "in

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desperate need", Mr Mataivelu should materialise to convey a prospect of money. After this unexpected turn of events it is also curious that the respondent did not consult the solicitors acting for him, if only to find out the stage his High Court action had reached. The appellant's broad statements in his affidavit in reply are unsatisfactory. For example regarding the conversation with the court officer, Mr Narayan deposed that the officer questioned the respondent, and corrected the documents in his own handwriting. Mr Ali's response was to deny the contents of that paragraph. However, the documents show they were in fact amended by hand. The respondent could have said how and when this happened. Further, Mr Narayan, in referring to the respondent's conversation with the court official, named that person. If this was a fabrication, as the respondent seems to suggest, Mr Narayan took a great risk. Apart from expressing astonishment, the respondent's reply is simply a denial.

Imprecise responses leave much of what the appellant's deponents say about the events of 24 to 29 June uncontested as to detail. As we have already said, clearly there were interchanges between the respondent and the solicitors at this time. The absence of a credible account to the contrary leads to an inclination to accept the appellant's version.

As one would expect there is a rule of professional conduct (rule 6.02) precluding a practitioner from communicating with the client of another lawyer in relation to a matter where the practitioner has been dealing with the other, save in exceptional circumstances. This would explain why Mr Narayan would not deal with the respondent

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until he had signed a Notice of intent to act in person, and had confirmed his intentions to an independent person in the form of a court officer. In this respect Mr Yasim corroborates Mr Narayan's evidence. Although, as noted, the respondent denied speaking with the court officer, in other respects the affidavit in reply is evasive about Mr Yasim's evidence regarding the respondent's visit to the offices of A K Narayan & Co on 23 June.

It is apparent that on his own version, Mr Narayan had limited and indirect dealings with the respondent. This is not a disciplinary hearing so we pass no judgment on that. At the moment the issues are what the evidence establishes regarding the relationship between the respondent and Mr Narayan, and whether what emerges is sufficient to be within the legal concept of a relationship giving rise to the rebuttable presumption of undue influence.

Although following the decision of the House of Lords in Royal Bank of Scotland v Etridge [2001] 4 AllER 449 the description "manifest disadvantage" is out of favour, whether there was a significant imbalance to the disadvantage of the person seeking to set the transaction aside remains a relevant consideration. Here there has been no evidence as to the level of award the respondent might reasonably have recovered, whether in his common law action, or for workers compensation. However, on the bare facts that his recovery of $2583.36 was eroded by costs of $1430.00, and that he was never advised about his chances of doing better, we are prepared to accept that there was a significant element of detriment. We also accept that the respondent did not receive

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independent advice about the worth of his claim; Mr Ram was not put in a position to provide such advice, nor did he certify that it had been given. On its own however that will not suffice.

As to the truth of the dealings between the parties, we bear in mind the well known passage in Eng Mee Young v Letchumanan [1980] AC 331, 341 to the effect that notwithstanding the absence of cross examination the court is not bound to accept uncritically every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statements by the same deponent, or inherently improbable. On a careful examination of the affidavits on both sides we do not find the respondent's account at all convincing. We are not satisfied that Mr Matailevu approached the respondent. Nor are we satisfied of the correctness of the respondent's assertions about a critical conversation with Mr Narayan on 23 June. The respondent has not established there was any such conversation at all, let alone one in the persuasive and professionally improper terms to which he deposed.

In preference to the account given by the respondent, on our view of the evidence there is a simpler and more probable explanation of events. The respondent was desperate for money. He decided to try to obtain revival of the offer made previously. Hoping to avoid payment of the costs he realised would be owing, he did not go to his solicitors. He made contact with Mr Matailevu. How he obtained his name is speculation but he might have got it from his former employer. After that, events followed as explained

by the appellant's deponents. Mr Ali was never in any doubt that what he received would be in full and final settlement. The fact that he raised no query about that when the effect of the discharge was explained to him confirmed his state of mind when he signed the other documents a few days earlier. Things only unraveled when the respondent received an account from his solicitors which consumed much of the settlement.

These facts do not reveal any relationship sufficient to raise a presumption of undue influence. Mr Ali deserves sympathy but it is his own foolishness that has brought about the result. The law cannot intervene on that ground alone, as explained in the classic statement in the judgment of Salmond J in Brusewitz v Brown [1924] NZLR 1106, 1109.

Accordingly we must allow the appeal. We will reserve leave to the appellant to apply for costs, but in the circumstances the appellant may give consideration to letting that aspect lie.

Result

Appeal allowed; High Court Orders setting aside discontinuance and awarding costs, vacated; Notice of Motion to set aside discontinuance dismissed.

Leave to appellant to apply for costs.

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Reddy J R, President

FIJI COURT OF APPEAL

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Eichelbaum, JA

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Gallen, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellant
Messrs M.K. Sahu Khan and Company, Ba for the Respondent

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