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

CIVIL APPEAL NO ABU0041 OF 2002
(High Court Civil Action No. 70 of 2001S)

BETWEEN:

ESTATE MANAGEMENT SERVICES LIMITED

Appellant

AND:

SYDNEY JAMES LEE and
JACQUELINE ROSEMARY LEE

Respondents

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Tuesday 27 May 2003, Suva

Counsel: Mr P. Knight for the Appellant
Mr N. Prasad for the Respondents

Date of Judgment: Friday, 30 May 2003

JUDGMENT OF THE COURT

This is an appeal against a judgment of Scott J given on 21 August 2002. The Judge entered summary judgment for the respondents for the sum of

$91,206.09 together with costs $1,500.00. The appellant now challenge the quantum of the Judge's award and the order for costs.

Background

On 22 June 1982 the respondents as purchasers and the appellants as vendors entered into an agreement for sale and purchase in respect of a lot of land at Pacific Harbour. The purchase price was F$14,000.00. The respondents paid a deposit of 25% of the purchase price, F$3,500, and the balance by quarterly instalments as provided in the agreement. The respondents completed the payment of the purchase price on 22 April 1987.

On payment of the purchase price the appellant was required under the agreement to transfer the lot to the respondents and give vacant possession. In 1987 and again in 1989 the appellant was asked to complete but it did not do so.

The respondents instructed solicitors. On 30 October 1992 the respondents demanded a transfer of the lot . On 9 November 1992 the appellant replied to the effect that the lot had not been developed, that title could not issue and that the land (including the lot sold to the respondents) had been sold to a Japanese company Minami Taiheiyo Kaihatsu Kabushiki Kaisha. In fact, the sale had taken place on 27 March 1988 without the knowledge of the respondents. The appellant asserted that under a final deed of settlement with the Japanese company the latter was obliged to develop the lands so that separate titles could be issued.

In 1992 the respondent asked the Japanese company for information as to when the development would take place. That inquiry was unsuccessful.

In the same year 1992, another disgruntled purchaser at Pacific Harbour sued the appellant for failing to complete the transfer of a lot bought by him. The appellant joined the Japanese company as a third party. Ultimately Pathik J found in favour of the purchaser against the appellant and ordered the Japanese company to indemnify the appellant. That judgment was upheld by this Court in 1997. We shall refer to this litigation as "the Eyre litigation".

After the completion of the Eyre litigation the respondents again made demand on the appellant. Their hopes of a resolution with either the appellant or the Japanese company short of litigation were not fulfilled.

Action commenced

On 15 February 2001 the respondents commenced an action against the appellant on the basis of the agreement for sale and purchase. The respondents relied on breach of contract. The respondents' prayer for relief was in the following terms:

> *"(a) payment of the sum of F$14,000.00 together with any devaluation exchange losses occurred to the Fiji currency since payment in full by the Plaintiffs to the Defendant.*
>
> *(b) Interest at the rate of $13.50 as charged on overdrafts by commercial banks in Fiji on the said sum of $14,000.00 or at such*

other rate as the Court thinks fit and/or under the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

(c) further or alternatively damages

(d) by reason of the matters alleged in paragraphs 8-10 in the circumstances exemplary damages

(e) costs on an indemnity basis

(f) other relief which the Court deems just. "

The appellant filed a defence. It denied that it had failed to comply with its contractual obligations and it put the respondents to proof of their loss.

On 10 October 2001 the appellant joined the Japanese company as a third party. The appellant sought indemnity from the third party for the respondents' claim. The appellant relied on a Deed of Settlement (containing an indemnity) dated 20 March 1990 between the appellant and the Japanese company. The third party did not acknowledge service.

Summary judgment application

On 31 January 2002 the respondents applied for summary judgment. The orders sought were:

"1. For Judgment in this action against the Defendant for the sum of:-

a) F$14,000.00 together with any devaluation exchange losses occurred to the Fiji currency since payment in full by the Plaintiffs to the Defendant; and

b) *Interest at the rate of $13.50 as charged on overdrafts by commercial banks in Fiji on the said sum of F$14,000.00 or at such other rate as the Court thinks fit and/or under the provisions of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap. 27.*

2. *Further or in the alternative, for an order that the Plaintiff be entitled to register a Judgment, acquire, sell, transfer the property in Certificate of Title No. 26353, Lot 1 on DP 6694 (as to Lot 1250 shown in the sketch plan) pursuant to section 104 of the Land Transfer Act, Cap. 131.*

3. *For an order that costs be taxed and paid by the Defendant to the Plaintiffs.*

4. *Such further order(s) as this Honourable Court may deem fit to make in the circumstances."*

It is to be noted that the orders 1(a) and (b) sought by the respondents were in identical terms to the first two claims in the prayer for relief in the statement of claim.

The respondents' affidavit in support fully outlined the history of the matter. The relevant documents and correspondence were exhibited.

The appellant's affidavit in reply did not contest the respondent's claim. It was essentially directed at the claim for indemnity against the third party.

The summary judgment application was called before Scott J on 5 April 2002. All parties were represented by counsel. The Judge gave a short judgment. It was in the following terms:

"The Defendant accepts that it has no defence to the Plaintiff's claim but seeks indemnity from the Third Party which has not acknowledged service following the issue of the third party notice.

In these circumstances there will be Judgment for the Plaintiff against the Defendant.

The claims in paragraphs 1(a) and 1(b) of the summons have not been quantified. Precise figures are to be calculated by Plaintiff's counsel and the figures given to the Defendant for comment. In the absence of disagreement an order embodying the precise figures can be sealed.

As to (1)(b) the commencement date for the payment of interest will be 22-4-87.

In the event the calculations of 1(a) and 1(b) are not agreed leave will be likely to restore."

On 9 April 2002 the respondents' solicitors supplied the appellant's solicitors with the calculations ordered by the Judge. The respondents sought to recover $91,206.09. That sum was made up as follows:

Judgment sum	$14,000.00
Total devaluation exchange losses arising from the three devaluations of the Fiji dollar on 30 June 1987 (17.75%) 31 October 1987(15.25%) 20 January 1988 (20%)	$14,940.88
Total interest calculated on a compound basis from 22 April 1987 to 5 April 2002 (the day of the hearing before Scott J)	$62,265.21
TOTAL	$91,206.09

The respondents' solicitors enclosed detailed calculations and documentation from the Reserve Bank of Fiji as to the three devaluations. Party and party costs in the sum of $1,500.00 were suggested.

The respondents' solicitors sought a reply from the appellant's solicitors. There was no response. As the result the respondents had the matter restored before Scott J.

At a hearing before that Judge on 19 July 2002 the respondents and the third party were represented by counsel. There was no appearance for the appellant. The Judge made an order that the respondents file an affidavit setting out their calculations in support of the claim.

The order of Scott J of 19 July was promptly complied with. It repeated the calculations contained in the respondents' solicitors letter of 9 April 2002 and exhibited the relevant documentation. The affidavit was served on both the appellant and the third party.

There was no affidavit in reply.

The judgment under appeal

On 21 August 2002 counsel for all three parties again appeared before Scott J. In a short judgment he noted that he had ordered an affidavit of calculations to

be filed and served but that neither the appellant nor the third party had replied after service. He alluded to some "administrative breakdown" in the office of the appellant's solicitors but then went on to state that in any event the third party was liable to indemnify the appellant for any amount ordered. He recorded that the third party's counsel had not offered any submissions. He thereupon entered judgment for the plaintiff in the sum of $91,206.09 "as claimed and calculated".

And as to costs the record shows the following exchange :

"Plaintiff Counsel: ***I see costs and ask that they be summarily assessed. I ask $1500.***

Defence Counsel: ***I have nothing to say.***

Counsel for Third Party: ***I have nothing to say.***

Court: ***(after perusing the file) Plaintiffs costs assessed at $1500 to be paid within 28 days."***

Grounds of appeal

On 11 September 2002 the appellant filed its notice of appeal against Scott J's judgment of 21 August 2002.

The appellant's grounds of appeal concerned three aspects of the judgment.

First the appellant asserted that the Judge erred in allowing the devaluation of the Fiji dollar "to be factored into the damages" awarded to the respondents when the agreement for sale and purchase was expressed in Fiji dollars.

Secondly the Judge erred in allowing interest at 13.5%. The appellant also attacked commencement date 22 April 1987 (the date when the final instalment was paid on the lot) and the period for which interest was awarded 22 April 1987 to 5 April 2002.

And thirdly the appellant complained that the Judge erred in fixing costs at $1,500.00.

The appellant's conduct

Before examining the grounds of appeal we observe that a cursory examination of the events in this case reveals a history of inadequate response and sometimes no response on the part of the appellant. It sold the land which includes the respondents' lot after the latter had paid for it, and without their knowledge. It continued to avoid meeting its contractual obligations to the respondents. In the meantime the latter displayed commendable patience. They waited for something to happen. Since April 1987 to date they have waited in vain.

The appellant acknowledged in the High Court and again in this Court that it has no defence to the respondents' claim. On quantum the appellant was put on

notice by the statement of claim and later the summons for summary judgment that the respondents sought devaluation losses and interest at the rate of 13.5%. The appellant did not respond to the respondents' solicitors letter of 9 April 2002. There was no appearance before Scott J on 19 July 2002 after the restoration of the proceedings before the Judge. It did not file an affidavit in opposition after service of the respondents' affidavit of calculations. And finally it did not place before the Judge on 21 August 2002 the submissions now made in this Court or indeed make any submissions. Its stance on quantum only became clear in its notice of appeal.

Against this background and not unexpectedly counsel for the respondents in its written submissions filed ahead of the hearing emphasised these matters. He inferentially questioned the right of appeal.

Right of appeal

At the outset we therefore address the question of whether an appeal by the appellant is properly before us. That question is clearly answered by s12(1)(a) of the Court of Appeal Act. It provides:

> *" 12.– (1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal–*
>
> *(a) from any decision of the Supreme Court sitting in first instance including any decision of a judge in chambers;"*

In our view the judgment of Scott J on 21 August 2002 against which the appellant appeals is squarely within this provision. None of the exceptions set out in s12(2) apply.

Having reached this conclusion we now turn to the grounds of appeal and the competing arguments thereon.

Mr Knight's position

Mr Knight appeared as counsel for the appellant in this Court. In fairness to him we note that he was not engaged until after Scott J had given his judgment. He is in no way responsible for the failure of the appellant's counsel to make the submissions to Scott J which were made in this Court.

The devaluation ground

We now refer first to the complaint that the Judge erred in making an allowance for the three devaluations of the Fiji dollar.

Helpfully in Mr Knight's written submissions he succinctly set out the reasons for the attack under this head. He submitted that the Judge erred because:

(a) The agreement for sale and purchase between the parties was expressed in Fiji dollars and accordingly the respondents' obligation

was to pay the purchase price in that currency. Mr Knight accepted that some agreements between the appellant and the other purchasers were expressed in other currencies. For example in the Eyre litigation the purchase price was expressed in pounds sterling.

(b) The respondents did not establish a basis for the Court to take into account the devaluation of the Fiji dollar in making its award to the respondents.

(c) While the respondents paid the deposit in Australian dollars they did not adduce any evidence as to the currency in which they paid the instalments.

(d) At the time of the contract, June 1982, the devaluation of the Fiji dollar was not reasonably foreseeable and future devaluations were not in the contemplation of the parties, assuming that the respondents claim was for damages and not for repayment of the purchase price.

(e) If the claim however was for the repayment of the purchase price then the measure of the respondents' loss was the difference between the value of the land at the time of trial and the purchase price.

In Mr Knight's oral argument he questioned whether the respondents' claim was a claim for damages for breach of contract or for the repayment of the purchase

price. He emphasised that the onus was on the respondents to establish a legal foundation for the claim which is made and adduce sufficient evidence in support. His submission was that the respondents had failed in both respects. He wryly questioned whether the respondents would have made an allowance in the appellant's favour if the Fiji dollar had been revalued upwards.

Mr Prasad both in his written submissions and in his oral argument maintained that because of the successive exchange rate devaluations over the years since purchase the respondents, being Australian citizens, had not got back what the purchase had cost them and that they had thereby suffered loss.

Mr Prasad did not cite any authority for the proposition that although the contract was expressed in Fiji dollars the respondents could recover an exchange related loss.

The interest ground

We next turn to the ground of the appeal relating to interest.

Again we were assisted by succinct written submissions from Mr Knight and his oral argument.

On the rate of 13.5% Mr Knight submitted that the Judge erred because:

(a) the respondents did not establish a basis for claiming interest at 13.5% when the interest rate under the agreement was 8.5%;

(b) the respondents did not adduce any evidence to show whether they were in overdraft and, if so, what interest they were paying and, if not in overdraft, what interest they would have earned on the amount of the purchase price;

(c) the respondents did not adduce any evidence as to the commercial interest rates payable in the years in question;

(d) currently financial institutions in Fiji were paying a maximum of about 5% interest on long term deposits;

(d) in the Eyre litigation the trial Judge awarded 7% per annum and this award was not disturbed on appeal.

On the issue of the starting date, 22 April 1987, and the award of compound interest Mr Knight drew our attention to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Cap 27 Ed 1978 which provides:

> " *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."

As to the starting date Mr Knight submitted that the cause of action did not arise on 22 April 1987 as the respondents were still seeking a transfer of the land as late as October 1992. Mr Knight submitted that the earliest commencement date was possibly 9 November 1992 (the date of the appellant's reply to the respondents' solicitor's letter of 30 October 1992) but more probably the date of the issue of the writ 15 February 2001.

And as to the compounding of the interest Mr Knight submitted that the Court was required to award simple interest having regard to the provisions of section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act set out above. He contended that compound interest was only awarded by the Court in the exercise of its equitable jurisdiction for example where there had been a breach of a fiduciary relationship. See Wallersteiner v Moir (No 2) [1975] 1 QB 373 (CA) McGregor on Damages 16th Edition paragraph 670.

Mr Prasad in his written submissions justified:

(a) the rate of 13.5% on the basis of dicta in two decisions of this Court Jai Prakash Narayan v Savita Chandra (Civil Appeal No. 37 of 1985),

Mohammed Aleem Khan v Argo Travel Limited (Civil Appeal No. ABU0019 of 2001S);

(b) the award of compound interest on the authority of Wallersteiner v Moir (No 2) (supra);

(c) the commencement date of 22 April 1987 on the basis that "the appellant (has) failed to honour its part" of the bargain since that date.

The costs ground

The appellant's third complaint concerns the award of $1,500.00 costs which had been suggested as early 9 April 2002 by the respondents' solicitors and which had not been resisted before Scott J on 21 August 2002. In our view the appellant cannot be heard to complain now. In any event we consider that the sum awarded was a proper exercise of the Judge's discretion.

Our conclusions

The two complaints concerning devaluation and interest made by the appellant cannot be disposed of on this appeal. As is evident, the devaluation point is clearly arguable as a matter of law and the interest issues require evidence (which was not before the Judge); and as well there is a dispute as to the law applicable.

In this Court we do not have the benefit of the Judge's consideration of the law and the facts because he was not addressed on the relevant issues as he should have been. It is not possible for us to rehear the case within the confines of a civil appeal. Having now heard from counsel in this Court we are of the opinion that the Judge should not have entered summary judgment either on the devaluation claim or the claim for compound interest at 13.5% from 22 April 1987. These issues were not suitable for determination under O.14 of the High Court Rules even in the absence of positive opposition from the appellant.

The appellant's then counsel should have raised before Scott J the matters now raised in this Court. Had he done so we are confident that the Judge would have taken a different course. Instead there has been this appeal which has unnecessarily occasioned additional and unnecessary expense for the respondents.

The respondents are undoubtedly entitled to summary judgment for at least F$14,000.00. Had the Judge been properly alerted to the relevant issues he would have entered summary judgment for this sum and given leave to the appellant to defend the two contested issues as to quantum. These comments presage the course which we propose to adopt.

Result

We now make the following orders:

1) The appeal against the judgment in favour of the respondents against the appellant for F$91,206.09 is allowed and the judgment is vacated.

2) In lieu thereof there will be judgment in favour of the respondents against the appellants for the sum of $F14,000.00.

3) The appeal against the order for costs of $F1,500.00 in favour of the respondents against the appellants is dismissed.

4) The sums of $F14,000.00 and F$1,500.00, referred to in orders 2) and 3) are to be paid to the respondents within 14 days of the delivery of this judgment.

5) The appellant is given leave to defend as to quantum in respect of the following issues:

   a) the respondents' claim arising out of the successive devaluations of the Fiji dollar; and

   b) the respondents' claim for compound interest from 22 April 1987 to 5 April 2002 at the rate of 13.5% per annum;

6) The action is remitted to the High Court for the trial of the two issues for which leave to defend has been granted to the appellant.

7) Any further directions as to the trial are to be given in the High Court.

Costs

It remains for us to deal with the question of costs in this Court. Given the circumstances we consider that this is a proper case for solicitor and client costs against the appellant. Had the appellant made its stance known in the High Court the case would have taken a different course. We would not have had this appeal. The appellant must take full responsibility for this situation. The respondents in the meantime have been unnecessarily delayed (after earlier delays) and as we have stated earlier put to additional and unnecessary expense. We therefore make the following orders as to costs:

1) The appellant is to pay the respondents' costs of and incidental to this appeal on a solicitor and client basis together with all necessary disbursements and expenses (including counsel's fee, if any).

2) In the event that the parties are unable to agree as to the amount of such costs, disbursements and expenses the same are to be taxed and fixed by the Registrar of this Court.

FIJI COURT OF APPEAL

.....
Tompkins, JA

.....
Henry, JA

.....
Penlington, JA

Solicitors:
Messrs Cromptons, Suva for the Appellant
Messrs Mitchell, Keil & Associates, Suva for the Respondents