

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

CIVIL APPEAL NO. ABU0065 of 2004S
(HighCourtCivil Action No.HBC0167of 2004S)

BETWEEN:

RAJESH PRASAD
MUNI DEO RAJ

Appellants

AND:

SUNRISE CORPORATION LIMITED

Respondent

Coram:

Henry, JA
Scott, JA
McPherson, JA

Hearing:

Friday, 8 July 2005, Suva

Counsel:

Ms S. Devan for the Appellants
Dr M.S. Sahu Khan for the Respondent

Date of Judgment: Friday, 15 July 2005, Suva

JUDGMENT OF THE COURT

- [1] Mr Rajesh Prasad, who is the first appellant, is the registered proprietor of freehold land at Kasanji Street, Vatuwaqa, Suva, contained in certificate of title No. 26971. On 19 March 2004, he signed a document authorizing the second appellant Muni Deo Raj trading as Prime Properties to act as his estate agent to sell the land for \$630,000 on terms contained in that document. The agent advertised the property in the press and received a written offer in the form of a letter dated 29 March 2004 purporting to be from the respondent Sunrise Corporation Limited. It offered to buy

the land for \$670,000, with a deposit of \$100,000 payable on execution of a sale agreement, possession on the same date, and the balance of purchase moneys four months later.

- [2] By letter dated 29 March 2004 the agent conveyed to the first appellant the offer from the respondent enclosing a copy of it to the first appellant. The agent's letter concludes with the request "Please confirm to me as soon as possible." Alongside the agent's signature are written the words "OK approved" together with the first appellant's signature and a stamped impression of his business or trading name. It is not perhaps precisely clear when or how this acceptance was communicated to the offeror; but there seems little doubt it was done, resulting in the present litigation.
- [3] On the footing that a contract existed for the sale of the land by the first appellant to the respondent, the respondent lodged a caveat forbidding transfer or dealing with the land. It claims an estate or interest in the land as purchaser "by virtue of agreements dated 19 March 2004 and 29 March 2004." It would probably have more accurately referred to the respondent's offer of 29 March and first appellant's acceptance or about the same date; but nothing on the appeal turns on that.
- [4] The first appellant applied to the High Court for an order removing the caveat; but was unsuccessful. This is an appeal from that decision refusing the order for removal.
- [5] On appeal, the appellant relied on a number of grounds which it had raised before the primary judge. One of them was that the parties did not intend to be bound to sell and purchase until a formal written contract was executed by both of them. This would raise for consideration the applicability of the decision in *Eccles v. Bryant* [1948] Ch. 93 and require a consideration of *Masters v. Cameron* (1954) 91 CLR 353, at 360. It was also argued that there is no note or memorandum in writing of the contract signed by party to be charged. That in turn might raise the question

whether a memorandum might not be constituted of the two letters dated 29 March, including the first appellant's signature on the latter, if they are capable of being linked together under the principle in *Timmins v. Moreland Street Property Co. Ltd.* [1958] Ch. 110.

- [6] In the end, however, we do not think it necessary or desirable on an application such as this to reach a final conclusion on these matters. The respondent has in that regard at least an arguable case to support the interest it claims, which would be sufficient to justify maintaining the caveat until trial.
- [7] It is the other matter relied on by the first appellant that calls for closer consideration. It is that, at the time the agreement for sale and purchase was made on 29 March 2004, the respondent had not been incorporated. Indeed, so far as the material goes, there is nothing to suggest that the respondent has even now been registered and incorporated as a legal entity. From this it is evident that as a matter of law the respondent had no existence and so on 29 March 2004 was incapable of being a party to the contract that is claimed to constitute the ground for lodging and maintaining the disputed caveat.
- [8] There are two decisions of authority to that effect. The first is that of the English Court of Appeal in *Newborne v. Sensolid (Great Britain) Ltd* [1954] 1 QB 45. It was a case of a written offer to sell the defendant 200 cases of cooked meat on terms set out in a document which was subscribed "Leopold Newborne (London) Ld." followed by the signature of Leopold Newborne. His name appeared elsewhere on the document as one of the directors. It later turned out that at the time the agreement was made by completion by the defendant of the acceptance slip attached to the letter, Leopold Newborne (London) Ld. had not been incorporated by registration as a limited liability company. An attempt was then made to substitute Leopold Newborne in place of Leopold Newborne (London) Ld as the plaintiff in proceedings to recover damages for non-acceptance of the goods.

- [9] In affirming the decision of Parker J. dismissing this claim, Lord Goddard CJ in the Court of Appeal said ([1954] 1 QB 45,51):

“The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company’s contract is authenticated by the signature of one of its directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr Newborne.”

The result, his Lordship said, was that because the company did not exist, there never was a contract, and Mr Newborne could not come forward and say there was a contract with him. With this Morris and Romer LJ agreed, the former saying that both the signature on the document, and the document itself, were a complete nullity.

- [10] The decision in *Newborne v. Sensolid* was followed by the High Court of Australia in *Black v. Smallwood* (1966) 117 CLR 52. The facts were similar to those of the present case in that the two plaintiffs sought specific performance of a contract to sell made under the name Western Suburbs Holdings Pty Limited. The contract was signed under that name by both plaintiffs described as “directors”, although the company had at that time not been incorporated. The action by the two individual signatories failed because they were not parties to the contract, which professed to be made on behalf of a company that did not then exist.

- [11] When one turns to the correspondence in the present case, it is clear that the principle of those two decisions must govern this. The letter of offer dated 29 March 2004 is on letterhead showing the offeror to be “Sunrise Corporation Limited”, of P O Box 1921, Nadi, Fiji. It is subscribed “Yours faithfully, Sunrise Corporation Ltd.”, and signed “P Singh Executive Consultant, Head Office, Queen Street, Nadi.” The offer is made by a non-existent corporation and purports to be authenticated by the signature of someone acting as executive consultant to that non-existent corporation.

[12] The real estate agent Prime Properties in its letter dated 29 March 2004, communicating the offer to the appellant Rajesh Prasad simply adopted the form in which the written offer itself was cast. As well as enclosing a copy of the offer, it described the buyer's name as "Sunrise Corporation Limited" and its "executive director" as Mr Ramend Charan. The "company", it said, was willing to buy the property for \$670,000.00.

[13] The problem of exactly who the appellant was dealing with became even more acute for the respondent's solicitors in drawing up the caveat dated 23 April 2004. In the end, it was expressed as follows:

"I Ramend Prasad Charan.....of Nadi, Businessman as Managing Director and agent of Sunrise Corporation Limited claiming an estate or interest as purchaser by virtue of agreement dated 19 March and 29 March....."

[14] The signature of R P Charan is then declared to have been made in the presence and to be that of Suresh Chandra "as Managing Director and agent for Sunrise Corporation Limited a limited liability company having its registered office at Nadi, the Caveator...."

[15] It is, of course, impossible to reconcile these conflicting statements or contentions, for that is what they really are. To sustain the caveat, there must be a contract for sale and purchase. There can be no contract with Sunrise Corporation Limited, because it did not exist at any relevant time. There can be no contract with either P Singh, calling himself Executive Consultant, or with R P Charan as Managing Director, because neither of them professed to buy and because a person cannot be a consultant to or director of a non-existent corporation. As individuals neither of them can claim an interest in the land by virtue of any contract with Mr Rajesh Prasad as the owner of the land.

[16] It was nevertheless submitted by Dr. Sahu Khan that the description Sunrise Corporation Ltd. was simply the name under which Ramend Prasad Charan and Praveen Singh carried on an enterprise or partnership business. There is an affidavit from Mr Charan which disposes (para.5) that the respondent plaintiff "has never claimed that it was incorporated as a company or registered as such...." That is, inconsistent with the jurat completed by Suresh Chandra, solicitor, in deposing to the signature on the caveat of R P Charan as being that of the Managing Director of Sunrise Corporation Limited " a limited liability company – having its registered office at Nadi... ." It is also inconsistent with the description throughout the material of the respondent as a "Corporation." No one suggests that it is possible in Fiji to attain corporate status or limited liability except under and by virtue of statutory authority. No such authority is identified or relied on here.

[17] The same paragraph (para.5) of Mr Charan's affidavit goes on to say that the respondent is a "business entity" and enterprise, of which he and Praveen Singh are the partners "and an application has been made for registration of the business as a limited liability company." This is reminiscent of a passage in the separate reasons for judgment of Windeyer J. in *Black v. Smallwood* (1966) 117 CLR 52, at 64, where his Honour said:

"Questions such as are now before us have frequently arisen in America. The answer has in some jurisdictions been supplied by legislation; in others by the adoption of a rule that "organizers of corporation who transact business in the corporate name before its organization has been completed will be deemed partners operating under the corporate name as a trade name.....""

This is essentially what Dr. Sahu Khan is contending for in the present case. However, Sir Victor Windeyer went on to add in that case, "But we have no such rule."

[18] Sir Victor Windeyer was there speaking of Anglo-Australian law; but there is no reason to suppose that the law of Fiji is in this respect any different. Plainly that is

so if the matter is considered, as it must be, according to the ordinary rules of offer and acceptance. The meaning and effect of the offer must be determined objectively from the words used in making it. The respondent's offer purported to emanate from an entity calling itself Sunrise Corporation Limited. It did not affect to come from a partnership or firm comprising one or both of two individuals, Singh and Charan, whose signature or signatures on that or any other document served the purpose only of authenticating what purported to be a subscription of the offer of 29 March 2004 in the name of the corporation itself. Since the corporation did not exist at that date, the supposed offer was a nullity and incapable of acceptance to produce a valid contract for purchase of the land sufficient to support a caveat by either or those individuals.

[19] Counsel for the respondent also contended that the personality of the purchaser was something that would or could be resolved at settlement or completion when the identity of the transferee would be determined by the parties or their solicitors. Adopting that approach would involve making a new contract, being either one with a corporation that did not exist when the supposed contract was made on 29 March 2004, or with some other person or entity. That would not be the contract which the caveat was lodged to protect or is capable of protecting.

[20] As a final submission, counsel for the respondent pointed out that the Companies Act (Cap.247) does for certain purposes recognize and in s. 358 defines the concept of an "unregistered company." Section 358 says that it includes any partnership, association or company, with certain exceptions. The specified exceptions include:

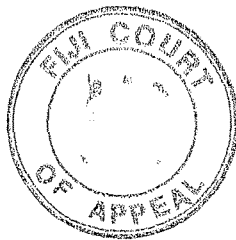
"(b) a partnership, association or company which consists of fewer than 8 members and is not a partnership, association or company formed outside Fiji."

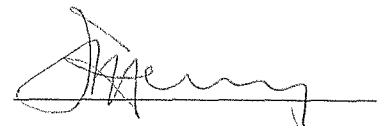
[21] It follows that the partnership, if any, alleged to subsist between Singh and Charan is not an "unregistered company" within the meaning of this provision. Those two are, if anything, a partnership, association, or company formed, not outside but

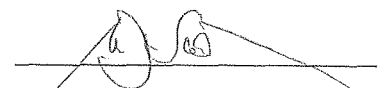
within Fiji. In any event Part IX, of which s.358 forms a principal provision, is directed to "Winding up of Unregistered Companies." Winding up the business enterprise of Messrs. Singh and Charan is not something that any one is seeking to achieve here.


[25] The result is in our view that there was and is no valid contract or other ground on which the caveat could have been lodged or can be maintained in this case. It must be removed. The orders will be as follows:

1. Appeal allowed with costs fixed at \$500.
2. Set aside with costs the order made on 14 August 2004 dismissing the summons dated 16 July 2004.
3. Order that Caveat No. 54254 lodged on 23 April 2004 on Certificate of Title No. 26971, being land described as Lot 1 on Deposit Plan 6973, be removed.




Henry, JA


Scott, JA


McPherson, JA

Solicitors:

Messrs. G.P. Lala and Associates, Suva for the Appellants
Messrs. Sahu Khan and Sahu Khan, Ba for the Respondent

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