IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

*APPELLATE JURISDICTION*

MISCALLENOUS ACTION NO. 30 OF 2007

BETWEEN : THE NEW INDIA ASSURANCE CO. LIMITED
*Appellant*

AND : FIJI DEVELOPMENT BANK
*1st Respondent*

AND : BRIGHTSPOT FASHIONS LIMITED
*2nd Respondent*

BEFORE THE HONOURABLE JUDGE OF APPEAL MR JUSTICE JOHN E. BYRNE

Counsel : *A.K. Narayan for the Appellant*
*D. Sharma for the 1st Respondent*
*V. Mishra for the 2nd Respondent*

Date of Hearing & Oral Ruling : *31st October 2007*

Date of Published Ruling : *16th November 2007*

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## *RULING*

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[1] On the 31st of October 2007 after hearing oral argument and reading written submissions I granted the Applicant/Appellant leave to appeal to the Court of

Appeal in terms of paragraphs (a) (b) and (c) of the Applicant's/Appellant's summons for leave to appeal and Stay dated the 27th of September 2007. I gave brief oral reasons for my decision but was requested by the parties to publish these later which I now do.

[2] The facts as found by Jiten Singh J. in the High Court in his Decision of the 11th of June 2007 are as follows:

[3] Brightspot Fashions Limited is the registered lessee of Native Lease 16714. There was a double storey building on the land. The company operated a business from that building. The 1st Respondent (Original Plaintiff) is a financier. It advanced certain sums of money to Brightspot and took a mortgage over the Native Lease as security.

[4] Brightspot insured the building, stock, business furniture, plant and contents with the Applicant/Appellant (Original Defendant). The double storey building was insured for $200,000.00. The contents stock business furniture, plant and other chattels were insured for $220,000.00. The 1st Respondent (Original Plaintiff) had no bill of sale over the stock and contents. The insurance policy showed Brightspot Fashions Ltd. as owner and the Bank as mortgagee. The policy also carried an endorsement:

*"loss if any payable to Fiji Development Bank (Rakiraki) as mortgagee whose discharge shall be sufficient and binding to the company".*

[5] On the 20th of May 2000 the Brightspot building was destroyed by fire. On the 8th of May 2001 Brightspot was paid $133,000.00. It signed a discharge voucher *"in full satisfaction, compromise and discharge of all claims for loss and expense sustained to property insured".* Brightspot admits receiving the $133,000.00 and signing the discharge.

[6] The Bank sued the insurance company for loss or damage caused by fire to the building. Brightspot alleges in an Affidavit filed in the High Court that there was no settlement by it for destruction of the building. It says it is an Interested Party to the proceedings as it owned the Native Lease and building and it had insured the property. It requested the High Court to be joined first as a co-Plaintiff or alternatively as an interested party.

[7] One of the defences raised by the Applicant/Appellant (Original Defendant) was that the discharge given by the 1st Respondent was the end of the matter. There could be no further claims against it including any by the Bank. Singh J. said that if that was so, then sound commercial

sense dictates that Brightspot has an interest in these proceedings. If the Bank was not entitled to anything from the Applicant/Appellant, then obviously it would exercise its powers of sale under the mortgage and might even sue for any residual balance. The learned Judge then said:

> ***"In the final analysis, Brightspot has to pay the Bank what is due under the mortgage. In the event the Bank were to settle its claim for a low sum, then again Brightspot will suffer. Even if this case were to be settled, I believe the sanction of Brightspot is necessary for it to protect its interest".***

[8] Brightspot does not dispute that the Bank is entitled to make a claim.

[9] The Applicant/Appellant (Defendant) objected to joinder of Brightspot on three grounds:

a) The 1st Respondent is represented by a firm of solicitors and the application should have come through the same firm of solicitors. To allow joinder would mean there would be two different firms acting for the two Plaintiffs. It

also said that there was a possibility of conflict or at least the Court could not rule out that possibility on the basis of the current pleadings. The 1st Respondent alleges in the pleadings that the Applicant/Appellant should have paid the moneys to the 1st Respondent and not to Brightspot.

b) Secondly, the Applicant/Appellant alleges that this being a claim in contract, the limitation period has expired and to allow Brightspot to become a party now would amount to by-passing the provisions of the Limitation Act.

c) Thirdly, the Applicant/Appellant further claims there would be delay caused in finalising the proceedings as there would be inevitable resultant amendments if Brightspot were joined as a party.

[10] **The Law as to the Joinder of Parties**

I considered the law applicable in my decision of the 5th of August 1999 when sitting as a Judge of Appeal in Civil Appeal No. ABUOO21 of 1998 - **Bubble Up Investments Limited v. National MBF Finance (Fiji) Limited**. In that

case as in the instant one, the application was made to the Court of Appeal under the Court of Appeal Act and Rule 6 of the Court of Appeal Rules. Under these Rules the High Court Rules are applicable. Order 15 Rule 6(2) of the High Court Rules applies. It is in the following terms –

> ***"Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –***
>
> ***(a) order any of the following persons to be added as a party, namely –***
>
> ***(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon or***

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter".*

[11] The scope of this Rule and its predecessor has been considered in numerous cases, the earliest of which appears to be **Attorney-General v. Corporation of Birmingham** - 15Ch. D. 423 and in later cases such as **Amon D. Raphael Tuck & Sons Ltd.** (1956) 1QB 357, **The Result** (1958) P.174 and **Re Vandervell Trusts** (1969) 3 All E.R. 496 which was over-ruled by the House of Lords in **Vandervell Trustees Ltd. v. White & Ors.** (1971) AC 912.

[12] Order 15 Rule 6 was amended in England by R.S.C. (Amendment No.4 of 1971) and R.S.C. (Amendment 1981) after the decision of the House of Lords in **Vandervell Trustees Ltd. v. White & Ors**. In that case

the House of Lords disagreed with the interpretation of the then Rule given by Lord Denning in the Court of Appeal where at (1963) 3 All E.R. 499, quoting Rule 6(2) as it then stood, he said these words should be given a liberal construction. He cited with approval the remarks of Lord Esher, M.R. in **Byrne v. Brown** (1889) Q.B.D. 657 at p.666 who said:

> ***"One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it".***

[13] According to the Supreme Court Practice 1993 at p.202, para. 2(b)(ii), confers on the Court the wider jurisdiction which it was thought the Court had under the former para. 2(b) and the former paragraph 2(b) but which the House of Lords in Vandervell's case held that it did not. I said in my Decision in Bubble Up Investments Ltd. that it was clear to me that the amendment was intended to give effect to the remarks of Lord Denning in the Court of Appeal.

[14] I agree with Singh J. who said at page 4 of his Decision that:

> ***"This is a facilitative or enabling rule and the paramount consideration is to have before the Court all necessary parties. It also gives the Court enormous flexibility as to who can participate and by appropriate terms define the level of participation. The issue really boils down to this - will Brightspot's rights against all liabilities to any party to the action in respect of the subject matter of the action be directly affected by any judgment which may eventually be made in this case. I think so".***

[15] I agree with all of what His Lordship said there.

[16] The learned Judge then said at page 5 of his Decision that if he joined Brightspot as a co-Plaintiff, there is no guarantee that the two Plaintiffs would retain one firm of solicitors. It might also necessitate amendments to pleadings. The 1st Respondent's solicitors would not agree to Brightspot being joined as a co-Plaintiff so that, as the learned Judge said, there is *"some vague warning of fighting in the face of the enemy"*. He therefore thought that joining Brightspot as a co-Plaintiff was not the prudent course. He thought that the proper course to follow was joinder as an interested party with liberty given to it that if the 1st Respondent failed to adduce satisfactory evidence about the value of the building, then it could do so. He also gave it liberty to cross-examine the Applicant's/Appellant's witnesses relating to this aspect with leave of the Court.

[17] Had the learned Judge stopped there, I would have little argument with his reasoning. He was obviously concerned to avoid any delay of the action because as he said any adjournment of a case causes some prejudice - the trial is delayed. Witnesses must be summoned again. By joining Brightspot as an interested party he considered

that there would be no postponement of the trial. The events which have given rise to this litigation occurred over seven years ago and therefore the learned Judge said that any further postponement of the case was unwarranted.

[18] Generally speaking I agree with His Lordship's views on this but it must not be forgotten that it is not only Brightspot which has any interest in this litigation; so too do all the other parties. I can understand the learned Judge's concerns for Brightspot but in my view they tend to overlook the concerns of the other parties.

[19] Had the Judge not finished his Decision by saying in his last paragraph on page five of his Decision –

> ***"It is also given liberty to bring in evidence relating to the circumstances in which the fire occurred and to cross-examine defendant's witnesses with leave of the Court. I say with leave of the Court because if the Court is of the view that the Plaintiff has adequately cross-examined a witness then such leave may not be forthcoming",*** I would not have differed from him.

[20] However in my Judgment that paragraph if utilised to the full by Brightspot could extend the scope of this litigation to an unwarranted degree. In my Judgment, despite the Judge's view that there was no need for any pleadings by Brightspot because it has sworn an Affidavit disclosing the nature of its interest, I consider that is not enough. The virtue of pleadings is, as has been said time and again, that they narrow the issues between the parties. I consider that I should grant the orders sought by the Applicant/Appellant in its summons of the 27th of September 2007, and that I should also direct that on the hearing of the appeal, the Full Court give directions as to the filing of pleadings if joinder of the 2nd Respondent Brightspot Fashions Ltd. as an interested party was appropriate. It is true, as the Applicant/Appellant contends, that the existing rules do not make provision for joinder of an interested party in the present circumstances nor are there any precedents as to pleadings and future conduct of the trial when an interested party is joined. But the common law has always been inventive and ready to break new ground if it considers this desirable in the interest of justice, always the aim of Courts. I consider this appeal raises matters of significant importance for civil procedure, administration of civil litigation, the rights of litigants and causes of

action and so should have the benefit of a decision by the Full Court.

[21] The Applicant/Appellant undertakes to expeditiously prosecute the appeal. In this regard I was informed by Mr Narayan, counsel for the Applicant/Appellant, that following my oral ruling of the 31st of October the Applicant/Appellant had already lodged an order for sealing by the Court shortly after I gave my ruling. The orders I make therefore are:

1. That leave be granted to appeal the decision of His Lordship Mr Justice Jiten Singh made in the High Court of Fiji at Suva on the 11th of June, 2007 which allowed Brightspot Fashions Ltd. to be joined as an interested party.

2. That the time for appealing the Order made by Singh J. on the 11th of June 2007 be extended.

3. That the proceedings in the High Court be stayed pending the hearing and determination of the appeal by the Full Court of this Court.

4. That on the hearing of the appeal the Full Court give directions as to the filing of pleadings if joinder of the 2nd Respondent as an Interested Party was appropriate.

[22] Costs will be in the cause.

FIJI COURT OF APPEAL

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[ John E. Byrne ]
**JUDGE OF APPEAL**

At Suva
16th November 2007