IN THE FIJI COURT OF APPEAL
Civil Appeal No. 52 of 1985

Between :

SUBAIYA MANI — Appellant

- and -

ST. FORT INVESTMENT LTD & ORS — Respondents

Mr. A. K. Singh for the Appellant.
Mr. B. Sweetman for the Respondents.

Date of Hearing : 23rd October, 1985

Delivery of Judgment : 8th November, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

In an action in the Supreme Court sitting at Suva the Appellant (Mani) had claimed from the Respondents the sum of $124,500 alleging that he was entitled to that sum as commission earned by him for negotiating the sale and purchase of the Respondents' shares in Bay of Islands Hotel Company Limited by a Hong Kong businessman Mr. Hanuman Prasad.

Rooney J. heard the case, rejected the claim and gave judgment in favour of the Respondents. Mani now appeals.

The transaction was not a particularly complicated one but there was much conflict in the evidence given by various witnesses as to the role played by the Appellant,

and the relationship if any between him and the Third Respondent Gregory Lawlor who acted for and on behalf of his co-shareholders, the other Respondents.

The learned Judge, in a lengthy judgment detailed these conflicts, and obviously was much troubled as to where the truth lay for he said:

> "I am of the opinion that none of the witnesses, with the exception of Jamnadas, has given evidence which is entirely truthful".

Jamnadas was a solicitor who had some brief part in the affair but his evidence was of limited scope and did not carry the matter one way or the other.

The following outline is taken (with some editing and addition) from Mr. Singh's admirable written submissions.

The Bay of Islands Company Limited ("the Company") owned the Tradewinds Hotel at Lami together with certain land and other assets connected therewith. The respondents were shareholders in the company. The shareholders had decided to sell their interest some three (3) or four (4) years prior to 1981.

Sometime in 1981, the shareholders had given an option to purchase their shares in the Company to certain New Zealand investors. The option was to expire at the end of August, 1981.

In 1981 Hanuman Parshad ("Parshad"), a businessman from Hong Kong, became interested in investing in Fiji. Parshad had earlier met Vivekanand Sharma ("Sharma") at various places overseas. In August, 1981 Parshad telephoned Sharma and asked to find him a hotel in Fiji which was for sale. As a result of this call, Sharma contacted the Appellant, a Real Estate Agent, who then commenced making enquiries for possible properties to refer to Parshad.

The appellant had earlier heard rumoursthat the Tradewinds Hotel was for sale. He contacted the Hotel to check on its availability and was referred to the 2nd named respondent, who in turn informed him that her son Lawlor was the person to deal with. Lawlor was at that time away on a fishing trip.

On 10th August, 1981, the Appellant met Lawlor at the Hotel. Indeed his first approach (as the Judge found) was to rouse Lawlor from his bed late at night and endeavour to obtain a written authority to sell, which was refused.

On 11th August, 1981, Parshad arrived in Fiji and checked in at the Tradewinds Hotel. The Appellant informed Lawlor of Parshad's arrival.

The next morning the Appellant, Parshad and Sharma went to Lawlor's office. Appellant had also taken Parshad to view another hotel near Nadi, but Parshad had not been interested.

In the course of the next few days, negotiations and discussions took place between Parshad and Lawlor and Appellant was present at most or all of these meetings. This was not unnatural for he had been engaged by Sharma on behalf of Parshad.

On 17th August, 1981, Parshad, Lawlor, Sharma and Appellant were present in the office of Mr. Michael Benefield at Messrs Munro, Leys & Company. Agreement was imminent and the price was attractive to Lawlor. Appellant raised the question of his commission and Parshad said he would not pay it. This looked as if it would be a stumbling block and the Judge has found that Lawlor, fearing a break down in negotiations said to those present that he would look after the Appellant's commission. The Judge has found that this undertaking was given not to the Appellant but to Parshad, and no amount was mentioned. Appellant has

subsequently made demand but Lawlor has not paid.

The trial Judge held:

(a) that there had been no engagement by Lawlor of Appellant prior to 17th August;

(b) On 17th August there was a promise by Lawlor that he would pay Appellant, but no consideration was given at that time by the Appellant in exchange for the promise, and anything then said by Appellant would be defeated by the doctrine of past consideration.

On appeal Mr. Singh advances his submissions under two grounds:

> "1. That the learned trial Judge erred in law and in fact in holding that the Appellant had failed to establish the existence of an agency agreement prior to the meeting of the 17th August, 1981 in light of the evidence accepted by His Lordship;
>
> 2. That the learned trial Judge erred in law and in fact in holding that the Respondent's (Lawlor's) undertaking to pay the Appellant's commission was gratuitous and not supported by any consideration."

Under Ground 1 :

Mr. Singh has carefully examined the evidence. He accepts as he must the specific findings of fact expressed in the judgment, but submits that this court is free to draw its own inferences based on those primary findings and he relies on the well-known authority of Powell v. Streatham Manor Nursing Home (1935) AC 243 - a case frequently cited and adopted by this Court.

Mr. Singh's submission is that the judge has found:-

(a) Appellant was at the meeting of 17th August and his presence was not refused there;

(b) He was not a friend of the parties but an estate agent interested in the transaction;

(c) Lawlor undertook to pay Appellant's commission - a matter which was being pressed upon the meeting by Appellant and which Lawlor himself said in evidence was a matter he wished to have clarified.

From the facts it is submitted that this Court should draw the inference that Lawlor's undertaking presupposed some arrangement or contract between him and the Appellant, and the undertaking was an admission evidencing the prior agreement. Mr. Singh's submissions were made succintly but with clarity. However we believe that they are attempting to persuade us to conclusions which are contrary to factual findings not merely to inferences so based.

The learned Judge spent many pages setting out the conflicting versions of events given by the witnesses on each side and said how difficult it was to find the exact truth - and he expressly said that none of them (except Jamnadas) was totally truthful. But he then sets down such conclusions as he could reach with sufficient confidence to base a judgment. He commences that part of his conclusions (at p. 100) with the words: "I have no doubt that..."

The crucial matters so found are (using the Judge's words):-

> The Appellant sought out Lawlor and begged to be given written authority to sell and was refused.

The Appellant although rebuffed decided to stay in the negotiations in the hope that something to his advantage would emerge.

The Appellant failed to establish the existence of an agency agreement between himself and the Respondent prior to the meeting of 17th August.

On 17th August Parshad raised the question of commission and said he would not pay it.

Fearing the loss of the sale Lawlor told Parshad he would pay the Commissions to the Appellant.

There had been no request by Lawlor for the Appellant to play any part in the negotiations on his behalf and there was no understanding between them that he would pay anything "nor" said the Judge "could such be implied."

Now it can be accepted that given established facts, an Appellate Court can draw inferences - and perhaps an "implied promise" could be a matter of inference. But in circumstances such as these the "implication" means something which both men would understand had arisen from the course of dealing between them. That must be a matter of deciding that in their dealings, from what had been said, from the way they reacted to each other, from their conduct inter se, it was clear to each that they were acting on a common though unspoken understanding. A pronouncement that there was no such understanding made by the Judge who has seen and heard them give evidence is as much a conclusion of fact as a finding of what words were spoken between them. This Court could not reach such a conclusion in the face of the Judge's finding that there was :

(a) No prior agreement;

(b) No prior understanding.

Ground 2 traverses the same factual material but deals with the legal situation which can arise in "past consideration cases".

Mr. Singh has accurately discussed the scope of:

Lanleigh v. Brathwait (1615) Hob. 105
re Casey's Patents, Stewart v. Casey (1892) 1 Ch. 104
Casey v. C.I.R. (1959) NZLR 1052
re McArdle (1951) Ch. 669.

and other cases.

The principles to be derived from these are set out with clarity in Chitty on Contracts (25th Ed.) at paras. 162-165.

In para. 165 it is said:-

> "Past act done at promisor's request. Even an act done before the giving of a promise to make a payment can be consideration for the promise when three conditions are satisfied. First, the act must have been done at the request of the promisor; secondly, it must have been understood that payment would be made; and thirdly, the payment, if it had been promised in advance, must have been legally recoverable. In such a case the promisee is, quite apart from the subsequent promise, entitled to a quantum meruit for his services."

The same matters have been recently summarised to the same effect by Lord Scarman in delivering the opinion of the Privy Council in Pao On v. Lau Yiu Long (1980) AC 614.

If we refer back to the factual matters discussed under Ground 1 we see that there were findings of fact fatal to the appellant on both the first and second requirements referred to in para. 165 - namely, there was no request by the promisor and no understanding as to payment.

Finally Mr. Singh submitted that this was substantially one transaction, in the way in which that matter is discussed in Chitty at para. 163.

But here there were distinct stages in the transaction - a clear separation of events prior to the 17th of August, as against the matters which developed on that day, and this differs from the example given by Chitty of the handing over of a guarantee immediately after the purchase of goods.

Finally one notes that in all cases the consideration, if it existed, must pass from the promisee. The consideration on the 17th August, which is the only transaction which could sustain the claim on the facts as found, was the agreement by Parshad to buy the shares. We do not speculate what the result might have been had Appellant sued Parshad for payment for his activities in finding him a seller, and Parshad had claimed an indemnity arising out of his dealings with Lawlor on the 17th August.

It will be seen that we are in broad agreement with the conclusions reached by Rooney J. There was no engagement of appellant by Lawlor prior to 17th August, and no consideration which would sustain the alleged promise of that date.

The appeal is dismissed with costs to be taxed if not agreed.

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Vice-President

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Judge of Appeal

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Judge of Appeal