

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0041 OF 1996
(High Court Civil Action No. HBC0139 of 1996)

BETWEEN:

FONG SUN DEVELOPMENTS LIMITED

APPELLANT

-and-

MINSON FIJI LIMITED

RESPONDENT

Mr. H. Nagin for the Appellant
Mr. R. Smith for the Respondent

Date and Place of Hearing : 11 August 1997, Suva
Date of Delivery of Judgment : 15 August 1997

JUDGMENT OF THE COURT

This is an appeal from the judgment of Fatiaki J given on the 23 August 1996 in which he ordered that a sum of \$115,500 paid into Court by the appellant (Fong Sun) be paid out to the respondent (Minson), that an interim injunction granted to Minson preventing Fong Sun from leasing the building, the subject matter of the action, be dissolved and that the application of Fong Sun for a stay of proceedings pending arbitration be refused. The appeal comes to this Court pursuant to leave granted by Fatiaki J in respect of the stay pending arbitration and by this Court itself in respect of the

payment out of Court order. Leave to appeal was not sought in respect of the dissolving of the interim injunction.

The background to this matter is set out in the judgment of this Court given on 28 February in respect the application for leave to appeal. It is as follows:-

"The case arises out of a building contract executed between the builder (Minson) and the owner (Fong Sun). The contract was executed by the parties on 10 August 1995 and provided for the construction of a new five level office building on Ratu Mara Road at Samabula. It provided inter alia for a completion date (clause 21) interim payment certificates (clause 13) and for the deduction of fixed sums for liquidated damages in the event of late completion (clause 22).

On the 2nd of April 1996 owing to differences that had arisen between the parties as to an interim payment certificate number 8 the builder (Minson) determined the contract pursuant to clause 26(1)(a) and issued proceedings by way of a writ of summons. On the 3rd of April the owner (Fong Sun) acknowledged service of the builder's writ and indicated its intention to contest the proceedings."

At this point it may be noted that, in addition to Fong Sun, Minson had joined three other defendants and raised a number of causes of action other than the matter of the No.8 interim certificate. These other defendants and the other causes of action will be referred to later.

Thereafter followed a number of interlocutory proceedings which included the grant, ex parte, of an injunction against Fong Sun and an application for stay of Minson's action pending a referral and determination of the dispute by way of arbitration. Later Fong Sun sought an injunction against Minson to enable it to complete the building and Minson sought to commit Fong Sun and others for alleged breaches of the earlier

injunction. Eventually on the 16 May all the pending interlocutory applications were heard in Chambers and, by consent, it was ordered that a motion to set aside the ex parte orders, the application for stay pending arbitration and the committal application were adjourned on 2 days notice, and it was further ordered that:-

- (i) Minson be restrained from hindering or interfering with the appellants' working on or completing the building;
- (ii) Minson to hand over the keys of the building to Fong Sun;
- (iii) Fong Sun pay into Court the sum of \$115,500 being the balance of certificate No.8 within 10 days.

At this point it should, perhaps, be noted that the \$115,500 arose in this way: the "Architect" as defined in the contract had certified in Certificate No.8 that a certain sum was properly payable to Minson. Fong Sun had paid the sum certified less \$115,500 and justified its deducting that amount as "liquidated damages" on the grounds that it was entitled to do so in terms of Clause 22 of the contract if the contractor, Minson, failed to complete the works by the date fixed for completion or within any extended time fixed under Clause 23. Fong Sun contended Minson had so failed.

Returning to the narrative, on 14 June 1996 the case came again before the Court. There were three applications for determination:-

- 1. An application by Fong Sun to dissolve the injunction which effectively prevented it from leasing out the building, and for a stay of proceedings of

Minson's action pending arbitration of the disputes between Minson and Fong Sun.

- 2. An application by Minson for leave to issue contempt proceedings.
- 3. An application by Minson for payment out of Court of the \$115,500 paid into Court.

Minson did not pursue the second application relating to the contempt proceedings and Fatiaki J gave judgment on the first and third applications on the 23 August. This is the judgment under appeal.

It is apparent from the above background summary and the statement of claim that there are a considerable number of matters in dispute in the action between Minson, on the one hand, and Fong Sun, the second defendant a Mr. Chung Fong Sun, who is alleged to own Fong Sun, and the third defendant a Mr. Atish Naidu, the Architect nominated in the contract, on the other hand. It may be noted in passing that a fourth defendant was joined in the action but no relief was claimed from it; it was a subcontractor, alleged to be also owned by Mr. Chung Fong Sun. These matters include the No.8 certificate and the payment made, and withheld, under it as liquidated damages; the determination of the contract by Minson for alleged fundamental breach by Fong Sun in terms of Clause 26(1) of the contract; issues relating to, and requests made for, extensions to the completion date which were not dealt with by the Architect; a claim by Minson that in light of its determination of the contract for fundamental breach it was entitled to be paid on a quantum meruit basis; claims of negligence against the Architect in a number of respects including (a) failing to issue written confirmation of Architects

Instructions; (b) negligent selection of subcontractors; (c) failing to provide a suitable design for a switchboard with various consequential faults; (d) breach of Architect's duty in relation to other persons and the question of the consequential damage that flowed from that breach; (e) negligence, recklessness or fraud in certifying payment to the fourth defendant a sub-contractor and the basis for the allegation of negligence recklessness and fraud.

Minson claimed from Fong Sun \$804,820.86, from Mr. Chung Fong Sun \$207,001.86 and from Fong Sun, Mr. Chung Fong Sun and the Architect a sum to be quantified.

The notice of appeal shows that there are two matters before the Court in this appeal. They are whether Fatiaki J was right in:

1. refusing to stay Minson's action against Fong Sun pending arbitration; and
2. ordering payment out of Court to Minsons of the sum of \$115,500.

We deal with these two matters in turn.

The learned judge in his judgment in relation to the stay issue said:-

"In this regard counsel (for Fong Sun) refers to the provisions of Clause 33 of the building contract (a reference to arbitration provision) and submits that it is clearly applicable to the present circumstances. I note however that it is not a 'Scott v Avery' Clause which requires that a dispute or difference be referred to arbitration before any Court action may be brought. Furthermore Section 5 of the Arbitration Act (Cap.38) recognises that the Court has a wide and unfettered discretion whether or not to stay any action pleading arbitration."

He went on to refer to Mr. Smith's submission for Minson relating to the question of Fong Sun's "Acknowledgement of Service", which was relevant to a submission relating to the taking of any steps in the proceedings in terms of s.5 of the Arbitration Act but which was in effect abandoned by Mr. Smith, and the matter of the Court's discretion in terms of s.5. He then referred to the legalistic nature of the issues involved in the case, which included the interpretation of contractual provisions; ascertaining the rights and duties of the parties under the contract; the nature of the relief sought, which included injunctions and certain other matters. He concluded by saying that he was satisfied that the Court should exercise its discretion by refusing the application for a stay. He was in fact in error in his reference to injunctions as none were sought in the statement of claim.

It was not disputed by either counsel that in the circumstances existing in this case His Lordship had a discretion. Mr. Nagin for Fong Sun directed much of his argument to the "Acknowledgement of Service" point which, as noted, Mr. Smith ultimately abandoned and went on to submit that the issues raised in the case would best be dealt with by people who are well versed with building matters.

Mr. Smith submitted that the Court was being asked to review the exercise of the judge's discretion and that the principles applicable in such circumstances were set out in the speech of Lord Diplock in Garden Cottage Foods Ltd v Milk Marketing Board (1983) 2 All E.R. 770 at p.772, where he said:-

"In an expedited appeal by the company against the judge's refusal to grant an interlocutory injunction, the Court of Appeal delivered an extempore judgment on 18 May 1982, shortly after the publication of the decision of this House in Hadmor Productions Ltd v Hamilton. [1982] 1 All

E.R 1042 at 1046, [1983] AC 191 at 220, in which this House took occasion to point out that on an appeal from the judge's grant or refusal of an interlocutory injunction an appellate court, including your Lordships, must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where, even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

He went on to submit that His Lordship had not fallen into any of the errors Lord Diplock had mentioned nor were any of the other instances he postulated applicable. We agree with this submission and see no reason to interfere with the judge's exercise of his discretion. Indeed, it appears to us that His Lordship's view that serious legal issues were raised in the action is reinforced by the issues that arise on the statement of claim outlined earlier and which include questions of negligence and fraud. We observe too, that some of the issues raised in the statement of claim necessarily involve the second, third and fourth parties, but it would not be possible for those issues to be resolved on an arbitration as those parties were not parties to the contract and thus could not be required to submit to arbitration. It does not follow, of course, that where a builder sues on

alleged breaches of a building contract that contains an arbitration clause, and joint parties other than the other party to the contract, the dispute cannot be referred to arbitration; but where an application for a stay pending arbitration is made it is a factor that the judge can take into account when exercising his discretion. It follows that the appeal on this point fails.

In respect of the payment out of Court order we first record that Mr. Smith informed the Court that he did not intend to make any submissions on the issue. He relied wholly on the judgment. Mr. Nagin on the other hand submitted strongly that the money paid into Court should remain there until the merits of the matter had been decided by either the Court or by Arbitration. He submitted that it had not been intended, when the order was made that the money be paid in, that it should be paid out before a final decision. He submitted that its deduction from the amount certified was properly made and authorised by Clause 22 of the contract.

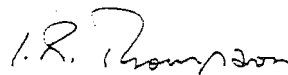
The terms of His Lordship's judgment make it clear that he did not accept Mr. Nagin's approach to the issue. He said:-

"...the "payment in" was ordered by the Court in the exercise of its unfettered discretion to grant the defendant's (Fong Sun) equitable relief sought albeit in an interlocutory motion, but nevertheless final in its effect in that the defendants were permitted thereby to complete the construction of the building.

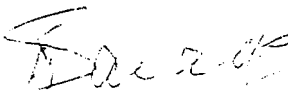
In my view the "payment in" was a condition of the injunction sought but cannot therefore be said to be itself tied down to a resolution of any particular dispute between the parties in the substantive action."

It follows in our view that as he exercised his discretion to order the payment in so may he exercise his discretion to order the payment out. Bearing in mind what Lord Diplock said in the Garden Cottage Foods' case we cannot see any basis for interfering with the exercise of his discretion. We add, as indeed the learned judge did, that it was certainly not established that Fong Sun had been justified in making the deduction of that particular sum in the first place when it made payment of the amount certified under Certificate No.8.

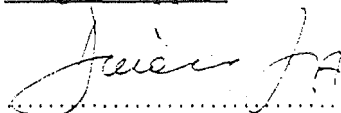
It follows that the appeal on this point also fails and the appeal is accordingly dismissed. Costs are allowed to the respondent, Minson Fiji Limited.



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Mr. Justice I. R. Thompson
Judge of Appeal



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Mr. Justice Savage
Judge of Appeal



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Mr. Justice J. D. Dillon
Judge of Appeal