IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0039 OF 1996S
(High Court Civil Actionl No.HBC0090 of 1992)

BETWEEN:

SOUTH PACIFIC RECORDING LIMITED — **APPELLANT**

-AND-

JOHN YATES
REGINA YATES — **RESPONDENTS**

Mr. A. Patel for the Appellants
Mr. V. Mishra for the Respondent

-AND-

CIVIL APPEAL NO: ABU0023 OF 1997S
(High Court Civil Actionl No. 90 of 1992)

BETWEEN:

JOHN YATES
REGINA YATES — **APPELLANTS**

-AND-

SOUTH PACIFIC RECORDING LIMITED — **RESPONDENT**

Mr V. Mishra for the Appellants
Mr A. Patel for the Respondent

Date and Place of Hearing: 10 November, 1997, Suva
Date of Delivery of Judgment: 14 November, 1997

JUDGMENT OF THE COURT

Both parties to the decision of Lyons J., delivered in the High Court at Lautoka on 12 July 1996, have appealed to this Court. The learned Judge gave judgment in favour of Mr and Mrs Yates on a claim for wrongful dismissal brought by them against their employer, South Pacific Recording Limited ('SPRL'). The amount for which judgment was entered was $5025 plus interest and costs. We refer later to the way in which this amount was calculated. The Judge

awarded interest to the Yates at the commercial rate of 13.5% from the date of their wrongful dismissal, 3rd August 1991, until the date of delivery of the decision. He also ordered SPRL to pay solicitor- and-client costs to the Yates. Although proceedings were not commenced until 23 March 1992, the Judge ordered that costs be paid from 15 August 1991.

SPRL filed its appeal within time against (a) the rate of interest awarded; (b) the order to pay solicitor- and- client costs; (c) the element of holiday pay included in damages given to the Yates. Subsequently, the Yates appealed, with leave, out of time. Their appeal attacked the basis on which the Judge assessed damages in their favour.

This Court considered that the appeal by the Yates was on a more substantial issue than the SPRL appeal. The Yates' appeal was therefore heard first with the SPRL appeal heard second as if were a cross-appeal. SPRL did not appeal against the central finding of Lyons J. that there had been an unlawful dismissal by SPRL of Mr and Mrs Yates.

The hearing occupied 3 sitting days in the High Court at Lautoka. Each sitting day was separated by several months - a highly unsatisfactory situation for a case dependant on the credibility of witnesses. Nevertheless, despite the long gaps the Judge recorded his view of the witnesses when finding the facts. He considered that Mr Yates and Mr Patel, the only witness for SPRL, were antagonistic towards each other; he accordingly viewed the evidence of each of them against a background of antagonism. Whilst stopping short of any finding on a general credibility preference, the Judge concluded that the parties' dislike of each other coloured the

evidence of each. He drew inferences from the evidence by applying his own common sense and not the parties' common dislike. Mrs Yates also gave evidence and, whilst supportive of her husband, the Judge considered her more objective than her husband and Mr Patel.

It is unnecessary for this Court to go into the detail of the petty disputes between the parties which culminated in the action of Mr Patel in summarily dismissing both Mr and Mrs Yates on 3 August 1991. Suffice to say that the finding of wrongful dismissal was quite open to the Judge on the evidence and there is no appeal against that finding. However, it is necessary for us to record the findings of the Judge and to set out certain documentation in order to assess his computation of the damages due to Mr and Mrs Yates arising from the wrongful dismissal.

The plaintiffs first met Mr Patel in the Solomon Islands in mid-1989. They were running a video production unit there; Mr Patel was visiting from Fiji for a trade fair. After certain preliminary discussions with Mr Patel, Mr Yates came to Fiji on 20 August 1990 to discuss with Mr Patel some firm relationship, with SPRL. The amended statement of claim, pleaded an agreement by which SPRL was to employ the Yates; the agreement was alleged to have been partly oral and partly written.

The evidence of Mr Yates was that, on his arrival in Fiji, he talked extensively with Mr Patel and they agreed on the terms of a basic employment contract, for himself and his wife. Both parties realised that any employment would be dependent on the issue of work permits. They drove to Suva to discuss the situation with the Immigration authorities. On 22 June 1990,

Mr Patel wrote the following letter addressed to Mr Yates, but supplied to the Director of Immigration in support of an application for a work permit.

"Mr John Yates
P O Box 439
Glebe
N.S.W. 2037
Australia

22nd June, 1990

Letter of Engagement

Dear Mr Yates

This letter is to confirm the arrangements that we have discussed in Depth concerning the new video production unit that we intend to operate shortly.

We are happy to offer you the post of Producer/Director for video and film production to be undertaken over a three year period.

The remuneration will be a salary of F$24,000 per annum and payable monthly.

I should also like to specify that provided we move into a profit position that a bonus system will come into operation.

In addition to your duties as a Producer/Director you will also be expected to organise and instruct one or more local assistants in various aspects of video work.

This letter of engagement is, of course, subject to the issuance of a work permit.

Yours sincerely,
SOUTH PACIFIC RECORDINGS LTD.

RAVINDRA S. PATEL
MANAGING DIRECTOR"

Mr Yates said in evidence of this letter (and the Judge so recorded it in his judgment) "that I understand exhibit 3 to be for the Immigration Department and underline the existing contract. My wife received a similar letter."

Some 6 days later, on 28 June 1990, after further discussion, Mr Yates and Mr Patel signed a detailed "Letter of Agreement relating to the formation and operation of SPG Video Production Unit". This document which was typed by Mr Yates reads as follows:-

"Letter of Agreement
RELATING TO THE FORMATION AND OPERATION OF THE SPG VIDEO PRODUCTION UNIT

It is agreed between Ravindra Patel and John Yates that:

1. ***Application for work permits shall be made for John and Regina Yates.***

2. ***This agreement shall only be effective on issuance of those permits.***

3. ***This agreement shall be effective from the todays date and shall be open for discussion and possible revision six months after the commencement of operations. (anticipated in August 1990).***

4. ***John Yates shall act as Director/manager of the video unit and shall be primarily responsible for production.***

5. ***Regina shall be the sales manager and shall be primarily responsible for client introduction and liaison.***

6. ***Ravindra Patel shall be the executive producer and shall be involved mainly in the area of fiscal management, negotiation and budgeting approvals.***

7. ***The unit shall be treated initially as a separate entity to SPR recording with separate accounts and bookeeping. Items such as rent of premises shall be credited from the unit to SPR Ltd.***

8. ***In order to facilitate the running of a separate organisation consideration shall be given in due course to the formation of a separate company and an issuance of shares.***

9. *After the commencement of operation the advisability of the formation of a separate company to service exclusively exports shall be given consideration in order to take advantage of tax free operation.*

10. *Any work done in the Solomons by John and Regina before their commencement of working within the SPR unit shall be their responsibility and any income from such work shall be theirs. If a contract is signed with the Ministry of Commerce and is made by the unit then a commission of 20% shall be paid to John and Regina. Any other contract negotiated in the Solomons prior to working for the unit shall carry a sales commission of 10%. Any other arrangement shall be by negotiation.*

11. *Remuneration to John and Regina shall be:*

A salary of $2000 per month to John Yates

Salary of $1000 per month to Regina.

In addition Regina shall receive a commission of 5% over $20,000 P.M. gross of billings for client that she introduces payable on receipt from clients. The company vehicle (van) shall be primarily used for business purposes but John Yates may allocate its use to any employee when not being used.

While waiting for work permits John and Regina shall receive a cash advance to assist in moving, airfares, relocation etc. which shall be a maximum of F$6000. This shall be paid as follows:

$2000 at this date and $2000 on 1st August only if work permits have not been issued. A further $2000 on 1st September if work permits have not been issued. As a security John has left two lenses listed as follows:

1. *300 m.m. Zenzanon o.*
2. *5.7 m.m. Angenieus No.*

Repayment of such an advance shall be over a 6 month period and upon completion the security shall be released.

12. *Ravindra Patel shall provide the capital for the acquisition of equipment and the running costs of the unit. John Yates shall provide equipment as specified in schedule A attached and these items shall be used within the unit but shall remain the property of John Yates. In return for this facility John Yates shall receive 15% of any profit from the operation of the unit. If a separate company is formed and shares issued then John and Regina shall receive 15% of the shares and the equipment shall become the property of the company. Items on schedule 'b' attached (16m.m.) Shall be stored on the units premises and if used shall be subject to a separate hire arrangement).*

Agreed this day ..28/6/90..... *.....Signed Ravindra Patel*

.....Signed John Yates"

Around the same time Mr Yates drafted an organisation plan which embodied his suggestions on the establishment of the video production unit. The Judge held that SPRL did not agree to all the suggestions. Those to which it did agree were incorporated in the 28 June 1990 document.

Mr and Mrs Yates and their two children transferred themselves and their belongings from the Solomon Islands to Fiji. They arrived in October 1990 and commenced working for SPRL. A similar letter to that of 22 June 1990 had been written by Mr Patel on 2 August 1990 to Mrs Yates offering her work as a script writer for videos and film production over a 3 year period at a salary of $12,000 per annum. This letter was written for the benefit of and tendered to the Immigration service. In due course work permits were issued for 2 years for both Mr and Mrs Yates.

After their arrival, preparations began to establish a video production unit, using some of the equipment which the Yates had brought with them. New equipment was also purchased. SPRL advanced the costs of removal which was eventually paid back. Sadly, as the Judge noted, the original expectations of the parties were not realised. There was only one other such unit in Fiji making television commercials and the like; the expected work did not materialise. The Court can take judicial notice of the fact that the television and associated industries were then only in their infancy in Fiji.

The Judge found that, by June/July 1991 Mr Patel was making petty demands of the Yates who were responding by largely ignoring these demands. They set up a company for

video production which they were to utilise in the then likely event that their relationship with SPRLwould be terminated. The Judge did not consider this action a breach of their contract of employment but rather "as an exercise in self-preservation.". He rejected suggestions of incompetence on the part of Mr Yates, pointing out that Mr Patel had over-estimated the demand for a video unit in Fiji.

The Judge held that the document of 28th June 1995 defined the terms of the contract between parties. He found that the Yates were to come to Fiji and work for a trial period of six months, or longer if agreed. If the arrangement prospered to mutual expectation, the parties would then enter into a separate venture either by way of partnership or a separate company. Thereafter the partnership or company would operate the video production unit and the Yates would cease to be employees of SPRL.

The Judge came to this view (quoted above) on the oral evidence and on his interpretation of clauses 3, 8 and 11 of the document. He considered that SPRL's letter addressed to Mr Yates and given to the Immigration Department was designed for immigration (work permit) purposes so as to "underline" Exhibit 2. He did not accept this letter overrode the other document. The Judge stated that plaintiff had himself confirmed this.

With respect to the learned Judge, we cannot see how a document written six days before would "underline" a later document. When Mr Yates in evidence referred to the 'contract', he must have been referring to the oral contract with Mr Patel made after his arrival in Fiji. The significant portion was then enshrined in the letter addressed to Mr Yates and given to the

Immigration Department. The Judge's finding that the there was a contract of employment for at least 6 months, terminable by the formation of a new venture, depended on continuing good relations between the parties and the future success of the operation. As neither of these two things occurred, the Judge then should have addressed the question of what was the duration of the contract without the joint venture possibility and what constituted reasonable notice by which either party could terminate that contract since summary dismissal was not justified. The Judge considered Mr Patel's arguments in favour of summary dismissal most unconvincing, describing some of his actions as petty.

The Judge held that "the employment relationship" was "a working trial" with an element of joint enterprise beyond that trial period. He further held that "There was a degree of self responsbility and autonomy, notably in the areas of client promotion, profit sharing and equipment use which, to my mind indicates that the agreement was rather than a contract of service, a contract to provide services for which the parties were paid monthly and could be terminated on a month's notice with the added provision of entering into joint enterprise if successful."

This statement that there was a "contract for services" rather than a contract of service is at odds with the finding of the Judge on the whole of the evidence, that the Yates were entitled to succeed on the grounds of their wrong dismissal from contracts of service. We unhesitatingly consider the Judge was right to find contracts of service between SPRL and the Yates. We cannot see how they could be called 'contracts for services'.

Although counsel referred us to several passages in the evidence and the documents, we cannot find anything to justify the Judge's finding that the employment contracts were terminable on one month's notice. This is a case where this Court is in as good a position as the trial Judge to draw inferences from proved facts and from the documents. In our view, the letter of 22 June 1990, written to the Immigration Department by Mr Patel, must be taken as recording the previously consummated oral agreement between the parties. It contained the essential items relating to the employment of Mr Yates, i.e. his duties, the term of his engagement and his salary. SPRL cannot be heard now to say differently. SPRL is in the same situation as that discussed by the Privy Council in Chettiar v. Chettiar [1962] 1 All ER 494. In that case, one party who had made certain representations about a transaction to a public authority, was held not able to resile from that statement. The letter of 22 June 1990 indicates that the work to be done by Mr Yates as Producer/ Director was to extend over a 3 year period. The detailed contract of 28 June 1990 referred to a 6 months' trial period, after which the contract would be open for discussion and possible revision. But there was nothing in the document to indicate that the contract would come to an end if there were no discussion.

Looking at the evidence as a whole, we find that there were oral contracts between the Yates and SPRL for them to work for a maximum of 3 years, subject to the issue of work permits. These were issued for two years only, though the witnesses seemed optimistic that, had all gone well, extension could readily be obtained. The contracts were for a minimum period of 6 months; thereafter they became terminable on reasonable notice. The Judge's apparent basis for finding only a monthly contract, from the fact that the salary was paid monthly, is a very weak indicator, overtaken by the other facts viewed as a whole.

In endeavouring to decide on what would be a reasonable period of notice, we take into account the Yates' specialised occupations, the newness of the television industry in Fiji at the time and the slim chances of the Yates' finding similar specialised employment in Fiji. We do not overlook the fact that, when the Yates saw that the relationship was about to implode, they set up their own small company. We agree with the Judge that, had things gone well between the parties, there would have been no necessity for them to have taken that step.

In all the circumstances, we consider a period of 6 months' notice appropriate in for both Mr and Mrs Yates. We observe that Mr Patel's letter of 22nd June 1990 was not addressed to Mrs Yates. Her similar letter was dated 2nd August 1990. But there was evidence that both Mr and Mrs Yates regarded their employment as a joint venture for the sake of which it was considered worthwhile to remove themselves and their family to another country where they could utilise their skills in specialist areas.

Counsel should now be able to work out the damages due, subtracting for the period of notice which we have found appropriate, the earnings during that period from the Yates' company.

The Judge awarded holiday pay to both Mr and Mrs Yates. There was nothing in the contract regarding holiday pay; therefore the general legislation which provides for 10 paid days holiday per annum must apply. The Judge was in error in awarding holiday pay on any other basis. Sick pay is also covered by the legislation and should also be taken into account in the calculation. If the parties cannot agree then the Registrar is empowered to decide the quantum in accordance with the principles set out in this judgment.

SPRL and Mrs Yates had liabilities under the Fiji National Provident Fund legislation. An employee under the age of 55 has to pay 7% of his or her salary to the Fund; the employer deducts this from the salary and adds another 7% as the employer's contribution. Those contributions are then sent to the Fund. Mr Yates was over the age of 55 at the relevant time and therefore was not obliged to contribute. The Judge said that " FNPF contributions were not envisaged nor thought appropriate as supported by the initial claims lodged in open correspondence." There is nothing in the statement of claim about the FNPF contributions for Mrs Yates. Because the contributions became an issue at trial, we think the appropriate order is that the SPLR should deduct 7% from the total amount of salary paid to Mrs Yates both under this judgment and before her dismissal. It should pay this deduction to the Fund plus another 7%, being the employer's contribution.

Accordingly the appeal by the Yates is allowed and the judgment is to be varied as indicated. We deal now with SPRL's appeal.

The Judge ordered interest on the damages awarded at the commercial rate of 13.5% per annum. He did so on the basis that the parties had indulged in a commercial venture which justified an award of interest at commercial rates. He ordered the interest to be paid from 3 August, 1997 the date of the unjustified termination.

In our view, this was not an appropriate case for the imposition of a commercial rate of interest. There was just no evidence of particular loss. An example of such evidence might have been that the Yates had to go into overdraft, once they had lost their employment with SPRL .

Those cases where commercial rates are paid, are usually where the successful party has had to borrow money because it should have been paid by the unsuccessful party. There was no evidence before the Judge of any particular hardship on the part of the Yates.

Counsel agreed that the relevant commercial rate was 13.5% but that savings or deposit account interest was about 6%. Counsel referred to cases where interest of 9% was paid in death claims by dependent relevants. In the circumstances, we think that an appropriate rate of interest, generous to the Yates, is 9% . SPRL's appeal is allowed accordingly and the judgment varied.

On the question of costs, the Judge's award to the Yates of solicitor-and-client costs appeared to be for the following reasons:

(a) SPRL was seen as "an intransigent opponent",

(b) there had been some suggestion of mediation by a third party which had been rejected by Mr Patel for SPRL and

(c) an open letter dated 2 September 1992 from the Yates' then solicitors to SPRL's solicitors offered to settle the case for $6,500 to obviate a trial. This letter received no reply despite reminder letters up until 23 February 1993.

The general rule is that the costs are in the discretion of the trial Judge. An appellate Court is unwilling to interfere unless the discretion has been exercised on a wrong principle. The scale under Appendix 4 of the High Court Rules, normally the basis for an award, is exceptionally modest; it cannot be taken as allowing more than a token contribution to a successful party's reasonably incurred expenses. O.1 r 9 (3) (a) allows a Judge to make a special order in any proceedings, but the discretion is restricted by 0.1 r. 9 (3) (b) and the detailed considerations set out in that sub-rule. However, 0.62 r. 9 (4) (b) entitles a Judge to award a gross sum in lieu of taxed costs.

An award of solicitor-and-client costs in a Fiji context is unusual. Some assistance may be gained from New Zealand practice because there is in that jurisdiction a scale of costs attached to the Rules which is meant to apply in the ordinary run of cases. In practice in recent years the scale is often by-passed by Judges, particularly in commercial cases in both the High Court and Court of Appeal. Both Courts are tending more and more to award a lump sum to represent a reasonable contribution to the costs of the successful party. That figure can be higher than usual where the conduct of the unsuccessful party has been unreasonable.

Reading the record we think the Judge was right to consider the conduct of Mr Patel of SPRL to have been unreasonable. The Yates' perfectly sensible and reasonable offer of settlement did not receive from him either the courtesy of a reply or a counter proposal.

It should be borne in mind that in today's situation, where time means money, the taxation of costs is a cumbersome, time consuming and costly procedure for both practitioners

and officers of the Court. Taxation of costs in New Zealand has become very rare because of the broad approach to which we have referred. Orders which result in a taxation are rarely cost efficient bearing in mind the potential for recourse to a Judge from a taxing officer's decision.

It is now becoming common in New Zealand and England for a plaintiff to indicate by way of open letter (i.e. a letter which is not marked 'without prejudice'), to the defendant the amount for which the plaintiff would be prepared to settle. Such a device is the equivalent of a defendant's payment into Court. Such a letter is known as a Calderbank letter, after the case of Calderbank v. Calderbank [1976] Fam 93. There, the English Court of Appeal held that a letter from one party indicating an offer which the Court considered the other party should have accepted led to the costs of the party writing the letter were recoverable from that other party from the date of the letter until the date of judgment. Cairns, L.J. noted that protection should be afforded to a party who wants to make a compromise where 'payment in' is not an appropriate vehicle. Cairns L.J. referred to similar practices in land compensation and admiralty cases. He saw no reason why the practice should not be adopted in matrimonial proceedings. The practice of Calderbank letters has now been adopted in New Zealand in respect of most classes of litigation. We see no reason why the Calderbank approach is not appropriate for Fiji. It is no answer to say, as did Mr Patel counsel for SPRL, that a litigant is entitled to his or her day in Court. That must be so but the litigant should not, in order to have his or her day in Court, adopt a totally unreasonable attitude about settlement out of Court. If he or she wishes to be unreasonable, then that is no justification why the other party should pay for that unreasonableness.

A most useful discussion of costs was given by Hardie Boys J in Morton v. Douglas Homes Ltd (No.2) [1984] 2 NZLR 620. The learned Judge described the New Zealand scale (a similar device to the Fiji scale) as a legislative direction as to what was to be regarded as a reasonable contribution to the costs of a successful litigant. If, in a particular case, compliance with that direction would not achieve the purpose of an award of costs (i.e. to impose on an unsuccessful party the obligation to make a reasonable contribution to the reasonable and proper costs of a successful party) then the Court can make an appropriate order to achieve that end. Matters to be taken into account include the length of the trial, the amount of preparation, and the amount of solicitor-and-client costs actually incurred. A Court is not obliged to make the unsuccessful party pay for the opponent's desire for "Rolls Royce" representation.

We agree with the learned Judge that this case called for a payment of party and party costs well in excess of the scale. It was not a case which called for solicitor- and-client costs such as Commissioner of Inland Revenue v. Inglis [1993] 2 NZLR 29, 35. The intransigence of the defendant in the face of a reasonable offer of compromise clearly justifies that approach. We think that the jurisdiction under 0. 62 r. 9 (4) (a) should have been invoked by the Judge. Acting under that Rule, we order SPRL to pay $2,500 costs plus disbursements to the Yates for the High Court trial.

In this Court the Yates have succeeded on the main issue but SPRL has succeeded partially on the questions of interest, costs and holiday pay. We therefore award the Yates $1000 costs plus disbursements on their appeal. We make no order as to costs on SPRL'S appeal.

Ian Barker J.A.

Sir Ian Barker
Judge of Appeal

I.R. Thompson J.A.

Mr Justice I. Thompson
Judge of Appeal

Savage J.A.

Mr Justice R. Savage
Judge of Appeal

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