

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0041 OF 1996

(High Court Civil Action No. HBC 0139 of 1996S)

BETWEEN:

FONG SUN DEVELOPMENTS LTD

APPLICANT

-and-

MINSON FIJI LIMITED

RESPONDENT

Mr. H. Nagin for the Applicant
Mr. J. Flower for the Respondent

Date and Place of Hearing : 19 February 1997, Suva
Date of Delivery of Judgment : 28 February 1997

JUDGMENT OF THE COURT

This is an application for leave to appeal against a judgment of Fatiaki J. given on 23/8/96 in which he ordered that a sum of \$115,500.00 paid into court by the applicant (the owner) be paid out to the respondent (the builder). This was an interlocutory order and it is necessary therefore under s.12(2)(f) of the Court of Appeal Act (Cap.12) to obtain leave either from the judge or this court to appeal against it. If the judge refuses leave application can be made to this court. Fatiaki J. made a number of other orders in respect of which leave has been granted to appeal and counsel agreed before us that we are not concerned with them at this stage.

The matter came before Thompson J.A sitting as a single judge of this court and on 5th November 1996 His Lordship made an order that the amount of \$115,500.00 be paid back into court pending the hearing of the substantive appeal. Pursuant to s.20 of the Court of Appeal Act (Cap.12) the builder as an "aggrieved party" now comes to this full court to have the question determined whether the \$115,500.00 should be paid back into court or whether the builder is entitled to retain this amount pending the hearing of the substantive appeal.

The case arises out of a building contract executed between the builder and the owner. 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 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 acknowledged service of the builder's writ and indicated its intention to contest the proceedings.

At this stage the building had not been completed and eventually the parties agreed that the owner should be allowed into possession of the building so it could be completed and some income obtained from it. The owner agreed to pay the sum of \$115,500.00 into court and consent orders were accordingly made.

In his judgment on 23/8/96 Fatiaki J. held that although the "payment in" was a condition of the injunction sought to allow the owner to enter upon and complete the construction of the building it was not "tied down" to a resolution of any particular dispute between the parties in the substantive action. He held that the "balance of justice" would be best met by dissolving an injunction which had been granted restraining the owners from leasing the building and by ordering that the sum of \$115,500.00 be paid out to the builder. The money was paid out before the owner applied for leave to appeal against the decision. Counsel accept however that if this court holds that the money should not have been paid out to the builder it has power to order that it should be paid back into court.

It is clear, as Thompson J.A said, that the question whether the owner could withhold \$115,500.00 or any smaller amount by way of liquidated damages for alleged delays caused by the builder is a major issue in the action. We are conscious that we are not dealing with an appeal from the judgment given by Thompson J.A. We are dealing with the

judgment of Fatiaki J. and must consider the matter afresh. As Thompson J.A also said, however, since the owner has been given leave to appeal against Fatiaki J.'s refusal to stay the action and refer the matter to arbitration, no substantial delay would be caused by giving leave to appeal against the order that the \$115,500.00 be paid to the builder. Leave is therefore given to appeal against the order that \$115,500.00 be paid out to the builder. In order to preserve the situation pending that appeal the amount must be paid back into court to await determination of that aspect of the appeal.

Thompson J.A made an order that the application before him should be reinstated if the owner had not by the 26 January 1997 caused the appeal to be set down for hearing by this court. That however has been frustrated by the builder seeking to have the full court determine the question. We are also conscious of the fact that as counsel said to us, this case has been overlong delayed by interlocutory applications both exparte and on notice. We therefore order that if the matter has not been listed for hearing by the court by 30th March the question whether the money should held in court is to be reconsidered by this court.

There are therefore orders:-

- (i) That the owner have leave to appeal against Fatiaki J.'s order that the sum of \$115,500.00 be paid out

of court to the builder.

(ii) That within 14 days of this order the builder repay \$115,500.00 into court to be held subject to (iii) below until the hearing and determination of the appeals against the orders of Fatiaki J.

(iii) That if these appeals have not been listed by 30th of March 1997 for hearing by this court the question whether the money should be held in court is to be reconsidered by this court.

M. Casey

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Sir Maurice Casey
Judge of Appeal

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

P. Hillyer

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Mr. Justice Peter Hillyer
Judge of Appeal