

IN THE FIJI COURT OF APPEAL

IN CHAMBERS

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0024 OF 1997S
(High Court Civil Action No.HBC 0409 of 1994/S)

BETWEEN:

PACIFIC TIMBER DEVELOPMENT LIMITED APPELLANT

-AND-

KARIM BUKSH F/N MADAR BUKSH RESPONDENT

Mr. I. Fa for the Appellant
Mr. S. Inoke for the Respondent
Mr K. Buksh also present

Date and Place of Hearing: 26 November, 1997, Suva
Date of Delivery of Decision: 27 November 1997

DECISION OF DILLON J.

By a contract of sale dated 24 June 1992 the Appellant (original Defendant) agreed to purchase from the Respondent (original Plaintiff) all the land comprised and described in Certificate of title No. 26549. The purchase price was to be paid in instalments as follows:-

- “(a) *By payment to the Plaintiff no later than 31st January 1991 of a deposit of \$40,000.00.*
- “(b) *The balance of the purchase price namely \$260,000 was to be paid by monthly instalments of \$3,350.00 on the first day of each month commencing 1st April 1990 until 1st August 1990 and thereafter \$5,500.00 per month until October 1991 and thereafter \$6,000.00 per month until October 1993.*
- “(c) *Interest on the balance on a reducing basis was chargeable at a rate of 13.5%.*

- (d) *The Purchaser was entitled at its option at any time to pay the balance of the Purchase Price to the Plaintiff whereupon title to the property would be transferred in accordance with the provisions of the Contract.*

By 22 August 1994 the Appellant was seriously in arrears with payment of the instalments which were overdue and outstanding under the contract of sale. The Respondent thereupon issued a Summons under Section 169 of the Land Transfer Act Cap. 131 calling on the Appellant to show cause why it should not give up immediate vacant possession of the property to the respondent. Submissions were filed on 25 September 1996, and 17 and 25 October 1996. Byrne J. issued an interlocutory judgment on 25 April 1997, which, in so far as it is relevant to this present application ordered as follows:-

"In my judgment it would be fair, and I now order, that the Defendant should pay into Court within 14 days of the delivery of this judgment the sum of \$180,000.00. This is based on the demand Notice to the Plaintiff of 23rd June 1994. On my own calculation it would appear that as at 24th October 1996, the date of the Plaintiff's last submission, the amount owing to the Bank is approximately \$187,000.00. Allowing for any possible errors I will take this figure to be \$180,000.00 to be paid into the Court within 14 days of of this judgment. If that sum is not paid in then the Plaintiff will be at liberty to apply for further Orders. I also order that the Defendant pay the Plaintiff costs of the Summons of 22nd August 1994 to be taxed if not agreed."

From that Judgment the Appellant filed notice of Appeal on 12 May 1997.

The Court file discloses that the Appellant after filing its notice of Appeal on 12 May 1997 failed to comply with Rule 17 of the Court of Appeal Rules for fixing security for costs as required. The Appellant by notice of motion dated 18 November 1997 now applies for an order that leave be granted to file a Summons for Security for costs out of time.

A brief chronology of events since the date of the Judgment appealed against, will be a useful starting point to consider the circumstances as to why a simple contract entered into in 1992 for the payment of a purchase price of \$300,000 by instalments, has 5 years later, still not been paid by the Appellant. More than that however, as to why of that original purchase price there is at the present time the sum of \$180,000 plus interest still outstanding..

(1) The initial Judgment was dated 25 April 1997 - the Appellant has refused to comply with the order to pay \$180,000 into Court within 14 days;

(2) On 6 June 1997 Byrne J. Made orders as follows:-

“(a) The (Appellant) offer \$3,500 per month rent for 3 months;

(b) The first payment to be made on 9 June 1997. Thereafter further payments on the first working day of each month;

(c) The matter be adjourned sine die and that it be restored on the list on 3 (three) days notice.”

The Appellant paid the first instalment of \$3,500 on due date viz 9 June 1997;

3. The Appellant failed to pay the second instalment of \$3,500 due on 1 July 1997. As a result this matter again came before Byrne J. on 17 July 1997 when he made the following orders;-

- “(a) The (Appellant) through its Solicitors pay the sum of \$3,500 on Friday 18 July 1997 no later than 10.30 a.m. such payment being the amount due to the (Respondent) on 1 July 1997 under the agreement made before this Court on 6 June 1997;
- (b) In default of such payment action to take its normal cause;
- (c) Costs of this application to be in the cause.”

The Appellant failed to pay the second instalment of \$3,500 on 18 July 1997, as ordered.

- 4. This matter again came before the Court on 13 August 1997 on which date the 1 July 1997 instalment was paid.
- 5. The Appellant on 13 August 1997 was ordered to pay the 1 August 1997 instalment of \$3,500 on 15 August 1997. The Appellant has failed or refused to make that payment. The Appellant since July 1997 has been occupying the Respondents property rent free.
- 6. The Appellant applied for stay of execution pending appeal. On 15 October 1997 Byrne J. refused the Appellants application.

7. The Appellant on 4 November 1997 issued a second Summons for Stay of Execution pending appeal. This summons was heard on 17 November 1997 when the Court made the following order.

"I am not prepared to deal with application before me in the light of the Appellant's failure to comply with Rule 17 of the Court of Appeal Rules. The Appellant has indicated it proposes to apply to Court to extend time to apply for fixing of security for costs.

I will allow until Tuesday 18/11/97 for the Appellant to file its application. A date will then be assigned for the hearing of the application already before the Court as well as the application to extend time for fixing of security of costs. Any application for extension of time will be dealt with on merits. Respondent is awarded \$150 cost for today in any case. This sum must be paid before any application is accepted for extension of time.

If the application for extension of time relating to security of costs is not filed by 18/11/97 and the cost as ordered not paid then the stay application will be deemed to have been dismissed."

8. The Appellant filed the notice of motion for leave to file its Summons for Security for costs out of time on 18 November 1997.

It is against that background that this Court is now required to consider the Appellants application for leave to apply for security for costs out of time.

Rule 17 of the Court of Appeal Rules requires application to be made to the Registrar within 30 days of service of the notice of appeal and for the amount and nature of security for costs to be fixed. The notice of appeal was filed on 12 May 1997. To comply with

Rule 17 the Appellant should have filed its application with the Registrar by 12 June 1997 - it was not filed until 18 November 1997.

In the course of the hearings detailed in the chronology referred to above Byrne J. had the opportunity to evaluate the Appellant and the reasons for the various applications he was required to consider. In his ruling dated 15 October 1997 refusing to grant a stay of execution pending appeal His Lordship made the following observations -

“The basis of the Defendant’s grounds of appeal is that it claims it has shown sufficient cause in accordance with Section 172 of the Land Transfer Act for the Plaintiff’s Summons to be dismissed. The Defendant therefore submits that the matter should proceed by way of Writ of Summons which would give both parties an opportunity to resolve a dispute of facts and other legal issues that arise from them.”

I have no doubt that such a course would play right into the hands of the Defendant and give it what would probably be at least another twelve months before the action was set down for trial leaving the Plaintiff presumably to remain out of pocket while the Defendant remains in possession of the Plaintiff’s property. In my view this can not be right or equitable. Reading the Defendant’s submission and the various affidavits of the Defendant sworn by Greig Joseph Hill I am left with the view that all the Defendant wants is just for itself without any concern for the losses currently being sustained by the Plaintiff.”

“In my view it is very arguable in this case that the defendant purchaser is not ready and willing to carry out the Contract but is using this court’s process purely as a means of gaining time.”

(The Defendant therein referred to is the Appellant in the present proceedings). Sadly it is abundantly clear that the Appellant has throughout adopted a somewhat cavalier attitude to its obligations under the contract and scant respect to its responsibilities to this Court.

It is against that background that the legal principles applying to applications for leave under Rule 17 must be considered. Those principles were very clearly spelt out by the Court of Appeal in the case of Hon. Major General Sitiveni Rabuka and Others v. R.V. Dreunimisimisi and Others C.A. 11 of 1997 when the application for extension of time was dismissed. In a subsequent application involving the same parties an application for leave to appeal to the Supreme Court was also dismissed.

Rule 17 of the Court of Appeal Rules was also considered by the Supreme Court in the case of Venkatamama v. Ferrier - Watson (Civil appeal No. CBV0002 of 1992) in a Judgment delivered on 17 November 1995 where it was stated -

"We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal; in cases not having the special combination of features present here, it is unlikely to be excused."

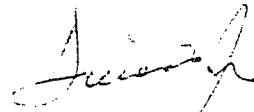
In my opinion there are no special features in the present case to justify leave being granted to the Appellant to file a summons for security for costs out of time.

The application for extension of time is therefore dismissed. The Appellant is to pay the Respondents costs to be fixed by the Registrar.

The Appellants application for stay of execution pending appeal was also adjourned till to-day. A similar application has already been considered in some detail by Byrne

J. and his judgment has already been referred to. For the same reasons that he expressed and which I also adopt, the Appellants application for stay is refused and it is ordered to pay costs to the Respondent as fixed by the Registrar.

Legal principles and precedent have dictated the form and content of the above orders. However the Appellant has according to its Counsels submissions "..... a substantial business which owns real property and a saw milling operation" These substantial, assets will enable it to comply with the original Judgment and so ".....allow a trial of all the facts in issue including whether there has been any waiver by the (Respondent) of his rights under the Contract of Sale."- that is if the Appellant wishes to pursue that option.



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Mr Justice J.D. Dillon
Justice of Appeal