IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0029 OF 1999S
(High Court Civil Action No: HBC84 of 1997)

BETWEEN:

SOUTH PACIFIC AGRICULTURE DEVELOPMENT LIMITED

Appellant

AND

YOUNG TAE KIM

Respondent

Coram: Sheppard, JA
Gallen, JA
Scott, JA

Hearing: Monday, 12 July 2004

Counsel: Mr. S. Matawalu for the Appellant
Mr. A.K. Singh for the Respondent

Date of Judgment: Friday 16 July 2004

JUDGMENT OF THE COURT

On 9 May 1997 the Respondent presented a petition to wind up the Appellant Company on the ground that a sum of $96,687.00 owed to the Respondent by the Appellant had not been repaid.

The Appellant Company contended that the amount claimed by the Respondent was in fact disputed on substantial grounds. It sought a stay of the

petition claiming that it was an abuse of the process of the Court (see Offshore Oil NZ v. Investment Corporation of Fiji Limited Civ App 29/84; FCA BV 84/415).

The principal facts are not in dispute. In 1995 the parties reached an oral agreement whereby the Appellant was to sell the Respondent a piece of land on Vanua Levu. The land measures a little under 1½ hectares. The purchase price was sixty million Korean Wan. The Respondent paid the Appellant fifty five million wan which is equivalent to F$96,687.00.

Since the area of the exceeded one acre the Respondent, who was a non-resident of Fiji, was required to obtain the consent of the Minister of Lands to the proposed purchase (Land Sales Act – Cap 137 – Section 6).

On about 2 May 1997 the Appellant Company prepared an application for Ministerial consent to the proposed sale and purchase.

According to paragraph 17 of the Appellant Company's affidavit filed on 14 May 1997 the Respondent did not proceed with the proposed purchase. Instead:

> "... he began to agitate against the Company based on false and malicious rumours received by him from persons of Korean descent living in Fiji. As a consequence the [Respondent] changed his mind and decided to withdraw from his negotiations with the Company. Thereafter he has proceeded with the basis of unreasonably accusing the Company and his officers of cheating against him."

On page 6 of his Judgment (page 114 of the record) the trial judge wrote:

> "On the evidence before me I find that the Company had in actual fact agreed to refund the [$F96,687.00] but had not done so because it says that the petitioner had not apologised to the Company's Managing Director".

The High Court found that the agreement to purchase the land was unlawful, of no effect and was unenforceable and that therefore the petitioner was entitled to the refund of the sum claimed. The application to stay the petition was dismissed.

On 13 July 1999 the Company appealed. There were two grounds of appeal. The first, which was that the trial judge had erred in finding that the sale and purchase agreement was void and unenforceable by virtue of Section 6 of the Land Sales Act, was abandoned. The second ground of appeal reads:

> "the learned judge erred in law and in fact in holding that there was no dispute on substantial grounds to justify restraining the Respondent/Petitioner from presenting his winding up petition against the Appellant company."

The appeal was first set down for hearing on 31 October 2000 however that session of the Court of Appeal was cancelled following the events of May 2000. It appears that the appeal then lay dormant until 29 April 2004 when it was set down for hearing on the following 12 July.

On 12 July Mr. Matawalu sought an adjournment. He explained that he had only joined the Appellant's firm of solicitors in February 2004 and that he had only been

briefed to appear during the week before the appeal was due to be heard. On 15 June the Appellant's solicitors had written to the Court explaining that their client was overseas and requesting an adjournment by consent. The Respondent however refused. Mr. Singh confirmed that he still opposed the application for an adjournment.

In the absence of a supporting affidavit revealing good grounds the Court does not, save in exceptional circumstances, look favourably upon applications for adjournment. In the present case the judgment appealed against is over five years old and during that period the Appellant Company has had the use of the sum paid to it by the Respondent. It is not clear how the presence of the Appellant Company's Managing Director at the hearing of the appeal would have any bearing on its outcome. The fact that counsel appearing had only recently been briefed cannot, of itself be a ground for an adjournment. The application for an adjournment was dismissed.

Mr. Matawalu then proceeded to argue his sole remaining ground of appeal. He did not supply the Court with any written submissions in support. While the Court of Appeal Rules do not require written submissions to be filed Practice Direction 1 of 1986: Appeals (Skeleton Arguments) requires "skeleton arguments" to be provided for the hearing of an appeal. A copy of the Practice Direction is appended to this Judgment. Notwithstanding the absence of any written submissions we decided to hear Mr. Matawalu however we would re-emphasise the requirement that the Practice Direction be complied with.

Mr. Matawalu's principal submission was that there was no debt genuinely due since the Appellant Company had at all times been ready and willing to provide title to the land in question. Indeed the Company was still willing to proceed. If there

was any impediment to completion then it had been placed there by the Respondent.

We were unable to accept that submission and did not find it necessary to call upon Counsel for the Respondents. It is clear to us that the oral agreement reached between the parties was at the very least ineffective. Being merely an oral agreement it failed to comply with the requirements of Section 59 (d) of the Indemnity Bailment and Guarantee Act (Cap 233). Had it been an otherwise valid contract in writing then it would have been unenforceable by virtue of Section 6 of the Land Sales Act (see Jennyne Gonzales v. Mohammed Akhtar and Others Civ App CBV0011 of 2002S).

Where a sum has been paid pursuant to an ineffective contract and there has been, as is here the case, a total failure of consideration then principles of unjust enrichment dictate that the payer is entitled to repayment (Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour [1943] AC 32.

Although neither the affidavit evidence before us nor the Judgment precisely reveal the circumstances in which the Respondent decided to pay the Appellant the sum in dispute it seems reasonably clear that he did so in the mistaken belief that he would immediately acquire freehold land. Prima facie a payer is entitled to recover money paid under a mistake (David Securities v. Commonwealth Bank 175 CLR 353)

Whether because of Section 59 (d) or whether by virtue of Section 6 of the Land Sales Act we are satisfied that there was at no time any binding contract between the parties and therefore the Respondent was entitled not to proceed and to seek the refund of monies paid by him to the Appellant Company.

Mr. Matawalu did not attempt to justify the excuse for non repayment offered by the Appellant Company in its letter of 20 February 1997 namely that the Appellant had, in some unspecified and unlitigated manner been defamed by the Respondent.

We agree with the trial Judge that the Appellant Company did not advance any genuine grounds for disputing the repayment of the sum claimed by the Respondent. Accordingly the appeal must be dismissed.

The Respondent is entitled to costs which we fix at $500.00.

Sheppard, JA

FIJI COURT OF APPEAL

Gallen, JA

Scott, JA

Solicitors:

Messrs. Muaror & Co. for the Appellant
Messrs. Mehboob Raza & Associates for the Respondent

IN THE SUPREME COURT OF FIJI

PRACTICE DIRECTION NO. 1 OF 1986

APPEALS (SKELETON ARGUMENTS)

SIR TIMOCI TUIVAGA, CJ:

As from 13th January, 1986, counsel in appeals before the Supreme Court (now the High Court) and the Court of Appeal should submit "skeleton arguments" for the hearing of the appeal.

"Skeleton arguments" are, as their name implies, a very abbreviated note of the argument and in no way usurp any part of the function of oral argument in court. They are an aide-memoire for convenience of reference before and during the hearing of the appeal.

The scope of "skeleton arguments" will of course depend upon the nature and peculiarities of the appeal concerned.

Before the appeal is called on, the judges will normally have read the notice of appeal, any respondent's notice and the judgment appealed from. The purpose of this pre-reading is not to form any view of the merits of the appeal, but to familiarise themselves with the issues and scope of the case and thereby avoid the necessity for a lengthy, or often any opening of the appeal. This process is assisted by the provision of "skeleton arguments" which are more informative than a notice of appeal or a respondent's notice, being fuller and more recently prepared.

During the hearing of the appeal itself, "skeleton arguments" enable much time to be saved because they reduce or obviate the need for the judges to take a longhand note, sometimes at dictation speed, of the submissions and authorities and other documents referred to. Furthermore, in some circumstances, a skeleton argument can do double duty not only as a note for the judges but also as a note from which counsel can argue the appeal. The usual procedure is for the "skeleton argument" to be prepared shortly before the hearing of the appeal.

"Skeleton arguments" should comply with the following requirements –

1. They should contain a numbered list of the points which counsel proposes to argue, stated in no more than one or two sentences, the object being to identify each point, not to argue it or to elaborate upon it.

2. Each listed point should be followed by full references to the material to which counsel will refer in support of it, that is, the relevant pages or passages in authorities, bundles of documents, affidavits, transcripts and the judgment under appeal.

3. They should also contain anything which counsel would expect to be taken down by the court during the hearing, such as propositions of law, chronologies of events, lists of dramatis personae, and, where necessary, glossaries of terms. If more convenient, these can of course be annexed to the "skeleton arguments" rather than being included in them. Both the court and opposing counsel can then work on the material without writing it down thus saving considerable time and labour.

4. They should be sent to the court as soon as convenient before the hearing. It is however more valuable if provided to the court in advance. A copy should of course at the same time be sent or handed to counsel on the other side.

It cannot be over-emphasised that 'skeleton arguments" are not formal documents to the terms of which anyone will be held. They are simply a tool to be used in the interests of greater efficiency. Experience also has shown that they can be valuable too. It is hoped that it will be possible to refine and extend their use.

Finally, even in simple appeals where "skeleton arguments" may be unnecessary, counsel should provide notes of any material such as have been mentioned which would otherwise have to be taken down by the court more or less at dictation speed, thereby saving considerable time and labour.

They are not envisaged to apply to criminal appeals against sentence only.

At Suva
2nd January, 1986.