IN THE COURT OF APPEAL, FIJI ISLANDS

ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0041 OF 2003

(High Court Civil Action No. ABU0041/2003S)

BETWEEN:

KARNAIL SINGH

Appellant

AND:

DHANRAJI SINGH

Respondent

Coram: Ward, P
Eichelbaum, JA
Gallen, JA

Hearing: 14 July 2004, Suva

Counsel: Dr. M S D Sahu Khan for the Appellant
Mr. V Kapadia for the Respondent

Judgment: 23 September 2004

JUDGMENT OF THE COURT

The plaintiff, now the respondent, is the mother of the defendant, who has brought this appeal. The defendant (appellant) is the executor and trustee of the will of his father, the plaintiff's late husband.

Background

In summary, the will provided that the trustees were to sell, call in and convert the estate into money and hold the same on trust –

To maintain and suitably provide for [the testator's wife] during her life AND to pay my said wife during her life such sums as my trustees shall in their absolute discretion think fit and proper having regard to the condition in life to which she has become accustomed up to the time of my death AND to provide her with suitable accommodation.

The will also made provision for the maintenance education and advancement of the testator's unmarried daughter, and for her wedding. The remainder of the estate was left to the appellant.

When the testator died in 1982, the Court granted probate to the appellant, the other trustee named in the will having filed a renunciation of probate.

In these proceeding, the respondent asserts that the appellant has not executed the terms of the will, in that he has paid her only minimal sums of money since her husband's death, and has failed to provide any accommodation.

The principal asset of the estate is a property at Nadroga not far from Natadola beach. It has been valued at $450,000, and when put up for sale by tender, by

order of the Court, attracted a bid in excess of $600,000. However, the property remains unsold, pending resolution of these proceedings.

Following a hearing on 3 February 2003 (the liability hearing) at which the appellant did not appear the High Court in a judgment delivered 11 February 2003 held in favour of the respondent. On 24 February 2003, the respondent's solicitors wrote to the appellant with a copy of the reasons for judgment. When the matter came before the Court for a call-over on 24 March, the appellant was represented by counsel. The appellant made arrangements to be represented at the implementation hearing on 14 May 2003 but in fact there was no appearance on his behalf. Subsequent correspondence was exhibited in which the appellant blamed his solicitors for failing to carry out his instructions and appear at the implementation hearing.

At that hearing the Court ordered, in summary, that the Nadroga property be sold by public tender, that the proceeds were to be used in the purchase of a suitable apartment for the respondent in the area where she lived, and that the hearing was to continue on 13 June 2003. On 11 June the appellant filed a Motion in the High Court seeking these orders:

1. that time be extended for the appellant to apply to set aside the judgment and orders given on 11 February and 14 May 2003;

2. that they be set aside;

3. that the appellant have leave to appeal against the judgment and orders.

As well, the appellant asked for various consequential orders.

On 25 July 2003 the Court granted the first application so, the Court said, as to allow the merits of the second application to be argued. The Court declined the

second and third. In respect of the third the Court, following an earlier decision of this Court, held that once the time for appeal had expired, the Court of Appeal is the appropriate court to deal with an application for leave to appeal and for an extension of time to appeal.

On 5 August 2003 the appellant filed in this Court:

1. A motion that the defendant have leave to appeal against the judgment and orders of 11 February and 14 May 2003;

2. An appeal against the judgment of 25 July 2003, in so far as that judgment refused the relief sought by the plaintiff.

We discuss these in turn.

Motion for leave

This first came before Smellie J, sitting as a single Judge of this Court, on 7 November 2003. In his judgment, delivered the same day, the Judge pointed out that as well as leave to appeal out of time, the appellant required leave to appeal an interlocutory order (Court of Appeal Act Cap 12, s12(2)(f)). The Judge said he was unimpressed with the appellant's explanations for failing to appear or have representation. He said:

...given the widow's age, health and undisputed needs the interests of justice dictate that the application for leave should be dismissed.

He proceeded to dismiss the application.

In the written submissions filed for the hearing before us, appellant's counsel argued that leave should be granted. The appellant was represented by the

same firm of barristers and solicitors as when the matter was before Smellie J, so his judgment could hardly have been overlooked but we were left unaware that the matter had already been before this Court until respondent's counsel drew that to our attention. It may be that counsel had in mind to exercise the right available under s35 of the Court of Appeal Act to request to have such an application determined by a full Bench when it has been declined by a single Judge. Whatever counsel may have intended, at the hearing before us he abandoned argument on this point, with the result that the judgment of this Court on the issue is as delivered by Smellie J.

The appeal

We commence by clearing away matters of a preliminary nature, the first two points raised challenging the validity of the original proceedings.

Representative capacity Counsel maintained that the proceedings were against the appellant in his personal capacity. He drew attention to the fact that where a defendant is sued in a representative capacity, under O6, r3 of the High Court Rules the writ is to be endorsed with a statement of that capacity. Contrary to counsel's argument, clearly the effect of the proceedings was to sue the appellant in his capacity as executor and trustee.

O2 of the High Court Rules deals with non-compliance with requirements of the rules. Irregularities such as the failure to endorse the writ do not nullify the proceedings. Under the Court of Appeal Rules (r6), subject to the latter rules the High Court Rules apply to civil proceedings in this Court. Acting under O2 and O20 of the High Court Rules we amend the writ by adding an endorsement that the defendant is sued in his capacity as executor and trustee of the estate of Dalbagh Singh.

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Service out of jurisdiction In his written submissions appellant's counsel maintained that the respondent had not obtained leave to serve the writ out of the jurisdiction. Plainly, she had. This point was abandoned.

Action not set down properly Counsel submitted that the action had not been set down properly, maintaining, variously, that the summons required by O34, r4 had not been taken out, or that there was no proof of service of any such summons. This point was not among the many raised in the appellant's affidavit in support of the summons to set aside the judgments. It is not mentioned in the High Court judgment under appeal, nor is it referred to in the Notice of Appeal against that judgment. On the information before us, the issue emerged for the first time in the appellant's written submissions in support of the appeal, in the form of an assertion by appellant's counsel. We do not know the facts and do not consider it appropriate that we should embark on a factual investigation ourselves into a technical point taken so belatedly.

We turn to the principal issue.

Did appellant have notice of the hearing on liability?

A fundamental question is whether the appellant had notice of the hearing which led to the judgment of 11 February 2003. The judgment proceeded on the assumption, or basis, that the appellant was aware of the hearing. If not, there was a material irregularity entitling the appellant to have the liability judgment set aside.

After commencement of the proceedings in 1999, Wm. Scott Grahame & Co, solicitors, filed an acknowledgement of service on the appellant's behalf. In 1999/2000 there was some correspondence between the solicitors acting with a

view to settlement. In May 2000 Wm. Scott Grahame & Co wrote to respondent's solicitors about a proposed fixture from mid October onwards. However, on 1 August 2000 they obtained a formal order authorising them to cease to represent the appellant.

On 14 February 2001, the deputy registrar made an order for trial of the action within 60 days. The formal order records that at the hearing before the deputy registrar, the appellant appeared on his own behalf.

In May 2001, the appellant instructed another firm of Suva solicitors, Esesimarm & Co, to represent him. He notified the acting chief registrar of the fact. The papers do not disclose that this firm took any formal steps in the proceedings, nor has any correspondence from them been exhibited.

At some stage the trial Judge made an order for a witness hearing.

In support of his applications to the High Court, the appellant filed an affidavit dated 11 June 2003 in which he swore:

...I was not aware of the hearing of the matter pursuant to which the Honourable Court pronounced the judgement on 11 February 2003....I was not aware of the hearing date pursuant to which the judgement was given on 11th of February, 2003.....

On this subject, in his judgment dealing with those applications, given on 31 July 2003 following a 25 July hearing, the Judge said:

In September 2002 the Chief Registrar wrote to the defendant (who was by then appearing in person) at his home address in Australia advising him of the hearing on 3 February but that letter (which the defendant does not deny receiving) evoked no response.....

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.....no explanation at all is offered by the defendant for his failure to appear on 11 February beyond the bald statement "I was not aware of the hearing."

This was the foundation for the Judge's critical finding, that the appellant had "chosen not to appear at the trial". In response to the appellant's affidavit, an affidavit was filed by the respondent's son in law. This stated:

On the 10th of September 2002 the High Court of Fiji fixed this matter for hearing on the 3rd February 2003. A letter dated 20th September 2002 was sent by the Chief Registrar of the High Court of Fiji to the Defendant advising him to attend in person at the hearing on the 3rd of February 2003. The Defendant thereafter at no stage made any enquiries with the Solicitors acting for the Plaintiff nor with any member of the Plaintiff's family although he was aware of these proceedings being instituted by his mother.

It appears that when the appellant claimed he had not had notice of the date of the liability hearing, respondent's solicitors found, on the court file, a document that on its face, was a copy of a letter from the Chief Registrar notifying the appellant of the date. Although counsel before us were unable to agree what happened in this regard at the hearing before Scott J on 25 July 2003, at any rate it was not suggested that the appellant, or counsel on his behalf, admitted receiving the letter. When the Judge stated that its receipt was not denied, he must have meant that the appellant had not in so many words denied receiving it.

The statement that the Chief Registrar had written to the appellant was hearsay. There was no direct proof that any such letter was dispatched.

Respondent's counsel put before us, without objection, a copy of a letter from the Chief Registrar dated 9 July 2002, apparently written on the direction of the

Judge, addressed to the appellant at 143 Riflebird Road, Morayfield, Brisbane, advising him of a hearing date of 10/11 September 2002. According to respondent's counsel, those dates were abandoned on account of the respondent's state of health. Again without objection, respondent's counsel put before us a copy of a further letter from the Chief Registrar dated 20 September. This letter, also it seems written on the Judge's instructions, and addressed to the appellant at the same address, obviously was the letter to which the respondent's son in law and the Judge referred. It advised a new date of 3 February 2003.

Although appellant's counsel took this point as well, we are not troubled by the informal mode of service. While, technically, either Wm. Scott Grahame & Co or Esssimarm & Co may have been the appellant's address for service, the former clearly were no longer acting, and there is no evidence that the latter ever became actively engaged in the case. So it was appropriate for the Judge, in exercise of his powers under O65, r5(1)(c), to direct that service of a notice of hearing should be by letter to the appellant's address. There is ample evidence that the address was a settled one which the appellant habitually used for correspondence, and we have no difficulty in concluding that a letter sent to the appellant there, even though not registered, had reached him.

One may assume that the Judge was aware of the existence of the copy of the letter on the court file, as we now are. Accordingly the position before the Judge was that he had directed the appellant should be notified of the dates of hearing; on the file, there were copies of letters indicating that his instructions had been carried out; when the appellant claimed he had not had notice of the hearing, affidavit evidence had deposed that the Court had notified the appellant of the date of hearing; and the appellant had not responded to that assertion, although it was open to him to file an affidavit in reply.

It is true that if the appellant had not received the letter, he would almost certainly have been unaware of the existence of the copy at the time he swore his affidavit. So at that stage he could not have been more explicit than to say he was unaware of the hearing date. But when it was deposed that he had been notified of the hearing date by letter, had this not been the case he could and should have sworn that he had not received any such letter.

The Judge was justified in saying that the appellant had not denied receiving the letter notifying him of the date of hearing, and that he had chosen not to appear at the trial. It was open to him to find that the appellant had in fact been notified. We are of the same view.

Respondent's alternative arguments

By way of alternative answer to the appellant's claim that he had not received notice of the hearing, counsel for the respondent submitted the appellant was estopped from contending that the liability judgment given on 11 February 2003 was irregular, or had waived the right to object to the irregularity. Following the hearing the Court issued a Memorandum giving respondent's counsel the opportunity of developing that argument. We extended the time for giving a respondent's notice under R19(2) of the Court of Appeal Rules, and both sides provided written submissions. We now deal with the issues arising.

Laches

The respondent's arguments included invoking the doctrine of laches. As seen the appellant became aware of the judgment not long after its delivery, probably by the end of February, and solicitors attended a call over on 24 March. However, the application to set aside the judgment was not made until 11 June.

Where a party does not appear at the trial O35, r2(2) of the High Court Rules provides a time limit of seven days after trial for applying to set aside the judgment. On the appellant's application, the High Court extended the time, so as to validate the application made on 11 June. There has been no cross appeal against that part of the judgment. Against that background we do not see there is room for any argument based on laches. Even if there were, it could not add anything to the respondent's contentions based on estoppel.

For completeness we note that O2, r2 provides that an application to set aside any step taken in proceedings shall not be allowed unless made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. This is a general provision whereas O35, r2(2) relates specifically to the setting aside of a judgment obtained where a party does not appear at the trial. No argument has been submitted on the issue whether a party applying under O35, r2(2) is subject to the requirements of O2, r2 as well. Even if that were so, however, in the present case the Judge's order extending the time for applying under O35, r2(2) must be taken as curing any irregularity (if such there was) under O2, r2(2).

Waiver

On the present facts we adopt the view taken by authorities quoted in *Meagher Gummow & Lehane's Equity Doctrines & Remedies* 4th Ed 2002 at 574 – 6 to the effect that waiver has no independent significance separate from estoppel or election between inconsistent rights. It has not been suggested that the concept of election could apply. We are left therefore with the issue of equitable estoppel.

Equitable estoppel

For present purposes the requirements of equitable estoppel may be summarised as follows. First, an express or implied representation that the party (here the appellant) will not rely on the legal right in question. The representation must be sufficiently clear, that is reasonably understood in the material sense by opposite party; or intended by appellant to be so understood, and in fact so understood. The High Court of Australia has stressed that the representation must be clear and unequivocal, *Legione v Hateley* (1983) 152 CLR 406, 435–7. Second, the opposite party must have altered their position in reliance on the representation. Australian judgments have used terms such as "material detriment", "material disadvantage", and "significant disadvantage", *Meagher Gummow & Lehane* at 553. Third, the Court has to be satisfied it would be inequitable that the appellant should be allowed to resile from his representation. Thus if the respondent cannot be restored to her former position, through terms or otherwise, the appellant would not ordinarily be allowed to depart from the representation. Whether it is just that the appellant be allowed to depart from his representation depends on the conduct of the parties, considerations of hardship and other matters that bear on the balance of justice.

Here, any representation must be found in events occurring after the appellant learned of the liability judgment. Viewed in isolation the appearance of solicitors on the appellant's behalf at the call over is not necessarily critical. The appellant was in Australia; there had been limited time in which to obtain and consider a copy of the reasons for judgment and take advice on the options open. Ideally counsel appearing on his behalf at the call over would have recorded that the appellant had not had notice of the liability hearing and that counsel's appearance was without prejudice to the appellant's right to apply to have the judgment set aside.

However, the fact of the appearance at call over coupled with the absence of any such reservation requires to be taken into account in construing the overall effect of the appellant's conduct, following notification to him of the outcome of the liability hearing. His subsequent inaction took place against the background that he was aware first, of the findings against him; second, that an implementation hearing would follow and third (after 24 March) that the hearing would be on 14 May. Notwithstanding the time limit of 7 days imposed by the Rules, the weeks and months went by without any communication from or action on behalf of the appellant, culminating in the non appearance of the appellant or anyone on his behalf at the implementation hearing.

The Court has no need to concern itself with any rights and wrongs as between the appellant and his then solicitors; that is a matter between them. For whatever reason, there was no appearance on the appellant's behalf. Seen through the respondent's eyes the non appearance was part of an ongoing course of conduct. For more than 10 weeks (i.e from the end of February, when the appellant knew of the liability judgment, until 14 May, the implementation hearing) the appellant had conducted himself as if he were accepting the liability judgment, notwithstanding his professed absence of knowledge of the hearing leading to that judgment. Cumulatively, we do not see how else his conduct could be viewed. Asked immediately before the implementation hearing whether the appellant had decided not to challenge the validity of the liability judgment, any objective observer would have said of course.

After the implementation hearing, so far as the respondent knew the conduct continued. It was not until after the Nadroga property had been advertised for sale that the appellant finally applied to have the judgments set aside.

Had the appellant made a timely application to have the liability judgment set aside, or even intimated that he proposed to do so, there can be little doubt proceedings would have taken a different turn. It is probable the implementation

hearing would not have gone ahead. Unnecessary costs would have been avoided. If however that was the only untoward outcome, the respondent could be compensated for the wasted costs as a condition of setting the judgments aside.

There are however other consequences. As noted, following the implementation hearing, and with the appellant's inaction continuing, the Nadroga property was advertised for sale by tender, attracting a number of offers described by the Judge as very favourable. The subsequent proceedings resulted in the suspension of the sale. The opportunity of a favourable sale has been lost, and the withdrawal of the property from sale may affect subsequent attempts to sell. Further, the normal delays attending High Court civil litigation are well known. The Court had moved this case forward with expedition, mindful of the respondent's age, state of health and need for financial assistance. Time, of an indefinable length, has been added to the litigation. The respondent cannot be compensated for the delay, which has eaten into the period during which she might obtain financial relief, and indeed has created a risk that because of the effluxion of time, she may never obtain a remedy.

Thus the respondent has satisfied the first two legal requirements. As to the third, the respondent cannot be restored to her former position. Too much has taken place to be undone: the implementation hearing, the receipt of tenders, the loss of priority in the litigation queue. If a retrial was ordered, assuming the respondent was successful it would be at least months, and quite likely a year or more, before she was restored to the position she held immediately before the implementation hearing.

Having regard to the conduct of the parties and considerations of hardship, all factors bearing on the balance of justice come down heavily in favour of the respondent. We are satisfied it would be inequitable to allow the appellant to resile from his representation.

Finally, we see no merit in the appellant's argument that the estoppel point was not taken before the High Court. The relevant facts are few, being limited to the events between the time the appellant received notification of the liability judgment, and the filing of the application to set aside the judgment. The appellant went into the events of this period in his affidavits in support of his application, including his correspondence with his solicitors and the Fiji Law Society. Had there been any further actions which might have thrown a more favourable light on his conduct, surely he would have put them before the Court too. We are satisfied that the evidence bearing on the plea is fully before the Court (see *Connecticut Fire Insurance v Kavanagh* [1892] AC 473, 480) and for that reason the decision of this Court cited by the appellant, *Madho Morar & anor v Govindji* (Civil Appeal 23 of 1979, judgment 25 July 1979) is distinguishable.

Thus on this alternative ground, also, we hold in favour of the respondent on the notice issue.

Other grounds – liability judgment

Counsel for the appellant argued that even if the appellant received notice of the hearing, the judgment should be set aside, in the exercise of the Court's discretion. On this footing the issue is whether in all the circumstances it is just to set aside the judgment. Three matters normally taken into account in measuring the justice of the case are first, whether the defendant's failure to appear was excusable; second, whether the defendant has a substantial ground of defence; and third, whether the plaintiff would suffer irreparable injury if the judgment were set aside. See *Russell v Cox* [1983] NZLR 654.

Here, on the assumption, as we have held, that the appellant had notice of the hearing, nothing has been put forward to excuse his non appearance. On the second issue, the requirements are that the defence must have "a real prospect

of success" and "carry some degree of conviction". See *Wearsmart Textiles Ltd v General Machinery Hire Ltd & anor* ABU 0030 of 1997S, judgment 29 May 1998 and *Suva CC v Meli Tabu* ABU 0055 of 2003S, judgment 16 July 2004. No attempt was made to persuade us that any such defence existed. To the contrary, all the indications are that the appellant has woefully neglected the obligations towards his mother imposed on him as executor and trustee. On the third question, for the reasons given under the estoppel heading, we consider that the respondent would suffer irreparable injury.

The balance of justice being strongly against the appellant, we are not prepared to set the liability judgment aside.

Implementation judgment

The theme of the appellant's case was that the liability judgment should be set aside because it had not been proved that the appellant had notice of the hearing, or alternatively that the judgment should be set aside in the exercise of the Court's discretion. On both sides it was assumed, understandably, that if the liability judgment was set aside, the implementation judgment could not stand.

The appellant raised only one matter relating separately to the implementation judgment, namely the Court's jurisdiction to make the particular orders. Our analysis of the formal orders is as follows: (a) the Nadroga property to be sold (b) by public tender (c) under the direction of the High Court (d) sale handled by respondent's solicitors (e) proceeds deposited in Court (f) proceeds to be used in purchase of an apartment (g) apartment to be "suitable" (h) to be of respondent's choice (i) in the area of Sydney where respondent resides.

The relevant provisions of O85 of the High Court Rules are as follows. "Administration action" includes an action for the execution of a trust, under the

direction of the Court. O85, r2 (1) provides that an action may be brought for any relief which could be granted in an administration action, and that it is unnecessary to make a claim for the execution under the direction of the Court of the trust in connection with which relief is sought. An action may be brought seeking by way of relief, among other things, an order directing a person to do a particular act in his capacity as trustee (r2(3). Relief may be granted notwithstanding that the proceedings were, as here, begun by originating summons (r4). Finally, the effect of r6 is that the Court may direct that a person other than the trustee shall have the conduct of a sale of trust property.

The respondent's originating summons sought relief in a variety of forms but the general thrust was to compel the appellant to carry out the terms of the trust under her late husband's will which required him to "maintain support and suitably provide for" the respondent, and to provide her with "suitable" accommodation. We have no doubt that the Judge's use of the word "suitable" was intended to refer back to these provisions of the will, and that the Court is to be the arbiter of what is suitable on that basis.

We are satisfied that the orders made were within the authority conferred by O85. In the absence of any other source of funds to enable the terms of the trust to be performed, an order for sale of the Nadroga property was appropriate, and indeed inevitable. The orders do not alter the testamentary provisions. The respondent will be entitled to the use of the apartment as accommodation for herself but the intention must be that it remains an asset in the estate.

Although the appellant did not advance any additional argument that if the liability judgment stood, the implementation judgment should nevertheless be discharged, we will address that subject briefly.

Jurisdiction apart, it was not suggested that the implementation judgment was in any respect irregular. Thus, again, the issue is whether in all the circumstances it

is just to set aside the judgment. As noted the appellant said he had instructed solicitors to appear at the implementation hearing. Why they failed to do so has not been explained. But even assuming, in the appellant's favour, that his failure to appear was excusable, the other two matters traditionally taken into account are entirely against him. No attempt has been made to persuade us that the orders made were inappropriate or other forms of relief would reasonably have met the case. And we are satisfied, for the reasons given previously, that the respondent would suffer irreparable injury. Overall the interests of justice favour the respondent. So in the exercise of the Court's discretion we would not be prepared to set the implementation judgment aside.

Orders

1. Amend the writ by adding an endorsement that the defendant is sued in his capacity as executor and trustee of the estate of Dalbagh Singh;

2. Appeal dismissed;

3. Costs $ 2000 in favour of the respondent, together with any disbursements as certified by the Chief Registrar.

Ward, P

Eichelbaum, JA

Gallen, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant

Messrs. Sherani and Company, Suva for the Respondent

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