

IN THE COURT OF APPEAL FIJI ISLANDS
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0022/2007

BETWEEN:

STINSON PEARCE LIMITED

Appellant

AND:

REDDY'S CONSTRUCTION LIMITED

Respondent

Coram: Shameem JA
Scutt, JA
Datt, JA

Hearing: 2 April 2008

Counsel: Mr N. Prasad for the appellant
Mr D. Gordon for the respondent

Date of Judgment: 16 April 2008

JUDGMENT OF THE COURT

[1] **The Appeal**

A number of curious features characterize this case. The original claim was by Stinson Pearce Limited (Stinson Pearce), the defendant being Reddy's Construction Limited (Reddy's Construction). A defence was filed by Reddy's Construction, together with a counterclaim. No defence to the counterclaim was filed. In the absence of the defence to the counterclaim, on 11 September 2006 judgment was entered in respect of the counterclaim.

[2] The Court made the following Orders:

UPON READING the Summons dated 24 May 2006 and the affidavit of Giyanand Naidu for the Defendant and the Affidavit of Dhinesh Lal Bala (f/n Shanti Lal Bala) for the Plaintiff

AND UPON HEARING Mr Nilesh Prasad of Counsel for the Plaintiff in part and Mr Ronald R Gordon of Counsel for the Defendant

IT IS HEREBY ORDERED that:

- (a) Leave granted to the plaintiff to withdraw its amendment to the Statement of Claim.
- (b) Given all the facts of the case, there is merit in the Defendant's argument and that there be judgment entered in favour of the Defendant on its Counter-claim.
- (c) Costs is awarded to the Defendant in the sum of \$850.00

ENTERED at Suva this 24th day of October 2006.

[3] No reasons for judgment were given.

[4] Argument then arose as to whether this was a default judgment to be disturbed only by way of an application to the judge who made it, or whether it was a judgment on the merits, to be the subject of appeal to this court, by way of leave.

[5] Stinson Pearce first made an application to the Master to set aside judgment. Having part-heard the application, the Master stated he had no jurisdiction as the judgment was that of a Judge. Stinson Pearce then made application to the Judge.

[6] Upon hearing the application, His Lordship's decision was short. It bears setting out in full, for it indicates the conundrum now facing this Court and which earlier confronted Stinson Pearce in determining what it should do to challenge the initial judgment.

[7] Delivering judgment on 23 March 2007, His Lordship said:

On 11 September 2006, this Court entered judgment on the Counter-Claim of the Defendant after hearing oral arguments from both Counsel. The reason for judgment was principally on the arguments that the Plaintiff had more than ample time to file its defence to the Counter-Claim and it appeared to the Court that it had not advanced sufficient or good enough reasons to explain the inordinate delay. In such circumstances, the Court would have entered default judgment in favour of the Defendant to Counter-Claim as pleaded by the Defendant. Instead the Court in its very brief ruling stated that, ***"Given all the facts of the case, there is merit in the Defendant's argument and that there be judgment in favour of the Defendant for its Counter-Claim."***

To all appearances therefore, it certainly gives the impression that a full hearing on the merits of the Counter-Claim had been heard by the Court and that judgment was given only after such hearing. This is not correct, as I have explained above. To the extent that this impression is created [it] is unfortunate but would seem unavoidable from the short judgment referred to. The parties certainly are of similar persuasion.

As to the Plaintiff's summons of 14 November 2006, the Court is satisfied that there is merit in the application. Leave is granted for first, the enlargement of time to file the appeal and secondly, leave to appeal the judgment of 11 September 2006. There is also a further order for stay of execution pending the appeal.

Costs in the cause.

[7] From His Lordship's judgment, it seems apparent that the original decision was one of summary judgment, where Stinson Pearce's path was to seek to have it set aside by application to the Judge. However, His Lordship having refused to do this on the basis that whatever the essence of his original determination, the words 'given all the facts' and 'merit' in the Defendant's argument meant it appeared as if the parties had had an opportunity to air all the arguments and had taken it (although neither was the case), the only path was by way of appeal. Thus His Lordship granted leave and the matter now comes before this Court on appeal.

[8] Before His Lordship, Stinson Pearce took the position, by its application, that the judgment was a summary judgment to be set aside by the Court. Reddy's Construction's position was that Stinson Pearce should seek leave to appeal as the judgment was apparently on the merits of the counterclaim, rather than on a summary basis. Now, the positions are reversed: Stinson Pearce argues that the proceeding is properly before this Court as an appeal; Reddy's Construction says the matter is not an appeal and should be the subject of an application to set aside summary judgment.

[9] It falls to this court to resolve the matter.

[10] **The Outcome**

It is apparent from the material before this Court that the Appellant was slow in filing a Defence to the Counterclaim and that it was upon this basis that judgment was entered against Stinson Pearce.

[11] The Judge's Notes appear to bear this out, there being explicit reference by the Appellant to 'default judgment' and no indication that there were any submissions or argument as to the substantive issues. The Judge's Notes in full are as follows:

**MR N. PRASAD
MR R. GORDON**

**FOR PLAINTIFF
FOR DEFENDANT**

RG Application (Summon) to file Supplementary Affidavit by the Plaintiff

NP (1) Would like to withdraw amended S of C

(2) Will then re-apply under proper procedure. Unable to file defence to counter-claim submit that I be given time to file proper defence to counter-claim.

If default judgment is entered I would be seeking it to be set aside.

Gordon: (1) 16 May 2006 letter to the Registry and to Counsel for Plaintiff informing that the acceptance of amendment was improper.
Submit that entitled to indemnity costs - \$2,000.00.

(2) Summons of 25 May was also for judgment to counter-claim – still stands.

(3) Submit that the Defendant is entitled to counter-claim.

[12] Then appear the Orders as they are set out above.

[13] As has been said on many occasions, timelines in the Rules of the Court have meaning. They are there for a purpose. They should be complied with.

[14] However, this Court is now faced with circumstances as they now exist, where both parties are agreed that there are serious matters to be tried and those matters have not been tried.

[15] Hence, the Court is constrained to grant the appeal, so that the parties are able to avail themselves of the opportunity to agitate the substantive issues, which we accept they have not so far had a chance to do. Apart from or in addition to any dispute on the facts, and it appears that there is such dispute requiring evidence and arguments, serious matters of law in the proceeding are entitled to an airing, not the least those going to the provisions of the Counter-Inflation Act.

[16] At the same time, that the appeal is granted should not be used as an opportunity for further delay by the Appellant.

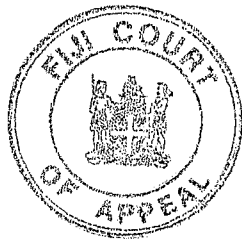
[17] The Court's orders are, therefore, designed to ensure that the Appellant engages in no further delay so that the parties are able to obtain their right to speedy justice. This means that the Appellant should be obliged to file its Defence to the Counterclaim promptly.

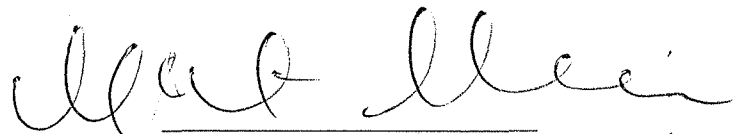
[18] Hence, the Court will make an order that the Appellant files its Defence to the Counterclaim within twenty-eight (28) days of the date of this judgment.

[19] Having given consideration to the question of costs, taking into account all the matters herein arising, the Court has decided to make no order as to costs.

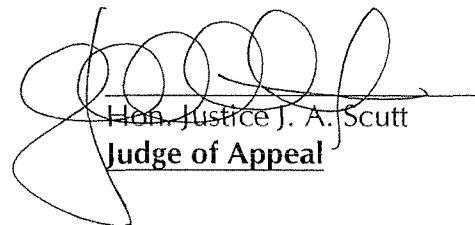
ORDERS

1. Appeal allowed
2. Appellant to file its Defence to the Counterclaim within twenty-eight (28) days of the date of this judgment.
3. The proceeding be remitted to the High Court for hearing before the trial Judge.
4. No order as to costs.

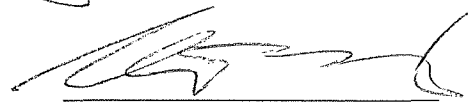




Hon. Justice N. Shameem
Judge of Appeal



Hon. Justice J. A. Scutt
Judge of Appeal



Hon. Justice C. Datt
Judge of Appeal

Solicitors

Messrs Mitchell Keil & Associates for the Appellant
Messrs. Gordon & Company for the Respondent