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

CIVIL APPEAL NO. ABU0077 OF 2007S
(High Court Civil Action No. HBA 7 of 2006S)

BETWEEN:

HARRY CHANDRA

Appellant

AND:

RAMAT ALI

Respondent

Coram: Devendra Pathik, JA
Randall Powell, JA
Andrew Bruce, JA

Hearing: Tuesday, 8th July 2008, Suva

Counsel: J. Sloan for the Appellant
V. Maharaj for the Respondent

Date of Judgment: Friday, 11th July 2008, Suva

JUDGMENT OF THE COURT

Introduction

1 This is an appeal against a decision of Jitoko J made on 2 November 2007 wherein he ordered that an appeal be allowed against a decision of Mr Ajmal Khan, sitting as a Magistrate at Suva in civil action MBC 340 of 2005.

2 The judgment the subject of appeal before Jitoko J was in a case in which the Plaintiff sought the refund of $10,000 paid to the Defendant for the purchase of real estate. The background of the matter is set out with admirable clarity in the judgment of that

learned Judge. We take the liberty of quoting from the opening passages of that judgment as follows:

> In March 2005 the Plaintiff/Respondent learnt of the sale of a property situated at 71 Milverton Road in Suva. The property is described in Certificate of Title No. 9302 on D.P. 2274. The owners of the property were Bahadur Ali and his wife Abida Bibi Ali, both residents of Australia. The Defendant/Appellant, held general powers of attorney on behalf of the Ali's, the property owners. Two installment payments of five thousand dollars ($5,000.00) were paid by the Respondent on 10th and 11th March, 2005 respectively as deposits. The payments were made to the real estate agent Titus Sales Agency, acting on behalf of the vendors. In the meantime the Respondent's loan application Westpac and FNPF was rejected and by agreement, the Respondent's father was substituted as the purchaser.
>
> The sale and purchase agreement that followed on 30 March, 2005 was entered into between the vendors, Mr and Mrs Ali by their attorney, the Appellant, and one Jagdish Chandra, the Respondent's father. The agreement fell through and according to counsel for the Appellant, the deposit was forfeited in accordance with paragraph 15(b) of the said Agreement.

The proceedings before the Magistrate

3 The Plaintiff called and gave evidence in support of his case. After the case for the Plaintiff closed, the Defendant applied for a non-suit or, to put that another way, he contended that there was no case for the Defendant to answer. The basis of this submission was that counsel contended that the Defendant was not a party to the agreement which was said to be the subject of the action. The case on the non-suit application was that the agreement was between the Vendors, whom the defendant represented as agent, on the one part and the father of the Plaintiff on the other part. The case for the Defendant on the non-suit was that the forfeiture of the deposit was made pursuant to the provisions of the Agreement and therefore as the Plaintiff had not been a party to that agreement, he accordingly had no standing to bring the action against the Defendant. The Defendant argued that the claim should be dismissed.

4 The learned Magistrate ruled that there was a case made out on the Plaintiff's case upon the basis that he had an equitable claim against the Defendant.

5 To put the matter neutrally, no evidence was called by the Defendant. The parties asked that they be permitted to file written submissions. In those submissions, counsel for the Defendant maintained the position in the application before the Magistrate for a non-suit.

6 In due course, after several adjournments, Judgment was entered for the Plaintiff.

Nomenclature

7 To (hopefully) avoid confusion, in this judgment the parties are referred to by their designation at trial.

The appeal to the High Court

8 The Defendant appealed to the High Court. On the appeal, the grounds of appeal could be divided into two categories. The first six grounds of appeal concerned the merits of the determination made by the learned Magistrate on the case before him. The 7th ground of appeal complained of a denial by the learned Magistrate of the procedural rights of the Defendant and asserted:

> The learned Magistrate erred in law in that having ruled that there was a case to answer for the Defendant following the submissions of no case to answer failed to put the [Defendant] to election to ascertain whether the [Defendant] did or did not want to give evidence before giving final Judgment whereby grave miscarriage of justice has occurred to the [Defendant]. (*sic*)

9 Jitoko J held that a Magistrate has the power to enter a non-suit against the Plaintiff in a civil action. He observed that the rules made under the Magistrates Court Act do not explicitly provide for such a procedure. However, he held that section 46 of that Act does incorporate by reference the practice for the time being observed in England in the County Courts and courts of summary jurisdiction. The learned Judge reinforced his holding by reference to a decision in ***New India Assurance Co Ltd v Morris Hedstrom Co*** [1967] FLR 12. In that Judgment, the Supreme Court recognized the existence of a power to enter a non-suit.

10 Jitoko J held that the issue was not whether the learned Magistrate had properly determined that merits of the application of non-suit, but whether he was in breach of

procedural requirements in not putting counsel for the Defendant to his election in connection with the calling of evidence following the dismissal of the non-suit. The learned Judge held:

> It is generally accepted that where a party elected not to call evidence but instead made [a] submission of no case to answer, and which submission is rejected, the right of that party to call evidence still exists to be exercised.

For this proposition he cited a passage from ***Yuill v Yuill*** [1945] 1 All ER 183 as follows:

> On a submission of no case, a party did not *ipso facto* lose the right to call evidence if the submission failed. The right was closed only when an election expressed or implied had actually taken place.

11 The learned Judge held that the proper practice following the dismissal of a non-suit is for the court to call upon the Defendant's counsel to elect whether or not to call evidence. The Judge held "it is clear from the record is that the Magistrate failed to do so but directed both parties file submissions instead."

12 The learned Judge then ordered that the matter be returned to the Magistrates court for a hearing *de novo* before another magistrate. He made consequential orders and awarded costs.

13 The Plaintiff appealed to the Court of Appeal.

Issues on appeal

14 The sole point taken before the Court of Appeal in this case concerned the order to remit the matter for a hearing in for a Magistrate. At one stage, counsel for the Plaintiff in his written submissions suggested that we might hear and determine the substantive points as to the merits of the matter. After reflection, counsel abandoned that approach. There was, nevertheless, some temptation to do this if only because sight must not be lost of the fact that the parties to the action do not appear to be well off and the dispute is over the sum of $10,000. When that is set against the likely costs in this matter both to date and in the future, it may be that sum at stake will pale into relative insignificance.

15 By reason of the foregoing, it became apparent in the course of argument that all options open to the Court of Appeal were unattractive from the standpoint of doing substantial justice. If the Plaintiff won his appeal, the only conceivable disposition open to the Court of Appeal would be to refer the matter back to the High Court for the continuation of the appeal - to deal with the unresolved grounds. Pausing there, it is, perhaps, a matter of regret that the other grounds of appeal were not disposed of before the learned Judge in the High Court. One can easily understand the course that he took part, but, undoubtedly unintentionally, the outcome is that it has produced has a level of unattractiveness. The second option that is open to the Court of Appeal is that, if it dismisses the appeal, the matter goes back before a Magistrate for a full determination of the matter.

16 It will be readily seen from the foregoing observations that whichever order the court makes there will be an element of injustice. In many respects the injustice will be to both parties regardless of the outcome. However, the injunction on the Court of Appeal is not to look for the least unjust solution but to determine the matter according to law.

17 It is therefore important to look carefully at what went on below. At the close of the case for the Plaintiff, we see the following (appeal record, page 140):

> **DEFENCE:**
> Apply for non- suit. Won't call evidence. Harry Chandra is Plaintiff. He paid deposit and new property was another is, not defendants. [then there are notes of the submissions made by counsel for the Defendant.]

The next significant entry in the record is (appeal record, page 141):

> **RULING:**
> I find in there is (*sic*) issues and an equitable claim on the half of the Plaintiff and there is a case made out.
> **PARTIES**: Ask written submissions.

18 We were told that it is common practice in the Magistrates court for the Magistrate to accept written submissions in these circumstances. A timetable was then set for the provision of written submissions. The record is silent as to the nature of the submissions that the parties proposed to supply. The court record then reveals (appeal record, pages 141-142) a series of adjournments culminating in proceedings

on the 27th of July 2006 when Judgment was given for the Plaintiff. It is perhaps significant to note that at one of the mentions of this matter on 25 May 2006 (appeal record, page 142) that both counsel appeared appear before the Magistrate where his record indicates "For Judgment - 18/7/06.". There does not appear to be any record of counsel for the Defendant demurring to such an announcement that there would be a judgment and the only explanation must be that he was interpreting judgment in this context as a ruling on the non-suit opposed to final judgment. There had, of course, already been a verbal ruling on the non-suit which the Magistrate noted in his record.

19 Counsel for the Defendant told us that he believed that after the written submissions had been filed that if the Magistrate ruled against his submission on the non-suit, the Magistrate would then invite him to continue his case. He says that he was quite surprised to discover that, contrary to his expectations, the learned Magistrate proceeded to deliver judgment. Counsel reinforces his assertion as to his then state of mind by reference to the concluding paragraph of the written submission that he filed before the learned Magistrate. In those submissions, it is clearly to be implied that counsel's expectation was as he has told us it was. We do accept that in this case what counsel for the Defendant said his expectations were. It is, of course, entirely a separate issue as to whether or not he was justified in the beliefs that he held.

20 It is certainly plain that counsel for the Plaintiff and the Magistrate interpreted things differently to counsel for the Defendant. Otherwise a Magistrate with the experience of Mr Ajmal Khan would have made enquiries. Further, written submissions from the Plaintiff had a clear air of finality about them as opposed to appearing to be interim submissions limited to the issue of non-suit.

21 As counsel for the Plaintiff told us, he interpreted the passage in which counsel for the Defendant indicated that he was applying for a non-suit and that he would not call evidence as indicating he was well aware of the basic principles in relation to non-suit. In our view, assuming that the Magistrate concluded what the position was as we suspect he did and accepting as we do what counsel for the Plaintiff believed,

the Magistrate and counsel for the Plaintiff were entirely justified in the view. Nevertheless, counsel for the Defendant believed the position to be different and, for the reasons we have expressed, we could not doubt the sincerity of his belief. Accordingly, in the determination of this appeal, we consider that we have to look at two issues:

(1) what is the law with respect to this matter; and
(2) on the application of that law what was the true position before the Magistrate?

22 ***Yuill v Yuill*** (above) was a matrimonial case. In that decision, in the passage shortly following that which Jitoko J quoted, Lord Greene MR observed:

> [Counsel] may make this election expressly or impliedly. The practice which has been laid down amounts to no more than a direction to the Judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected, he is, of course bound: but if for any reason be it through oversight or through a misapprehension as to the nature of counsel's argument, the Judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission.

The effect of this seems to be that once counsel intimates that he proposes to make a "no case" submission, the Judge is then entitled to decline to rule on their submission unless counsel who proposes to make the submission gives an undertaking that he will not call evidence. If counsel gives that undertaking then he would appear to be bound by it. On the other hand, if the Judge does not specifically ask for an undertaking, and goes ahead and rules on the "no case" submission, the counsel for the opposing party is entitled to call evidence in the ordinary way.

23 Counsel for the Defendant referred the Court to Halsbury's Laws of England, 3rd edition, Volume 3 paragraph 103. That specific paragraph does not quite deal with the point at issue. The point is considered at paragraph 106 on page 70 as follows:

> When all the evidence for the party who begins has been given, counsel intimates that his case is closed, and the counsel on the other side may submit that there is no case to go to the jury. The Judge has a discretion to rule on such a submission without putting counsel for the other side to his election whether he will or will not call evidence. If the submission fails and the counsel on the other side does not announce his intention to give evidence counsel for the

party who begins may address the jury a second time to the purpose of summing up the evidence, but he cannot do this in the Judge holds there is no case to go to the jury.

24 The learned editors of Halsbury's Laws of England go on to say that the Judge is entitled to refuse to rule on such a submission unless counsel for the other side says or otherwise indicate he is going to call no evidence. Indeed, Halsbury's Laws of England suggests that the Judge should "in general" insist on an election before ruling.

25 It would appear from a review of the cases that in England that making a "no case" submission is now something of a rarity. That might well be because the effect of the rule applied in its full rigour is to impose on counsel something of a risk. If counsel is asked to elect and does elect then he cannot then give evidence if his submission fails. Small wonder it is that counsel in those circumstances would have to be fairly confident of his position before making such an election.

26 In any event, the rule is not of universal application in civil proceedings. For example, in proceedings for contempt of court there is clear authority that such a rule does not apply: ***Re B*** [1996] 1 WLR 627.

27 One other matter should not pass without comment. Section 46 of the Magistrates Act imports the practice for the time being of certain courts including the County Court in England into the Magistrates Courts. These may have been provisions which were highly appropriate in colonial times. Such provisions may be found in the legislation of other former British colonies. It seems more consonant with a modern (and non-colonial) judicial system such as obtains in Fiji that the judicial system should be in control of its own rules rather than leave them to the vagaries of the changes from time to time of the system in relation to county courts in a jurisdiction far away. One specific and obvious point in relation to this is that the rules of practice in civil proceedings in England have now changed radically and the idea that these should be imported without any consideration by the courts of Fiji, the legal profession of Fiji and others who are appropriately interested in the administration of justice is something which many might find a little difficult to understand. It seems to

us that urgent attention should be directed towards a modernisation of the approach which applies in section 46.

28 On one view, what the learned Magistrate noted about the indication by counsel for the Defendant that the defence would not to give evidence is consistent the procedure for the Judge indicating to counsel that he would not hear a "no case" submission unless there was an election. However, frankly speaking, there is certainly room for doubt in relation to their when one looks at the record. This is not to criticise the learned Magistrate who, like other Magistrates, are under great pressure of work and it could be argued that such a criticism would have been a criticism of the pettifogging kind. Counsel for the Plaintiff rightly pointed out, it is a little difficult to know why someone would say he was not calling evidence if an election was not being made. The answer from counsel for the Defendant was that his position was, in essence, provisional.

29 As we have already indicated, counsel for the Defendant had a view about what was happening which may well not have accorded with the view of counsel for the Plaintiff and, additionally, the learned Magistrate. Nevertheless, it is wrong that a party should be shut out from calling evidence unless the procedure for election is explicitly carried out and scrupulously recorded.

30 For these reasons, we think that the order of Jitoko J was correct and it follows from this that the appeal must be dismissed. However, as we have already indicated on more than one occasion, the state of mind of counsel for the Defendant may not have been the same as other relevant parties in the proceedings. We think that it is just that the Defendant be given the opportunity to refute - if he can - the case for the Plaintiff. However, as costs are a matter within the discretion of this court, we decline to make any order for costs.

31 Accordingly, the order of this Court is:

(1) appeal dismissed; and

(2) no order as to costs

Addendum:

In the course of delivery the judgment, the Court announced that the appeal be allowed. A reading of the judgment would have readily revealed that this was inconsistent with such an order.

The proper Order of the Court is

(1) Appeal dismissed.

(2) No order as to costs.

This correction invokes the slip rule which is an inherent power of the Court of Appeal.

Pathik, JA

Powell, JA

Bruce, JA

Solicitors:

Siwatibau and Sloan, Suva for the Appellant
Maharaj Chandra and Associates, Suva for the Respondent