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

CIVIL APPEAL NO. ABU0093 OF 2006S
CIVIL APPEAL NO. ABU0051 OF 2006S
(High Court Civil Action No. 36 of 2004L)

BETWEEN: **VIMAL CONSTRUCTION AND JOINERY WORKS LIMITED**

First Appellant

BIMAL PRAKASH

Second Appellant

AND: **VINOD PATEL AND COMPANY LIMITED**

Respondent

Coram: Byrne, JA
Scutt, JA
Powell, JA

Hearing: Wednesday, 9 April 2008, Suva

Counsel: S Maharaj for the Appellants
N Khan for the Respondent

Date of Judgment: Tuesday 15 April 2008, Suva

JUDGMENT OF THE COURT

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[1] The Court's task in this appeal has not been an easy one, involving as it does appeals from several different judgments on many different issues at different periods of time.

[2] The appellants, by Amended Notice of Appeal filed 24 May 2007, appeal from four decisions of Connors J namely his:

- order made on 14 January 2005 to wind up the first appellant ("Vimals Construction").
- declaratory and other orders made on 22 March 2006.
- orders made on 22 May 2006 for the sale of properties belonging to the second and third appellants.
- refusal to grant injunctive relief on 4 September 2006.
- order made on 22 March 2006 that the first appellant pay the respondent's costs on an indemnity basis.

Winding Up Order of 14 January 2005 – Grounds 1, 4 & 5

[3] On 9 September 2004 the respondent presented in the Lautoka High Court a Winding Up Petition together with an affidavit sworn on 8 September 2004. It sought to wind up Vimals Constructions. In early October 2004 three other creditors filed supporting documents

[4] On 14 October 2004 the Winding Up Petition was adjourned to 19 November 2005. It was subsequently adjourned to 25 November 2005 and 14 January 2005. On the October and November dates Vimals Constructions was represented by Mr H Shah, Ms S Sahu Khan and Mr R.P Singh *"for H.A. Shah"* and on each of these occasions it was adjourned for *"Mention Only"*.

[5] On 14 January 2005 the matter came before the Deputy Registrar at 9.00 am where *Mr G Gordon/H A Shah* appeared for Vimal Constructions. The matter was then referred to Connors J with the same appearances except that *"Kumar for H.A. Shah"* appeared for Vimal Constructions and informed the Court that *"Unable to get instructions therefore not appear."*

[6] Connors J in Chambers proceeded to wind up Vimal Constructions and on 25 January 2005 the Winding Up Order was sealed.

[7] The first appellant's principal complaint is that it was irregular to make the order when the Petition was set down for mention only and when the matter was called in Chambers and not in open Court. The appellants identify other irregularities namely that the affidavit supporting the Petition should have been sworn and filed within 4 days *after* the Petition was presented, not 1 day before as in this case.

[8] The respondent's position is that the first appellant did nothing in the period since 9 September 2004. It should, in accordance with Order 9 Rule 3(1), have filed an answer to the Petition. Failure to do so allows the Court to hold that the respondent had admitted every material allegation of fact made in the Petition (Rule 3(4)). It was further put that by failing to instruct or adequately instruct its legal representatives, the respondent cannot complain that the Petition was dealt with on 14 January 2005.

[9] The first appellant's argument, which boils down to a denial of natural justice, has force because it was entitled to understand that the matter was before the Court on 14 January 2005 for mention only. The proper course on 14 January 2005 was for its legal representative to apply for an adjournment on this basis. Failure in these circumstances to grant an adjournment would likely amount to an appellable error by the judge.

[10] However the appellant was effectively without legal representation on that day. Moreover beyond the cryptic court record there is no evidence of what actually was said or occurred on 14 January 2005. This Court cannot even be told from the Bar Table, as no-one who appeared on 14 January 2005 was in Court for this appeal. If on 14 January 2005 an adjournment had been sought and refused, and that decision appealed from, this point would not be before this Court. It is a point which an appeal court is ill equipped to deal with.

[11] Moreover if an application or appeal to set aside the winding up order had been filed within time then on the above facts, the winding up order might well have been set aside. However the appellant took no steps to set aside the winding up order until 16 months later when on 18 May 2006 it filed a Summons seeking, inter alia, such orders.

[12] Bearing in mind the progress of events, set out in the judgment below, this extraordinary delay is fatal to Ground 1 of this appeal. Further, it would surely be unjust to parties outside these proceedings, including other creditors, for this Court to make an order setting aside the winding up order at this late stage.

[13] The earliest Notice of Appeal in these proceedings appears to have been filed on 16 August 2006, but it is difficult from the Court Record to be sure of that, as the appellants filed multiple appeals some of which they have now consolidated. In any event the appeal against the winding up order was approximately 18 months out of time.

[14] On 10 November 2006 a Notice of Motion seeking leave was filed, and, on 1 May 2007 the former President of the Court of Appeal, Ward JA, sitting as a single judge of this Court, granted the appellants leave to appeal out of time against the winding up order made on 14 January 2005. Ward JA said the reasons proffered for delay, namely that the former solicitors of the appellants did not advise the appellants of their right to appeal the order, was not an adequate explanation in itself, but he extended time to bring the appeal taking into account the *"merits"* of the appeal.

[15] The former President did not expound on what those merits were but in 2008 litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence *"in the nature of flagrant or serious incompetence"* (***R v Birks*** *(1990) NSWLR 677)* is required.

[16] In this Court's view it is difficult to see why "merit" of the appeal or proceeding, without more, would justify an extension of time except where the delay was minimal and no prejudice was occasioned by a respondent.

The Declaratory Orders of 22 March 2006 – Grounds 2 & 3

[17] On 13 December 2005 the respondent filed a Summons for declaratory and other orders.

[18] On 22 March 2006, this Summons was heard and Connors J made orders under section 324 of the Companies Act 1983 that the second appellant and others, being directors of Vimals Construction, were knowingly parties to carrying on of its business for fraudulent purposes and were liable for its debt of $54,420 owing to the third appellant, Vinod Patel & Co (Lautoka) Ltd.

[19] The appellants say that Rule 5(1)(h) & (k) and Rule 60(a) to (5) of the Companies Winding Up Rules Cap 247 require that any application to the Court under sections 324 and 325 of the Companies Act be heard in open court and by way of notice of motion. They say the proceedings before Connors J on 22 March 2006 were defective because they were commenced by Summons instead of Notice of Motion and were made in chambers not open court.

[20] The Notice of Motion point is without merit. The object of Rule 60 (which refers to Notice of Motion supported by affidavit) is that such a serious application must be formally made and not, for example, orally without notice. A Summons satisfies this requirement.

[21] The open court point may have been unanswerable if it had been taken. The trial judge ought not have heard this application in chambers. If an objection had been taken and the trial judge had persisted then he would have made an appellable error and, if the decision had been appealed, it would likely have been overturned.

However on 22 March 2006 the first appellant was represented by Mr Naivalu who not only failed to take any of the points that the appellants seek to take in this appeal but told the Court that the only instructions he had was to rely on an affidavit that had been filed and that otherwise he had no further submissions to make.

[22] Public policy favours the finality of litigation and the broad principles requiring the just and efficient conduct of the proceedings limit the circumstances in which parties may raise new matters on appeal. The general principle is that parties are bound by the way they conduct the proceedings and consequently are disallowed from raising new matters on appeal: ***Coulton v Holcombe*** (1986) 162 CLR 1.

[23] The fact is that from September 2004 until April 2006 the first appellant failed to give adequate or any instructions to a series of lawyers who, when they did appear, were unable to give the Court any assistance. It is difficult to escape the conclusion that until April 2006 the first appellant took no real interest in the various proceedings.

[24] This ground of appeal, namely that the declaring orders of 22 March 2006 be set aside, must fail because none of the points run on appeal were taken in the Court below.

[25] Moreover the appeal against these orders was not brought in time and the respondent contends that the leave that Ward JA gave on 1 May 2007 was restricted to an appeal against the winding up order of January 2005.

[26] A reading of Ward JA's leave decision suggests that this might be the case. He says in paragraph 1 of his ruling that *"This is an application for leave to appeal out of time against a Winding-up Order made on 14 January 2005"* and thereafter doesn't discuss any other judgment though he does refer to the multiplicity of proceedings between the parties and $65,000 that had been ordered to be paid into Court.

[27] The Notice of Motion of 10 November 2006 which might inform this Court what was before Ward JA is not in the Court Record and the Appeal Notice is a consolidated one, said to be *"Filed Pursuant to Leave granted by His Lordship Mr Justice Ward on 01/05/2007"*.

[28] Whether or not this was so we are unable to say but the onus is on the appellants to establish that they have leave to appeal the judgment of 22 March 2006 out of time and that onus has not been discharged.

[29] The Court Record is littered with Notices of Motion and Notices of Appeal. Some appeals were commenced, deemed abandoned and dismissed. There is an appeal filed 30 March 2006 against some orders of Connors J of 22 March 2006 relating to motor vehicles and it includes a ground that affidavits considered by the judge *"contained several irregularities and pack of lies"*. However this Notice doesn't appear to contain any of the grounds in the appeal before this Court.

<u>The Sale Orders of 22 April 2006 – Ground 6</u>

[30] On 26 April 2006 the respondent filed a Summons for orders to sell properties belonging to a director of Vimals Constructions, namely the second appellant Bimal Prakash.

[31] It seems at this point the appellants decided to take the proceedings seriously and retained their current lawyers. On 18 May 2006 the appellants filed a Summons seeking to set aside the winding up order, the declaratory orders and the order to pay money into Court.

[32] On 22 May 2006, this Summons was heard and Connors J made orders for sale of the properties. He refused to set aside the winding up order and the declaratory orders.

[33] The Summons of 26 April 2006 was made pursuant to Order 31 of the High Court Rules 1988 which provide that *"Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause that the land or any part thereof should be sold, the Court may order that land or part to be sold .."*

[34] The appellants contend that the Court had no jurisdiction pursuant to Order 31 because the matter before it involved a winding up proceedings and was not a cause relating to *"land"*.

[35] The respondent relies on the definition of "Cause" under Order 1 Rule 2 namely that it *"includes any action, suit or other original proceeding between a plaintiff and defendant"*.

[36] This is not a matter that the Court has to decide because the point was not taken before the trial judge when he made the orders, though it was raised before him on a stay application heard on 22 May 2006. On the other hand, this Court has a discretion to allow new points of law to be raised, particularly where the new matter sought to be raised asserts a material error of the law in the disposition of the proceedings below (for example where the alleged error of law relates to a point that is unanswerable: ***Hampton Court Ltd v Crooks*** *(1957) 97 CLR 367).*

[37] In this case the summons of 26 April 2006 sought orders for the sale of land so it clearly was a cause "relating to" land.

[38] In any event for the reasons stated earlier we are not satisfied that leave was obtained to appeal these proceedings out of time.

[39] The appeal against the judgment of 22 May 2006 also fails.

Refusal to Grant Injunctive Relief – 4 September 2006 – Grounds 8, 9, 10, 11, 12 & 14

[40] On 24 May 2006 the appellants filed a Notice of Motion for a stay of the sale orders and that motion was heard and the stay granted by Connors J on 25 May 2006.

[41] On 4 September 2006 the appellants by Summons filed on 29 September 2006 sought to further stay the orders for sale of the properties, the earlier stays having lapsed. The application was dismissed with costs on an indemnity basis, Connors J finding that many of the statements made in the affidavit in support of the Summons to be in conflict with the Court Record.

[42] It appears that this stay lapsed and that on 26 October 2006 Scott JA ordered that the orders for the disposal of the properties should be stayed and that a sum of $65,000 previously paid into Court as part of a conditional stay should remain there until further order. Scott JA also ordered that the second appellant be joined to the appeal.

[43] In light of this it is difficult to see why this Court should consider these grounds of appeal, however it is sufficient to dispose of them by noting that Connors J did not believe much of the affidavit evidence in support of the application. In these circumstances the Court cannot find that the trial judge made an error in the exercise of his discretion or that a substantial wrong has occurred: ***House v The King*** (1936) 55 CLR 499.

Indemnity Costs Order – 22 March 2006 – Ground 7

[44] The appellants say that in ordering indemnity costs on 22 March 2007 the trial judge took into account a letter of 20 February 2006 to the first appellant's then solicitor, and that that letter was written "without prejudice".

[45] The respondent says that a letter *"without prejudice save as to costs"* can be admitted into evidence on a costs application and that is undoubtedly correct. The question is, were the words "save as to costs" included?

[46] The problem for this Court is that a copy of the letter does not appear to be in the Court Record and at the hearing of this appeal counsel for the parties were unable to identify it or produce a copy.

[47] In any event in our view there is an additional reason why the trial judge might have ordered indemnity costs on this occasions, namely the failure of the appellants to retain properly instructed legal advisers. The lawyer who appeared on that day, Mr Naivalu, was unable to assist the Court in any way.

[48] This ground of appeal fails.

Refusal to allow joinder of a party – Ground 15

[49] In August 2006 the appellants sought to join another party as second respondent in one of the sets of proceedings. Connors J did not give such leave.

[50] The appellants in their written submissions invite the Court to read an affidavit that was filed in support of the joinder application and conclude that the trial judge erred in refusing it. The matter was not further addressed orally.

[51] The Court has read the affidavit. The decision to allow or refuse the joinder was a discretionary matter and this Court finds no appellable error.

Conduct of the Trial Judge – Ground 13

[52] The appellants in their written submissions contend that the trial judge was

unreasonable in the conduct of the various proceedings and displayed bias against the appellants.

[53] It is clear that the trial judge formed a view about the appellants and their conduct but it is not possible for this Court to conclude that it was unreasonable to take this view.

[54] The respondent took the Court to evidence that the first appellant continued to trade after the winding up order and transferred its assets including expensive motor vehicles to related companies. On 2 February 2006, twelve months after the winding up the provisional liquidator had received no funds to pay creditors, yet in December 2005 the second appellant had sworn that all creditors had been paid. In a Statement of Affairs sworn by the second appellant on 27 September 2005 he said that as at 22 February 2005 the first appellant had no assets. If this was true then significant funds had been stripped from the first appellant either shortly before or shortly after it had been wound up.

[55] There was sufficient material before Connors J for him to form the view, at least by March 2006, that the appellants were prepared to use whatever means were available to them to defeat the first appellant's legitimate creditors.

[56] Having formed that view, it was not unnatural or unreasonable that Connors J should have approached the appellants' later Court applications, evidence and submissions with a degree of scepticisin.

[57] This ground of appeal fails.

Conclusion

[58] In the earlier application before this Court Scott JA prefaced his decision with the words:

> *"this essentially straightforward litigation has become almost hopelessly confused as result of a multiplicity of applications, affidavits and rulings, several changes of solicitors, failure to follow the proper procedures and what appears to be an unnecessarily confrontational approach by the parties."*

[59] This Court considers those words apt.

[60] It may be that the appellants were badly served by a series of lawyers, and if so the appellants may have remedies elsewhere.

[61] It is equally possible that the appellants failed to properly instruct those lawyers and changed lawyers for the purposes of frustrating the first appellant's creditors and the legal process.

[62] The true position is not something that this Court can determine but in either case the appellants must bear prime responsibility for the failures identified by Scott JA.

[63] The proceedings between these parties need to be brought to an end. The appeal or appeals are dismissed with costs for the reasons set out above.

Orders

[64] The orders of the Court are:

(1) The appeal is dismissed.

(2) The appellants to pay the respondent's costs as agreed or taxed.

Byrne, JA

Scutt, JA

Powell, JA

<u>Solicitors:</u>

Suresh Maharaj and Associates, Lautoka for the Appellant
Yash Law, Lautoka for the Respondent

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