SHEET METAL AND PLUMBING (FIJI) LIMITED

v.

UDAY NARAYAN DEO

[HIGH COURT, 1999 (Fatiaki J) 14 April]

Appellate Jurisdiction

Small Claims Tribunals- rights of appeal therefrom- Small Claims Tribunal Decree 7/1991 Section 33.

The Respondent to a claim in the Small Claims Tribunal appealed to the High Court against a Resident Magistrate's refusal of his application for leave to appeal out of time against a determination of the tribunal. Dismissing the appeal, the High Court examined the limited nature of the right of appeal from a Small Claims Tribunal. It explained that there was no right of appeal except where the tribunal exceeded its jurisdiction or when the proceedings were conducted in a manner unfair and prejudicial to the appellant.

Cases cited:

Eagil Trust v. Piggott-Brown [1985] 3 All ER 119
Hertz New Zealand Ltd v. Disputes Tribunal (1994) 8 PRNZ
N.Z.I. Insurance N.Z. Ltd. v. Auckland District Court (1993) 3 NZLR 453
Port v. Liddicoat (1988) D.C.R.

Appeal to the High Court from the Magistrates' Court.

I. Razak and *S. Chandra* for the Appellant
Respondent in Person

Fatiaki J:

On the 6th April 1999 after hearing extensive argument from counsel for the appellant company and the respondent in person, I dismissed the appeal for reasons which I now provide.

This appeal arises out of an earlier unsuccessful application dated 14th April 1998 by the appellant to the Magistrates' Court, Suva seeking an extension of time to appeal against a decision of the Small Claims Tribunal (Mr. D. Dass) delivered on the 13th of January 1998.

Section 33(3) of the Small Claims Tribunal Decree 1991 ('the Decree') expressly provides that:

> 'An appeal shall be brought by the filing of a notice of appeal, ... within 14 days of the Tribunal's order.'

Plainly therefore, in this case, the appeal before the Magistrates' Court was

brought some 2 1/2 months out of time and the appellant quite properly sought an extension of the time within which its appeal could be filed and which the
A Magistrates' Court is empowered to grant pursuant to Order XXXVII rule 4 of the Magistrates' Court Rules (Cap. 14).

The application for extension of time was served on the respondent who appeared before the learned magistrate and opposed it on the basis that 'there is no truth to the matters raised in the affidavit in support'.

B As the respondent appeared in person the learned magistrate decided to orally record the respondent's reply on oath instead of ordering an affidavit in the usual manner. This occurred on 23rd April 1998 when the respondent and the appellant's representative both testified and were cross-examined on oath.

On 26th June 1998 the learned magistrate orally dismissed the appellant's
C application. In her written Reasons for Decision subsequently provided, the learned magistrate properly and correctly directed herself as to the relevant principles to be considered in the exercise of her discretion to extend the time limited for the filing of an appeal. Thereafter she correctly identifies the reasons or grounds advanced by the appellant in seeking to excuse or explain the inordinate delay in filing its appeal and then, after considering the New Zealand District
D Court decision of Port v. Liddicoat (1988) D.C.R. as to the time when the appeal period begins to run, the magistrate makes two crucial findings of fact on the basis of the evidence placed before her by the parties. These were:

> (1)'... that the orders made (by the Small Claims Tribunal) were declared at the conclusion of the hearing on the 13th January 1998,
> E in the presence of the parties and each was thereby put on notice as to the contents of the order.'

and later :

> (2)'... that the intended appellant had evinced to him (the respondent) an intention not to comply with the SCT Order on the telephone on
> F 13th January 1998 after the hearing and judgment (of the SCT).'

Neither finding of fact was challenged on the appeal before me and accordingly binds the appellant in this so-called appeal against the learned magistrate's refusal to extend the time limited for an appeal against the Order of the Small Claims Tribunal.

G I say 'so-called appeal' advisedly because while a perusal of the Notice and grounds of appeal filed before this court (at pp.1 & 3 of the record), sufficiently identifies the decision being appealed against ('wherein the defendants motion to appeal out of time was dismissed') no ground has been advanced which identifies any error in the learned magistrate's refusal to exercise her discretion.

Indeed both grounds of appeal if I may say so, directly relates to the merits of the appeal against the decision of the Small Claims Tribunal and not to the learned magistrate's decision.

Be that as it may I have additionally treated this as an appeal against the learned magistrate's refusal to exercise her discretion to extend the time within which the appellant might appeal against the decision or order of the Small Claims Tribunal.

In doing so, I have reminded myself that the decision being appealed against concerns the refusal by the learned magistrate to exercise a statutory discretion granted in the widest possible terms viz 'shall see fit to extend'.

In such an appeal it is trite that an appellate court will not lightly interfere with the exercise of a judicial discretion and should only do so where it is satisfied that the magistrate has erred in principle by giving weight to something he ought not to have taken into account or failed to give weight to something which he had taken into account or was plainly wrong in its decision.

In similar vein Griffiths L.J. said in Eagil Trust v. Piggott-Brown [1985] 3 All E.R. 119 at p.121 :

> "... there is a heavy burden on an appellant to demonstrate to this court that the (magistrate) has either failed to apply well-settled principles or, alternatively, that his discretion can be attacked on what are colloquially known as `Wednesbury' grounds."

In this case having independently considered the evidence before the learned magistrate ; the relevant statutory provisions of the Decree and the Magistrates Court Rules ; and her judgment, I am far from satisfied that the appellant has discharged the heavy burden placed on it. Additionally, having regard to the legislative scheme and procedure of the Small Claims Tribunal and the rather confined ambit of the right of appeal granted under the Decree, I am satisfied that an extension in the present circumstances would not be in the interests of justice.

The appeal against the refusal of the learned magistrate to exercise her discretion to extend the time for appeal is accordingly dismissed. That is sufficient to dispose of this appeal but, in deference to the submission of counsel for the appellant, I have decided to consider the other grounds which counsel submits deal with the merits of the case.

Before doing so however it is opportune that this Court make some general observations about the legislative intentions behind the creation of Small Claims Tribunals.

The most obvious intention is that expressed in the long title of the Decree which reads : 'A Decree To Establish Small Claims Tribunals in Fiji, To Provide Prompt and Inexpensive Relief to Claimants.'

From this title alone one can discern the following legislative intentions :

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(1) The Decree establishes Tribunals not Courts ;

(2) The nature of the cases with which the Tribunal is concerned are small claims;

(3) The central purpose of the Tribunal is 'to provide ... relief to claimants' ; and

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(4) By a process that is both prompt and inexpensive.

Other distinguishing features of a tribunal are :

(a) That it is presided over by a referee who need not have legal qualifications and whose primary function is to attempt to bring the parties in dispute to an agreed settlement;

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(b) Qualified and practising lawyers and professional advocates are excluded from its proceedings ;

and

(c) Evidence before a tribunal need not be given on oath nor need it be oral or even originate from the parties to the dispute.

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With those introductory observations I turn to the grounds of appeal filed by the appellant.

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In supporting the first ground of appeal counsel for the appellant argued that the failure of the referee to hear or allow the respondent to make his submissions before he made his decision, amounts to a breach of the *audi alteram partem* rule which is so fundamental to the conduct of a fair trial that the time to appeal should have been extended in order to allow the appeal to proceed on its merits. Attractive as the submission may appear on first impressions, it is unsupported in this case and cannot be acceded to.

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The appellant's own representative in his sworn evidence before the learned magistrate (at p.43 of the record) accepts :

(1) that on the 13th January 1998 he came down to the Small Claims Tribunal 'to represent the (appellant) company on the instructions of ... the managing director' ;

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(2) that he was 'in the Court room for about 45 minutes' ; and

(3) that '(the referee) had told (him) to pay $1,900 to the Court and to that (he) didn't agree. Later on (the referee) told (him) to bring a witness ...'

Furthermore the referee's record of proceedings (at p.38 of the appeal record) clearly records at '2.15 p.m.', the presence of the appellant company's representative and his answers to various questions that were asked of him including his disagreement 'to replacing the old system with a new Solarmate Hot Water System or pay $1,900 to the claimant'.

And at p.39 in his written decision the referee writes:

> '5. The Respondent was not agreeable to replacing the system with a new system or pay $1,900 to the claimant ;
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> 6. The Tribunal having heard both the claimant and the Respondent ... is satisfied that the ... Hot Water System supplied and installed by the Respondent has proved to be faulty ;
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> 7. The Tribunal therefore orders the Respondent to remove the ... Hot Water System from the Claimant's house at the Respondent's costs and pay the Claimant ($1,900.00) through the Small Claims Tribunal within (14) days from the date of this ORDER.'

Quite plainly, in light of the above fortified by the maxim '*omnia praesumuntur rite esse acta*' which is applicable to public officers acting in the discharge of public duties, and, in the absence of any sworn evidence to the contrary, there does not appear to be any substantial basis or reason to doubt the accuracy and authenticity of the referee's record. This ground of complaint is accordingly dismissed.

The second ground of appeal on the merits reads :

> 'That the learned magistrate erred in law and in fact by failing to properly consider the 3 year long term usage of the Solar System by the respondent while ordering the full refund to be paid by the appellant to the respondent of $1,900.00.'

In this regard counsel for the appellant company highlighted the plain fact that the respondent was in actual possession of the solar water heater since September 1993 when it was first installed at his residence and continues to do so and as such, presumably has derived some benefit from it over the years since 1993. This benefit, counsel claims, was not considered or compensated for in the referee's decision and is tantamount to an unjust enrichment to the respondent.

Against that, must be weighed the respondent's evidence as summarised by the referee in para.2 of his decision (at p.39 of the appeal record) ; the referee's clear finding of fact that the hot water system 'supplied and installed by the (appellant) has proved to be faulty' ; and his subsequent order that 'the (appellant) remove the hot water system from the (respondent's) house'.

Quite plainly in my view the referee's composite order in this case was within the category of orders he was empowered to make under Section 16 of the Decree. Section 17 then provides that such an order 'shall be final and binding on all parties to the proceedings ... and except as provided in Section 33, no appeal shall lie in respect thereof'.

In this latter regard Section 33 of the Decree provides a right of appeal limited to the following two grounds :

> '(a) the proceedings were conducted by the referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings ; or
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> (b) the Tribunal exceeded its jurisdiction.'

It is only necessary in this appeal, to consider ground (a).

At the outset it must be noted that the form of wording used in ground (a) is unusual and is plainly distinguishable from a general right of appeal such as that conferred under Section 36 of the Magistrates Courts Act (Cap.14) ; Section 12 of the Court of Appeal Act (Cap.12) ; and on the Supreme Court under Section 122 of the 1997 Constitution.

What is more ground (a) specifically refers to the manner in which the referee conducted the proceedings as the crucial concern of the right of appeal on that first ground. Furthermore not only must the conduct complained about be unfair to the appellant it must, in addition, prejudicially affect the result.

As to the manner or procedure required to be followed by the referee in conducting a proceeding under the Decree these are principally to be found in Sections 24 to 29 (inclusive) under the heading 'HEARINGS'. A cursory examination of these provisions serves to highlight the informal, non-adversarial nature of the proceedings before the Small Claims Tribunal and militates against a general appeal on the merits or for errors of law.

The non-legalistic nature of a Tribunal proceeding is further exemplified by the requirement in Section 15(4) of the Decree that :

> 'The Tribunal shall determine the dispute according to the substantial merits and justice of the case and in doing so ... shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.'

I am fortified in my narrow view of the appellant's right of appeal, by the observations of Thorp J. in N.Z.I. Insurance N.Z. Ltd. v. Auckland District Court [1993] 3 N.Z.L.R. 453 when he said of a similar right granted in the Disputes Tribunals Act 1988 (New Zealand), in identical terms to our ground (a) above, at p.458 :

> 'The essential matter (in the words used) ... is its specification of the basis for appeal against a referee's determination as being the conduct of proceedings in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. This formulation is both specific and unusual. On its ordinary grammatical construction it provides only a limited right of appeal, and requires any intending appellant to direct the (Court) to some unfairness in the form, and not simply the result, of the tribunal's hearing.'

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and a little later in his judgment his honour said :

> 'read on (its) own, and on the basis of (its) ordinary grammatical meaning, (the section) would not leave any careful interpreter in much doubt that the right of appeal (it) created was a special type of appeal, limited to cases of procedural unfairness (and does not extend to the correction of errors of law).'

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Even more trenchant is the view expressed by Greig J. in Hertz New Zealand Ltd. v. Disputes Tribunal (1994) 8 PRNZ where his honour said in rejecting the appeal in that case, at p.151:

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> '... there is no appeal on the merits even if there is a clear and fundamental error of law in the conclusion of the Tribunal.'

Quite plainly in my view not only is this second ground of appeal misconceived in so far as it seeks to question the merits of the referee's decision without pointing to any procedural unfairness but further, in so far as it purports to be predicated on the difficult legal principle of unjust enrichment it fails to properly appreciate the function and nature of a non-legally qualified referee exercising what in effect is an equity and good conscience jurisiction.

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In this latter regard can it not be said in good conscience that the inconvenience and damage suffered and the expenses incurred by the respondent since the installation of the defective solar water heater cancels out (for want of a better term) any unquantifiable benefits the respondent may have enjoyed over the past 3 years from being in possession of the hot water system ? and is not the buyer of defective or unfit goods entitled to damages under the Sale of Goods Act (Cap. 230) ? These considerations merely serve to re-inforce the broad nature of a referee's jurisdiction.

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This second ground of appeal is accordingly dismissed as incompetent.

(Appeal dismissed.)