

ABBAS ALI and Ors v CHAUDHARY and Ors (HBC0061 of 2001L)

HIGH COURT — CIVIL JURISDICTION

5 GATES J

22, 29 March 2004

10 **Contempt — contempt of court — burden of proof — criminal standard of proof — willful disobedience — mens rea.**

15 **Real property — caveats — whether lodging of caveat interfered company's business — whether lodging of caveat amounted to contempt — Constitution of the Republic of Fiji 1997 s 124 — Companies Act s 221 — High Court Rules O 52 rr 1, 2, 45 6(2)(a) — Indemnity Guarantee and Bailment Act (Cap 232) s 59.**

A dispute arose among the shareholders of second Plaintiff, a land sales company. The Defendants alleged abuse of office against the managing director (the first Plaintiff).

20 An interim injunction was obtained by the Plaintiffs preventing the Defendants from dealing with the company's assets or from operating the bank account other than with counter-signatures from the Plaintiffs' faction. Thereafter, the parties agreed to go forward under the terms of a consent order. However, the compromise did not last but worsen.

25 As a result, the court made an interim order which placed management and control in the hands of one faction only, subject to certain safeguards and terms. On 6 August 2002, the order was confirmed by a further order in almost identical terms except that it was recorded that there would be a ruling on the notice on the substantive share issue.

Meanwhile, Edward Henry Thompson (the third Defendant (D3)) lodged three caveats on the second Plaintiff's subdivisional lots (Lots 18, 20 and 21) which resulted to contempt of the court's orders of 24 May 2002.

30 On 6 February 2004 the Plaintiffs filed an ex parte notice of motion seeking leave to issue an order of committal for contempt pursuant to O 52 rr 1 and 2 of the High Court Rules against D3.

On 22 March 2004, a ruling on the notice on the substantive share issue was made, and shareholdings were attributed to each of the 10 shareholders.

D3 was duly served with papers and the matter was set for inter partes hearing and was heard on 4 March 2004.

35 The issues were: (a) whether the lodging of caveats against subdivisional lots by a lender constituted an interference in running a land sales company who is the registered owner of the lots; and (b) whether such act amounted to a contempt of a court order that granted temporary control and management of the company during a shareholders dispute to one faction only, the lender being a shareholder in the opposing faction.

40 D3 denied the contempt arguing that he was merely exercising his rights over the three properties of which right he had obtained as a result of making loans to the company.

45 **Held** — (1) D3 had no valid or caveatable interest against the subject lots because he merely intended to advance his interests in order to pressure the company to allocate to him the subject lots or for the purpose of the repayment of his loan and interest ahead of the others. Thus, in lodging the caveats improperly, his acts constituted interference or disruption of the company's business.

50 (2) That the following acts of D3 amounted to contempt of court: (a) his attempt to lodge caveats on the second Plaintiff's lots which interfered the company's business; (b) his lodging of caveats so that he can demand repayment of the loan for being frustrated by the long delay in obtaining repayment of the loan he made to the company; (c) his intent to advance his claim ahead of the others. Thus, D3 is fined and ordered to contribute to the Plaintiffs' costs.

Determination made.

Cases referred to

5 *Barclays de Zoete Wedd Securities Ltd v Nadir* [1992] TLR 141; *Chiltern District Council v Keane* [1985] 1 WLR 619; [1985] 2 All ER 118; *Dean v Dean* [1987] FLR 517; *Gagnon v Macdonald* [1984] TLR 631; *Hampden v Wallis* (1884) 26 Ch D 746; *Harmsworth v Harmsworth* [1987] 1 WLR 1676; [1987] 3 All ER 816; *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87; *Penelope Postulka v George Postulka* [1988] 34 FLR 82; *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899; *Vijay Kumar v Shiu Ram* (unreported, HBM0026/00S), cited.

10 *Fairclough v Manchester Ship Canal Co* [1897] WN 7; *McIlraith v Grady* [1968] 1 QB 468; [1967] 3 All ER 625; *Re Supply of Ready Mixed Concrete* [1992] QB 213; [1991] 4 All ER 150; [1991] 3 WLR 707; *Steiner Products Ltd v Willy Steiner Ltd* [1966] 1 WLR 986; [1966] 2 All ER 387, considered.

15 *S. Maharaj* for the first and second Plaintiffs

J. Sharma for the Defendants

20 **Gates J.** Contempt Proceedings; O 52 r 1, r 2; shareholders competing for domination of company; interim orders effectively placing control in hands of one faction; contempt jurisdiction of High Court; onus of proof on mover; criminal standard of proof; wilful disobedience, meaning of; contumacious disregard; mens rea required a deliberate act; knowledge of terms of order, not necessarily that act is prohibited; necessary requirements of procedural papers to be filed; itemised and sufficient particulars; endorsement on order of penal notice; strict compliance; lodging of caveats; caveatable interest; loans by directors to company; absence of security documents or appropriate resolutions; interest on loan; s 59 Indemnity, Guarantee and Bailment Act (Cap 232); Description of caveatable interest on lodgment form; allegations of forgery; disputed facts; absence of testimony and exposure to cross-examination.

30 **The issue and the proceedings**

[1] The first question here is whether the lodging of caveats against subdivisational lots by a lender constituted an interference with the running of a land sales company, the registered owner of the lots. Second, did such acts amount to a contempt of a court order that had granted temporary control and management of the company on terms during a shareholders dispute to one faction only, the lender being a shareholder in the opposing faction? The alleged contemnor denied the contempt saying he was only exercising lawful rights over the three properties, rights which he had obtained as a result of making loans to the company. The rights were not identical in all three cases.

40 [2] On 6 February 2004 the Plaintiffs filed an ex parte notice of motion seeking leave to issue an order of committal for contempt pursuant to O 52 r 1 and 2 of the High Court Rules against the third-named Defendant (D3), Edward Henry Thompson. The notice was supported by necessary statement requesting leave and an affidavit from the first-named first Plaintiff (P1), Abbas Ali: sworn on 45 6 February 2004.

[3] Papers were duly served on the accused contemnor and the matter came on inter partes for hearing. It was first set down on 4 March 2004 and was eventually heard on 29 March 2004 in open court: O 52 r 5(1).

50 [4] No challenge was made to the service of these proceedings or to the personal service of the original order in respect of which it is alleged the accused contemnor is in breach; O 45 r 6(2)(a). Service of the original orders on 8 August

2002 was established by the affidavit of service of Poate Rakanace. The accused contemnor was present in court to answer the contempt.

Original order and background

5 [5] The interim order which I had made at Lautoka on 24 May 2002 was:

- 10 (1) *THAT* the day to day affairs of the company be vested in the newly elected Board of Directors pursuant to Special General Meeting held on the 1st of May, 2002 and who shall alone have the power to conduct each and all the affairs of the Company as authorised by it from time to time.
- 15 (2) *THAT* all necessary and accountable Company payments to be paid by Company cheques signed by any two (2) of the following Directors namely:
 - (i) Moape Vosiga
 - (ii) Ratu Apisai Naevo
 - (iii) Saiyad Hussein
 - (iv) Masatoshi Kayano
 - (v) Fumiyo Kayano
 - (vi) Abbas Aliof the newly appointed Board of Directors of the Company on 1st May, 2002 together with Chartered Accountant/Company Secretary namely William Crosbie.
- 20 (3) *THAT* all other affairs of the Company including its business be conducted as authorised by the Memorandum and Articles of Association of the Company.
- 25 (4) *THAT* until this honourable Court decides and determines on the issue of shareholdings in the Company in the within Action, the new Board of Directors appointed pursuant to the Special General Meeting held on 1st of May, 2002 shall have the sole control of the Company and further until a new Board of Directors are appointed thereafter by the members of the Company.
- 30 (5) *THAT* the Defendants shall have filed and served within 21 days their Reply to Affidavit of Abbas Ali dated 15th May, 2002 on the Plaintiff who shall thereafter reply their reply within seven (7) days.
- (6) *THAT* matter adjourned for hearing at Suva on 6th of August, 2002 at 10.30 am.

35 [6] That order was confirmed by a further order made on 6 August 2002 in almost identical terms, save that it recorded that there would be a ruling on notice on the substantive share issue. The ruling was delivered on 22 March 2004 and it decided the shareholdings to be attributed to each of the 10 shareholders.

[7] In it I referred to the background of this case and in paras 2–3 had said:

- 40 [2] The 2nd Plaintiff is a land sales company. It holds prime State leasehold land adjoining the Nadi beach. Its business is to develop infrastructure and to sell lots from the sub-division. Some lots have already been sold and substantial residential properties have been built on them. Unfortunately, the shareholders of the company have quarrelled. The Defendants make allegations of abuse of office against the Managing Director [1st named 1st Plaintiff] and say his style of management was dictatorial.
- 45 [3] After an interim injunction was obtained by the Plaintiffs to prevent the Defendants from dealing with the company's assets or from operating the bank account other than with counter-signatures from the Plaintiffs' faction, the parties agreed, at least for a while, to go forward under the terms of a consent order. This compromise did not last. Things went from bad to worse.
- 50 Matters in this action were fought tooth and nail, the parties taking out between them some 31 summonses or motions including 6 for contempt...

[8] Because the parties were unable to work together, the court made an interim order which effectively placed management and control in the hands of one faction only, subject to certain safeguards and terms.

[9] Unless there were found to be a lawful basis for the lodging of the three
5 caveats, their lodging leading to disruption and delay in sales of lots for a land sales company such as the second Plaintiff (P2), could constitute an interference with the company's day-to-day operations. I find that, absent the lawfulness of the lodging of the caveats, such an interference could amount to a contempt of the orders of the court for the conduct of the company, and in particular the
10 vesting of sole power, control and authority in the newly elected board.

[10] To have to apply to court to remove caveats from its lots is a costly and time-consuming matter for a land sales company, indeed for any litigant. It must also be discouraging for potential purchasers, the customers of the company, when they cannot make progress to complete their purchases. The presence of
15 caveats may also cause other purchasers to withdraw their offers. All of this is bad for business for a land sales company. It gives rise to bad publicity and is likely to cause a drop in offers for lots if there are thought to be difficulties in obtaining registration of a transfer. The interim orders were granted to keep the business going while questions of ownership of shares and control of the
20 company could be resolved.

Contempt: General considerations

[11] A jurisdiction and a power to punish persons for contempt of court in
25 accordance with the law is bestowed on the superior courts including the High Court by s 124 of the 1997 Constitution: previously s 121 of the 1990 Constitution.

[12] The onus of proof in such proceedings is on the mover of the motion. Proof is to be established to that standard applying in the criminal courts, namely
30 proof beyond reasonable doubt: *Barclays de Zoete Wedd Securities Ltd v Nadir* [1992] TLR 141; *Dean v Dean* [1987] FLR 517; *Vijay Kumar v Shiu Ram* (unreported, HBM0026/00S).

[13] Where, as here, the contempt alleged is of disobedience to a court order the accused contemnor must be shown to have wilfully disobeyed the order. An
35 unintentional act of disobedience is not enough: *Steiner Products Ltd v Willy Steiner Ltd* [1966] 1 WLR 986; [1966] 2 All ER 387 where Stamp J found breach of a consent order to have been wilful. His Lordship cited with approval observations of the Court of Appeal in *Fairclough v Manchester Ship Canal Co* [1897] WN 7 which had said:

40 In these cases, casual, or accidental and unintentional disobedience to an order of the court is not enough to justify either sequestration or committal; the court must be satisfied that a contempt of court has been committed in other words, that its order has been contumaciously disregarded.

Stamp J added at WLR 991; All ER 390:

45 I do not think that the Court of Appeal intended to use the word "contumaciously" as meaning something different from "wilfully".

[14] In the instant case, if the accused contemnor deliberately lodged the
50 caveats, a positive act, though he only intended to exercise his lawful rights, the lodging would be a deliberate act. It would be sufficient to prove a wilful disobedience if the lodging were deliberate even if not known to be in conflict

with the orders: *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899. “Wilful” in this contempt means either deliberately doing an act knowing that there is some risk of the consequences, or doing an act not caring about the risks involved.

5 [15] If the lodging of caveats amounted to a contemptuous interference with the business of the company and of the order, it matters not that the accused contemnor did not intend to be in breach of the order: In *Re Supply of Ready Mixed Concrete* [1992] QB 213 at 276; [1991] 4 All ER 150 at 168 Lord Donaldson of Lymington MR said:

- 10 1. The fundamental purpose of the contempt jurisdiction of the court in the context of disobedience of court orders is to uphold the supremacy of the rule of law and the court’s authority to administer it. It is punitive in character. That it may provide an enforcement remedy for third parties is incidental.
- 15 2. It is an essential prerequisite to a finding of contempt that the factual basis shall have been proved beyond all reasonable doubt and that there shall have been mens rea on the part of the alleged contemnor. Mens rea in this context does not mean a wilful intention to disobey the court’s order, but an intention to do the act which constitutes the disobedience with knowledge of the terms of the order, although not necessarily an understanding that the act is prohibited.

20 [16] In Fiji the papers to be filed in contempt proceedings are not quite on a par with those required under the English rules, O 52 r 4. The English rules require a notice of motion and an affidavit in support, whereas the Fiji rules require an application for leave to comprise a notice of motion, a statement giving particulars and grounds, and an affidavit in support: O 52 r 2.

25 [17] This means that in Fiji the details of the charges are to be set out in the statement and not in the notice of motion. Perhaps the form is not as important as the substance of the information provided. For what is required is that the accused contemnor should be provided with the itemised charges that he or she has to meet: *Harmsworth v Harmsworth* [1987] 1 WLR 1676; [1987] 30 3 All ER 816 at 819. These particulars were sufficiently set out by the Plaintiffs in p 2 of the statement.

[18] Lastly, both orders were issued bearing an appropriate penal notice endorsement in compliance with O 45 r 6. This is the endorsement which warns the person to be served of the consequences of failure to obey the order, namely 35 that he or she is liable to be compelled to do so by process of execution. Had the endorsements been omitted the omissions would have been fatal to proceedings such as these to enforce obedience to the order: *Hampden v Wallis* (1884) 26 Ch D 746; *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 40 2 KB 87; *Penilope Postulka v George Postulka* [1988] 34 FLR 82 at 84.

[19] In contempt proceedings procedural steps assume greater significance than in ordinary civil proceedings. In *McIlraith v Grady* [1968] 1 QB 468 at 477B; [1967] 3 All ER 625 at 627 Lord Denning MR commented:

45 No man’s liberty is to be taken away unless every requirement of the law has been strictly complied with

(See too *Chiltern District Council v Keane* [1985] 1 WLR 619 at 621f; [1985] 2 All ER 118; *Gagnon v Macdonald* [1984] TLR 631.)

[20] The particulars of contempt were given:

- 50 (i) That between the 6th day of August, 2002 till to-date the 3rd named Defendant Edward Henry Thompson has interfered and is interfering with the day to day operations of the Company by the new Board.

- (ii) That the 3rd named Defendant Edward Henry Thompson is disrupting the affairs of the Company and preventing the Company from selling the Company Lots.
- (iii) That the lodgment of Caveats by the 3rd named Defendant Edward Henry Thompson is stopping the sale and subsequent Transfer and settlement of sale of Lot Number 21 on SO 3956 and will interfere with processing of sale of Lot 20 on SO 3956 under negotiation.

[21] The allegations in summary can be said to be about interference with the day-to-day operations of the company (P2) and of the board, causing disruption to the company by preventing it from selling its lots. The evidence from both sides comprised the affidavits filed together with documentary exhibits.

The caveats

[22] The mover needs to be able to prove beyond reasonable doubt that there was no valid basis for the lodging of these three caveats which had the effect of or potential for disrupting the company's business of selling lots. A mistaken claim to a single lot resulting in the lodging of a caveat is one thing. The lodging of caveats on three lots may be another matter. But first is there an arguable claim to lodge the caveat?

[23] In his affidavit the accused contemnor deposes that the company through its managing director "had undertaken and resolved to transfer Lot 19 to me". This was denied by the managing director. Mr Thompson said he had expended a considerable amount of money and resources on the lot, "and to renovate and occupy house on Lot 10 which was purchased by my wife on my behalf". This house was originally on the land when the company bought the land from one Ram Phal in 1992.

[24] The then Chairman Mr Chaudhary, [first-named Defendant (D1)] at a directors' meeting of 8 June 1996 had referred to two of the shareholders either having built a house on an unallocated lot or in Mr Thompson's case occupying a lot where there was already a house which his wife had bought. The chairman is recorded as having remarked "In any circumstances the company has the right to remove the occupants from the land with no compensation or damages". The purchase of the house by his wife does not give Mr Thompson a right to lodge a caveat on the land on which the house sits.

[25] The company for its part does not deny that the directors including the accused contemnor have lent money to the company. These loans give rise to personal rights against the company not to any rights to specific lots, to specific assets of the company. In argument, Mr Sharma said Mr Thompson had advanced monies which had been due for repayment several years ago. The money had not been paid back. It was advanced, he said, "on the basis that he would have lots in return and interest on overdue monies".

[26] The difficulty for the accused is that his contract was with the company. What was that contract? How was his money to be dealt with? What were the terms of the loan, and what was the property to be secured? Was it to be secured over a specific lot as he claims or over all of the assets of the company? Was the security to be a mortgage or a charge? The Plaintiffs say that the letter of acknowledgment dated 19 November 1997 of the loan of \$60,000 that Mr Thompson made is insufficient for compliance with s 59 of the Indemnity, Guarantee and Bailment Act (Cap 232).

[27] The acknowledgement note stated:

The directors of the company hereby confirm that securities for the whole amount of Sixty Thousand Dollars shall be provided as stipulated in the memorandum and article of the company and as requested by Mr Thompson.

5 This note could not bind the company in itself to issue documents of any specific type or concerning any particular property. It is far too vague for that.

[28] Another note was issued on 18 March 1999. This was even more obscure:

10 The directors hereby confirm that the whole amount of \$20,000.00 is being treated as loan to the company and payments shall be made to Mr Thompson according (to) the arrangements made between the two parties.

15 [29] There was no resolution of the company to allocate these lots to Mr Thompson. Clearly the directors could not have granted company assets to themselves unless perhaps there was 100% agreement among the shareholders in a special general meeting. Proper securities documents should have been drawn up, the company should have unequivocally resolved to allow the securities over part of its property and the money could then have been released to the company. The failure to do so was unfortunate. However none of the other directors who lent money appear to have been granted securities over company land or given
20 acknowledgments that interest would be paid.

[30] On 15 August 2000 the accused contemnor issued a winding up notice to the company pursuant to s 221 of the Companies Act. In it he claimed \$80,000 as being due and owing “for cash lent and advanced” and referred to the two acknowledgment letters. Interest being due and owing was not mentioned. If the
25 accused considered he had fixed rights to enforce his debt against specific lots, it is strange that these securities were not mentioned in that notice.

[31] The mover also exhibited two previous caveats lodged by Mr Thompson on 18 June 2002. These were for Lots 18 and 21. The interest claimed by D3, the caveator, was in both instances “as one of the Director(s) and shareholder(s)”.
30 This would not have constituted a caveatable interest, and it is hardly surprising that the Registrar of Titles rejected both of them. It is noteworthy that the accused contemnor did not lodge a caveat on Lot 19 at this time. There was no caveatable interest held by the accused contemnor in Lot 19 for he had no legal or equitable interest in that lot.

35 [32] The accused contemnor also claims a caveatable interest in Lot 20. He said that it had been resolved that lots would be transferred to directors. Extracts from the minutes of directors’ meetings exhibited did not amount to a sufficient or reliable resolution however. It was a general indication of intent given at a directors’ meeting. Such a disposal of company assets to directors would require
40 more specific authorisation and resolution from the shareholders at a special meeting. Directors would be in conflict with their duty to the company in disposing of its assets to themselves in such a way.

[33] Initially there was no application for a caveat on Lot 20. Yet the caveat gave the caveator’s interest as:

45 Equitable owner by virtue of Memorandum of Agreement dated 19/11/1997 to transfer the said Land to the Caveator for \$25,000.00 (Twenty-Five Thousand Dollars) via CASH lent and services rendered for the Caveatee.

50 [34] The accused contemnor says his claim to Lot 20 is reliant on the memorandum of agreement dated 19 November 1997. The Plaintiffs argue that this claim has come out of the blue. Why, if there were a genuine document

recording an agreement to sell to D3 in 1997, has this claim not surfaced before? The Plaintiffs deny the validity of the memorandum and question its genuineness in various ways.

5 [35] First Abbas Ali says his signature has been forged on it. Second, he claims the signature of Mr Chaudhary has been inserted in between his and Mr Masatoshi's signature on the letter of acknowledgement of D3 loan, of 19.11.97. Two versions of the memorandum are exhibited by Mr Ali. The first is unsigned for the purchaser and D3 has signed for the company with Mr Ali's apparent signature. In the second memorandum, D3 has signed for purchaser and
10 vendor, and Mr Chaudhary's signature appears as a countersignature for purchaser and vendor. The Plaintiffs dispute the genuineness of these documents.

[36] Various arguments have been raised by the Plaintiffs as to why this memorandum should be rejected as unreliable. However I have not heard
15 evidence on oath from the parties on this document, nor observed that testimony subjected to cross-examination. While reasonable suspicions might be entertained about the memorandum, the question of its genuineness and whether it gives rise to a caveatable interest in Lot 20 cannot be resolved in these proceedings by affidavit. The matter will no doubt be resolved after evidence is taken in Lautoka High Court Action No HBC111.03L. Accordingly I disregard
20 the attempted lodging of a caveat against Lot 20 as evidence in favour of the mover's case for contempt.

[37] The accused contemnor claims the company had "undertaken and resolved to transfer Lot 21 to me for interest portion of the advance made by me to the
25 (company)". This interest was not put forward and declared to the registrar on the caveat form. There is no evidence of the company having agreed to pay interest for loans made by the accused contemnor nor for any other of the directors who had also made advances. I find the accused contemnor had no caveatable interest in Lot 21.

30 **Conclusion**

[38] I conclude that the accused contemnor had no valid or caveatable interest to protect to permit him to lodge caveats against Lots 19 and 21. By lodging them he was seeking to advance his interests either to pressure the company to allocate
35 him the lots or to meet his demands for repayment of his loan and interest ahead of the others. His situation, though in many ways understandable, was similar to the other directors who had also to await the company's progress and await the repayment of their loans. But in lodging the caveats improperly I am satisfied beyond reasonable doubt that he did disrupt the business of the company and that he is in contempt of the court's orders of 24 May 2002.

40 [39] I have previously lifted the injunction on the lodging of caveats. There will be no injunction preventing D3 from lodging a caveat against Lot 20. That is a matter for D3 to decide no doubt with careful consideration and advice from his lawyers. However there will be an injunction until further order preventing the lodging of caveats against Lots 19 and 21.

45 [40] I invite counsel's submissions on sentence.

Sentence:

[For Contempt]

50 [1] Edward Henry Thompson you have been found guilty of contempt in that you attempted to lodge caveats on P2's subdivisional lots which interfered with the day-to-day operations of the company, which in turn amounted to a contempt of the court's orders of 24 May 2002.

[2] In your defence it can be said that you are 65 years old and a retiree living in Fiji. As such you are particularly concerned about your investment and have been frustrated by the long delay in obtaining repayment of the loan you made to the company, and for which you received neither income nor interest. I accept that you may not have realised that these acts would result in your committing contempt.

[3] The contempt has come about by your wishing to advance your claim as against others in the company in similar situation to yourself, albeit you have been a bigger lender. But the law must be upheld and with it the court's authority.

[4] You will have to bear a substantial part of the Plaintiffs' costs in bringing these enforcement proceedings. It is accepted a global sum is the correct approach. I note there have been three attendances at the Suva High Court and complex documents have had to be worked on and filed.

[5] In the result, you are fined \$1000, in default of payment you must serve 30 days in prison. You are to pay a contribution towards the Plaintiffs' costs of \$2000. Both these sums are to be paid within 21 days of today's date.

Determination made.

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