SHARDA PRASAD v REGISTRAR OF TITLES (CBV0010 of 2003S)

SUPREME COURT — CIVIL JURISDICTION

FATIAKI CJ, MASON, WEINBERG and HANDLEY JJ

6, 7, 8 April 2005

Practice and procedure — appeals — payment in excess of damages awarded — interlocutory relief in aid of restitution — interim payments provisional — whether Constitution precluded Chief Justice from sitting — Constitution s 129 — Court of Appeal (Amendment) Rules 1999 rr 17(1), 17(2), 17(3).

The Petitioner sought damages from the Respondent for negligence in registering a transfer of land. The Petitioner lodged a caveat over said land and had contracted to purchase it. The negligence was admitted and the judgment was delivered and the sum awarded was $326,250. The Respondent appealed to the Court of Appeal and the court successfully reduced the damages to $25,250. The order was not challenged but the Petitioner sought to examine the restitution of the interim payments for a total of $155,000 before the Court of Appeal reduced it to $25,250. The Respondent applied ex parte to the Chief Justice, as a judge of the High Court for the orders in the nature of *Mareva* orders which restrained the Petitioner from removing or disposing of the assets. The relief was granted on the terms that included the liberty to apply on 24 hours' notice and a provision that the orders would be discharged upon payment. The Petitioner has not repaid the money and asked the High Court to discharge or vary the *ex parte Mareva* orders. The Petitioner alleged that s 129 of the Constitution precluded the Chief Justice from sitting in the present matter. The petition for an extension of time and for special leave to challenge orders of the Court of Appeal made on 15 November 2002 was filed well out of time on 15 December 2003.

Held — (1) The Chief Justice did not sit in the trial of the matter and only granted interlocutory relief in aid of the restitution order of the Court of Appeal. Moreover, the Court of Appeal has not yet embarked upon any appeal. The Court of Appeal only corrected the injustice to the appellant when it ordered the Petitioner to repay interim payments which turned out to be in excess of the damages awarded.

(2) The Respondent's right to restitution did not turn upon the correctness of the interim orders. The Petitioner and his counsel were on notice that the interim payments were provisional and that the Respondent intended to appeal. The retention on the interim payment was always subject to the outcome of the appeal.

Application dismissed.

Cases referred to

Rodger v Comptoir d'Escompte de Paris [1871] EngR 3; (1871) LR 3 PC 465; *Commonwealth v McCormack* (1984) 155 CLR 273; 55 ALR 185, cited.

Venkatamma v Ferrier-Hatson Civ App CBV0002/92, considered.

A. K. Singh for the Petitioner

J. J. Udit and *M. R.Vuniwaqa* for the Respondent

[1] Fatiaki CJ, Mason, Weinberg and Handley JJ. At the conclusion of the hearing, the court ordered that the petition and a summons, filed on behalf of Mr Sharda Prasad be dismissed with costs. Our reasons follow.

Proceedings below

[2] This petition for an extension of time and for special leave seeks to challenge orders of the Court of Appeal made on 15 November 2002. The petition was filed well out of time on 15 December 2003.

[3] The Petitioner claimed damages from the Registrar of Titles for negligence in registering a transfer, despite the Petitioner having lodged a caveat. The Petitioner had contracted to purchase the land. Negligence was admitted and the trial in the High Court before Byrne J proceeded as an assessment of damages. 5 The sum awarded in a judgment delivered on 26 January 2000 was $326,250.

[4] The registrar appealed to the Court of Appeal and, on 15 November 2002, was successful in having the damages reduced to $25,250. This order is not challenged in the petition.

10 **[5]** The matter sought to be ventilated relates to the restitution of interim payments that had been ordered by the primary judge and paid by the registrar before the substantive judgment was set aside by the Court of Appeal. On 18 January 2001, the trial judge ordered the registrar to make an interim payment of $125,000. A further $200,000 was ordered to be paid on 7 June 2001, but this 15 order was vacated on 8 August and replaced with one directing payment of $30,000. $155,000 was paid under orders of the trial judge before the judgment for $326,250 was reduced to $25,250 by the Court of Appeal.

[6] In a separate appeal and in submissions during the damages appeal, the registrar sought repayment to the extent that the final judgment of the Court of 20 Appeal was less than the amount paid to the Petitioner under the interim orders. The Court of Appeal found it unnecessary to consider the power of a High Court judge to order interim payment during the pendency of an appeal to the Court of Appeal. The court applied the principles requiring restitution of moneys paid under a judgment after its reversal on appeal: see generally *Rodger v Comptoir* 25 *d'Escompte de Paris* [1871] EngR 3; (1871) LR 3 PC 465 (*Rodger*) discussed below.

[7] The Court of Appeal said:

> 30 The interim payments were, of their nature, interim or interlocutory payments. The respondent's right to retain the moneys depended entirely upon the result of appeal SABU0031 of 2001S. When, by order of this Court, this appeal is allowed and the assessment of damages below is varied by substituting $25,250 for the figure of $326,250, the respondent will be bound to repay the excess received over a total of $25,250 and interest of 3% thereon from 26 January 2000, the date of the Judgment in 35 the High Court. The justification for the excess interim payments having failed, the excess retained will be money had and received to the use of the appellant, money which the respondent is liable to repay to the appellant under principles of unjust enrichment.

40 **[8]** The Court of Appeal ordered the present Petitioner to repay within 21 days such interim payments as exceeded $25,250 plus 3% interest from 26 January 2000. Any remaining issue arising from the making and receiving of the interim payments was remitted to the High Court. This order was made on 15 November 2002.

45 **[9]** On 25 November 2002 the Registrar of Titles applied ex parte to the Chief Justice, as a judge of the High Court, for orders in the nature of *Mareva* orders restraining the present Petitioner from removing or disposing of assets. This relief was granted on terms that included liberty to apply on 24 hours' notice and a provision that the orders would be discharged forthwith upon payment of 50 $128,123.30 together with any costs that the High Court may award in the application.

[10] The Petitioner has not repaid the money. He has, we were informed, moved the High Court to discharge or vary the *ex parte Mareva* orders. That application has been heard and judgment stands reserved.

[11] It is convenient at this stage to address two applications made at the outset of the hearing in this court on 6 April.

A Constitutional point without merit

[12] The Petitioner submitted that s 129 of the Constitution precluded the Chief Justice from sitting in the present matter.

That section provides:

> A judge who has sat in a trial of a matter that is the subject of appeal to a higher court must not sit in the appeal.

[13] This provision has no application, for two reasons. The Chief Justice did not sit in the trial of the matter that is the subject of proceedings in this court. Byrne J was the trial judge. The Chief Justice granted interlocutory relief in aid of the restitution order of the Court of Appeal. Second, this court has not yet embarked upon any appeal. The proceedings were listed on the basis that the court would consider the petition separately from any appeal. The court would first have to decide to extend time and then to grant special leave before, at a later date, hearing any appeal. Matters are often listed for the concurrent hearing of a petition for special leave and (contingently on the grant of leave) the appeal. This practice was not followed in the present case, because the Petitioner could not be ready for a full hearing as revealed at call-over on 10 February and 16 March 2005.

Adjournment application and challenge to the president's procedural directions

[14] On 5 November 2004, the record of appeal to the Supreme Court was released to the Petitioner's lawyer, Mr A K Singh. Notice of call-over on 10 February 2005 issued on 3 February 2005.

[15] The Petitioner's lawyer wrote to the registrar on 4 February 2005. The letter acknowledged that the purpose of the call-over was to fix a hearing date in April. The court was asked to vacate the April date on the basis that the lawyer would be engaged in the High Court from 30 March 2005 to 15 April 2005 as the accused in a criminal matter. (He had been charged on 25 July 2003.)

[16] At the call-over on 10 February 2005, Mr Singh, who had represented the Petitioner at earlier stages in the litigation, sought to have the petition listed for hearing in October. The president declined and directed the Petitioner to file a further affidavit explaining the delay in filing the petition. The application was adjourned to 16 March 2005.

[17] On 16 March the hearing was fixed for 6 April limited to the petition. The Petitioner was directed to file his submissions by 1 April. None were filed until after the application to vacate the fixture was refused by this court.

[18] Instead the Petitioner filed a summons on 22 March, returnable on 6 April, seeking orders vacating the hearing date and the order of the Chief Justice of 16 March 2005 "on the basis of non compliance or breach of section 36(1) and (2) of the Supreme Court Rules"; and that the Petitioner's "appeal" be listed for later call-over.

[19] The Petitioner was entitled to seek the review of the president's procedural directions by the Full Court and to reagitate his application that the petition stand over to October 2005: s 11(b) of the Supreme Court Act 1998.

[20] However, the Petitioner and his legal advisers were not entitled to disregard the president's directions in the meantime. The suggestion that the Chief Justice's direction of 16 March was a breach of the Rules is misconceived. Rule 36 of the Supreme Court Rules provides:

> An appellant or petitioner must file a statement of written submissions 42 days before the date appointed for the hearing of the appeal or petition, and must serve a copy of the statement as the respondent within 7 days of filing it.
>
> The respondent must file in the Supreme Court registry 21 days before the hearing of the appeal or petition, a statement of written submissions.
>
> A statement of written submissions must set out succinctly and clearly the issues giving rise to the appeal or petition and the argument in support of any such issues, with supporting authorities.
>
> A statement of written submissions must not exceed 25 pages of typewritten or printed foolscap with one and a half lines spacing between the lines.

[21] This Rule does not limit the power of a judge to fix an early hearing date or prevent a judge extending or abridging the times in the Rules for filing and serving written submissions: ss 8 and 14 of the Supreme Court Act 1998; r 46 of the Supreme Court Rules 1998; O 3, r 4 of the High Court Rules 1988.

[22] The Petitioner and his legal adviser knew from late 2004 that the petition would be probably be set down for hearing at this session. The president indicated at much at the call-over of 10 February 2005.

[23] The Petitioner was advised by his own lawyer to seek other representation when it was clear that the lawyer's personal difficulties would prevent him preparing the case. The Petitioner chose to disregard the president's direction.

[24] The reasons offered in paras 18–20 of his latest affidavit are uncompelling, amounting to little more than an assertion of a "right under the constitution" to have counsel of choice. We do not overlook the fact that Mr Singh had prior knowledge of the case, but reject the submission that the matter is of such complication that more than 14 days was needed for preparation. As it turned out, Mr Singh's trial was adjourned and he continued to represent the Petitioner.

The application for extension of time

[25] The orders under challenge were made on 15 November 2002 but the petition and affidavit verifying were not filed until 17 December 2003, 11 months after the time limited by r 6.

[26] In *Venkatamma v Ferrier-Hatson* Civ App CBV0002/92 this court said:

> … the Rules are there to be obeyed. In future petitioners must understand that they are on notice that non-compliance may well be fatal to an appeal: in cases not having the special combination of features present here, it is unlikely to be excused.

[27] The Petitioner applied to the Court of Appeal for leave to appeal to this court, but the application was rejected on 14 February 2003. At that stage, the Petitioner and his legal representative must have considered the relevant legal issues.

[28] In March 2003 the Petitioner's solicitor (presumably Mr Singh) advised him to lodge "an appeal" to the Supreme Court, informing him that he had 30 days to do so.

[29] His affidavit of 21 March 2005 states "I then read and seek [sic] advise from my family members and other Solicitors."

[30] A "Petition for Special Appeal" is said to have been lodged and rejected "due to some error". The date of lodgment, the form of the document and the nature of the error are undisclosed.

[31] Later delays are explained on the basis that "I was unable to contact my Solicitor as most of the time he was overseas completing his studies in Masters in Law" and he was later charged with a criminal offence. There is a passing reference to having to "look for funds to re-lodge my petition of Appeal as all the money that I received had been used".

[32] The sorry chronology after the filing of the petition and the provision of the record of appeal has already been recorded.

[33] These reasons, such as they are, leave us entirely unpersuaded that it is in the interests of justice to excuse the late filing of the petition by granting the necessary extension of time.

[34] The Petitioner's studied neglect of the processes and orders of this court are sufficient grounds in themselves for refusing to extend time.

Substantive issues ought to be raised

[35] In any event, the petition was doomed to failure because the right to restitution on reversal of a judgment is well established and the principles were correctly applied by the Court of Appeal. Over 130 years ago, Lord Cairns LC said in *Rodger* at LR 3 PC 475:

> … one of the to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case …

[36] In *Rodger*, Appellants who had satisfied the judgment of the court below, succeeded, on appeal to the Privy Council, in having that judgment reversed. The Privy Council held that it had jurisdiction to order that the money paid by the Appellants should be repaid and with interest from the date of payment. See also *Commonwealth v McCormack* (1984) 155 CLR 273; 55 ALR 185.

[37] The Court of Appeal was bound to do what it could within its powers to correct the injustice to the then Appellant resulting from its payments under the judgment and orders for interim payment which had turned out to be in excess of the damages awarded in the Court of Appeal. The orders disposing of the substantive appeal have not been challenged. Restitution as ordered by the Court of Appeal followed merely consequentially and as of right upon the substantive orders allowing the appeal. Indeed, restitution would have been available even if the then Appellant had paid under the judgment of the High Court without the so called interim payment orders made by Byrne J.

[38] The Petitioner barely addressed these principles in the oral and later filed written submissions of his counsel.

[39] Three groups of arguments were offered in response to the reluctantly conceded prime facie right to restitution.

[40] The first concentrated on the interim payment of $125,000 shortly after 18 January 2001. The present Respondent filed a notice of appeal to the Court of Appeal on 7 March 2000. It was served on 13 March 2000 but r 17(1) of the Court of Appeal (Amendment) Rules 1999 was overlooked and the appeal was deemed abandoned.

[41] Rule 17(2) and (3) stipulated that in this event a fresh notice of appeal could be filed before the expiration of 42 days or longer with the leave of the Court of Appeal. Neither side appears to have adverted to this until December 2000.

[42] On 7 December 2000, the Registrar of Titles attempted to revive the appeal by reserving a copy of the notice of appeal and the Petitioner's counsel wrote to the Registrar of the Court of Appeal requesting the *dismissal* (our emphasis) of the appeal for failing to comply with r 17.

[43] On 12 December 2000, the Petitioner filed a summons in the High Court for an order that the Respondent "make an *interim payment* of the sum of $250,000 … pending the hearing of the [Petitioner's] application before a Judge of the Fiji Court of Appeal to *dismiss* the appeal … in breach of r 17(2)" (our emphasis).

[44] On 30 January 2001, Byrne J ordered the Respondent to make "interim payment" of $125,000 by 20 February 2001, in default of which the balance of the judgment would become immediately due and payable. The sum was paid on the due date.

[45] The Registrar of Titles later sought and obtained leave to appeal in accordance with r 17(3).

[46] The first argument is that the principles in *Rodger* do not apply because there was no appeal on foot when the $125,000 was paid.

[47] The submission is misconceived. No party regarded the payment as a gift or a final settlement of the dispute. It was an "interim payment" made when the present Respondent was seeking to reinstate the appeal and the Petitioner was asserting a right to have it "dismissed". The Rules allowed a breach of r 17(2) to be excused, this was done and the appeal succeeded. The *Rodger* principle was not displaced by r 17(2).

[48] The second argument was that when leave to appeal was granted by Shameem J on 8 June 2001 it was on the basis that the then Appellant abandoned any right to restitution if the appeal succeeded. There is no evidence to support this and the notice of appeal filed that day sought to have the judgment wholly set aside.

[49] Her Ladyship said she was:

> … satisfied that the part payment of $125,000 to the Respondent alleviates to some extent, the prejudice that he might have suffered if the appeal proceeded after a delay of 12 months.

[50] These remarks are entirely consistent with the payment being "interim" in the sense that its ultimate retention would depend on the fate of the appeal. The Respondent in the Court of Appeal had the benefit of interim access to this fund. Clear evidence would be required before we could be satisfied that the Applicant for leave had given up the right to restitution of a substantial part of the judgment sum under appeal.

[51] There was a third group of miscellaneous arguments. It was suggested that the Court of Appeal should have granted the Petitioner an adjournment to enable him to respond to an affidavit filed on the eve of the hearing. There was nothing in that affidavit relevant to the issues in this court.

[52] It was also suggested that the Petitioner was not on notice that restitution was sought and he was deprived of the opportunity to prepare and argue against the right to restitution and for a defence of change of position. There was also a confusing reference to the right to recover money paid under mistake of law.

[53] These complaints are unsupported by evidence. The Court of Appeal noted that:

> There is no appeal from the first order of 18 January 2001 although the submissions of Mr JJ Udit with whom Ms M Rakaila appeared for the Registrar of Titles, seek relief in relation of all interim payments.

[54] The present Respondent's right to restitution did not turn upon the correctness of the interim payment orders. The Petitioner had the opportunity to advance before the Court of Appeal any evidence or submissions relevant to the then Appellant's claim to restitution on reversal of the judgment of the High Court.

[55] In any event, it is inconceivable that there could be a change of position defence in a case such as this. The Petitioner and his counsel were on notice that the interim payments were provisional because the Registrar of Titles intended to appeal to the Court of Appeal. Retention of the interim payments was always subject to the outcome of the appeal.

[56] The summons of 22 March 2005 and the petition of 15 December 2003 are dismissed with costs.

Application dismissed.