

**GULF INVESTMENT (FIJI) LTD v STRATEGIC NOMINEES LTD (IN RECEIVERSHIP) AND ORS (CBV0004 of 2011)**

SUPREME COURT — CIVIL JURISDICTION

5 GATES P

1, 2 August 2012

10 **Practice and procedure — adjournment — vacation of hearing date — medical condition of Director — police investigation incomplete — whether prejudice occasioned by adjournment — solicitor changed — genuineness of application.**

15 The petitioner sought an adjournment of the hearing date fixed for the hearing of his petition for special leave. The notice of motion contained the reason that the petitioner could not continue litigation without the presence of one of its Directors and that the Police had yet to complete their investigation.

**Held —**

20 (1) The evidence was not clear why the petitioner could not continue its litigation without the presence of one of its Directors. The court processes were still at the interlocutory stage, on existing if disputed facts, on a point of law concerning injunctive relief. No trial had taken place.

(2) The letter from the Police showed that the investigation was at a preliminary stage. However, these investigations can have no bearing on whether an appeal, launched by the Petitioner and set down for hearing in the appeal court, should have its hearing date vacated. Thus, the ground for an adjournment failed.

25 (3) A court must be cautious before granting an adjournment following several changes of solicitor or counsel. Changing a solicitor at the last minute could be a device for forcing an adjournment.

Application for adjournment declined.

30 *T Sharma* instructed by *Messrs Tirath Sharma Lawyers, Nausori* for the Petitioner.

*N Barnes* with *L Fong* instructed by *Messrs Munro Leys, Suva* for the first Respondent..

35 **Gates P.****[on Notice of Motion for vacation of hearing date]**

[1] A call-over to list cases for the now imminent Supreme Court Session commencing on 7th August 2012 was held on 26th June 2012. At that time I asked both counsel if they were ready for the hearing. Both replied they were. On that occasion Mr S. Nandan appeared for the Petitioner.

[2] Since the call-over two other solicitors have had carriage of the Petitioner's case. Four have been on record so far.

45 [3] On 11th July 2012 a Notice of Motion was filed in this court on behalf of the Petitioner by Marawai Law, together with the affidavit in support of Krishna Sami Naidu sworn and filed the same day. Marawai Law no longer act for the Petitioner.

50 [4] The motion sought an adjournment of the hearing date fixed for hearing of the petition for special leave. Two reasons were set out in Mr Naidu's affidavit and were urged on me at the hearing of the motion. They were, first that the Managing Director's medical condition was such that he (Mr Khan):

“will not be able to attend to this matter or give advice, brief and to answer relevant and pertinent issues of which the Petitioner Company’s solicitor or the Honourable Court may ask and require when this matter comes up for hearing in August, 2012, as he will be indisposed and still be in Australia.

5 That he is worried that this action may proceed without him being present in Court in Fiji and greatly fear that his absence will negate the outcome of this proceeding.”

[5] Mr Khan’s operation for heart by-pass surgery was performed on 8th June 2012 and Mr Khan was discharged from hospital on 17th June 2012. He is now convalescing. On 26th June 2012 at the call-over no suggestion was made by  
10 counsel that the Petitioner was not ready to argue the case by counsel on 7th August 2012 by reason of inadequate instructions or briefing.

[6] There is a misapprehension here. The litigant petitioner is a limited liability company not a specific individual. The company is said to own land valued by Bayleys [4th Respondent] at US\$46 million. Nothing is set out in the affidavit of  
15 its Manager Mr Naidu stating who the other Directors are or the shareholders. The property and assets are owned by the company not by Mr Khan. Nothing is stated about the directing “brains” of the company, or how the company is directed or managed.

[7] Upon the evidence presented it is not obvious why such a company in its  
20 litigation before the Supreme Court, the Final Court of Appeal, cannot continue its litigation without the presence of one of its Directors. This is not a trial. This is an appeal in an interlocutory matter, on existing if disputed facts, on a point of law concerning injunctive relief. This ground for an adjournment fails.

[8] The second issue raised is that the Police have yet to complete their  
25 investigation. It is clear from the letter from the Assistant Commissioner of Police Luke Rawalai of May 2012 (exact date not given) that the police investigation was at a very preliminary stage. In view of that preparatory achievement, some of the comments appeared to have been made prematurely.  
30 Much would depend on the results of a much more advanced stage of investigation.

[9] But these investigations can have no bearing on whether an appeal launched by the Petitioner and set down for hearing in this appeal court should have its  
35 hearing date vacated. Orders were made without this potential information. The issue for appellate argument would be whether those orders were correct when made. This second ground for an adjournment fails.

[10] On 17th June 2011 a stay was refused by this court. The Respondent seeks  
40 to exercise its rights under the mortgage to regain monies lent, said to be of the order of NZ\$5.8 million. The Respondent is presently free to execute its contractual rights.

[11] Mr Sharma said there would be no prejudice occasioned by the  
adjournment so far as the Respondents were concerned. That is not correct. As the chronology set out in the affidavit in opposition of Sharon Veu Morris for the  
45 1st Respondent, sworn and filed on 1st August 2012, makes clear these proceedings have been ongoing since the issue of writ of summons on 24th August 2009. An injunction was granted upon payment in of the NZ\$5.8 million. These conditions were not met by the Petitioner and the injunction lapsed. The petition for special leave was filed on 23rd March 2011.

[12] It has been said before that cases cannot be “parked” in the Supreme  
50 Court. The litigants need to complete their processes. Monies held up in litigation cannot be let out again by bankers or lenders whilst the matter lies unresolved.

The present court processes are still only at the interlocutory stage. No trial has taken place. These delays are prejudicial to the lender, as I had earlier referred to in the stay ruling.

5 [13] As an afterthought Mr Sharma asked for more time with which to prepare the appeal. This must also be refused. The grounds deal with illegality and breach of Exchange Control Regulations and the effect thereof on the mortgage. The issues in injunction applications are governed by long established authority. There is yet time for Mr Sharma to prepare his argument for the hearing.

10 [14] Mr Barnes questions the genuineness of the Petitioner's application. There is no criticism of Mr Sharma's conduct in this approach. Of the three orders for costs, none have been met. This has to be set alongside the failure to meet the financial terms of the original injunctive order of the Court of Appeal. A court must be cautious in these circumstances before granting an adjournment following several changes of solicitor or counsel. To change a solicitor at the last  
15 minute could be a device for forcing an adjournment.

[15] In the result, I find the arguments advanced, as best he could in the circumstances of the Petitioner's counsel, insufficient for the court to allow the application.

20 [16] The application for an adjournment is declined. There will be an order of costs for the 1st Respondent of \$750 which should be paid within 14 days.

*Adjournment declined.*

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