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PLASTIC MANUFACTURING (FIJI) LIMITED

v.

ICI FIJI LIMITED

B

[COURT OF APPEAL (Mishra, J.A., O'Regan J.A., Barker J.A.]

Civil Jurisdiction

Date of Hearing: 10 July 1984
Delivery of Judgment: 13 July 1984

C

(Practice and Procedure—Application for adjournment which was contested—discretion of trial Judge—principles to be applied by Appellate Court in considering exercise of that discretion—grounds advanced in Court at first instance flimsy and unsubstantiated by medical or other evidence in relation to absence of alleged main witness.)

V. Chand for the Appellant
D. Whippy for the Respondent.

D

Appeal against a decision of the Supreme Court given on 10 February 1984 whereby judgment had been entered for the sum of $3,562.18 and costs.

When the case had been called the appellant (defendant) had been refused an adjournment, whereafter the matter proceeded as undefended. Judgment was given for the sum stated in favour of the respondent.

E

The grounds for the adjournment as advanced were that the main witness for the appellant, Mr Lodhia was too ill to give evidence, having travelled to Australia for medical treatment.

F

The appeal was against the refusal of the court to grant a postponement of the hearing as was requested by appellant's counsel. No medical certificate, affidavit by the alleged witness or other documentation was offered to the Court. It was advised that counsel was not in a position to appear for the appellant if the matter were to proceed. Counsel for the respondent advised that it had informed the appellant the adjournment would be opposed.

G

Thereafter, the court gave leave to counsel for the appellant to withdraw. When the action, after some short adjournment was called there was no appearance on behalf of the appellant, the evidence for the respondent was called without attempt to cross examine its witnesses and upon the evidence offered judgment was entered.

I

A This report addresses itself to the principles to be applied generally to be considered by an Appellate Court asked to consider the refusal of a trial Judge on a contested application for a adjournment. The report does not attempt to concern itself with the particular facts of the litigation

Held:

B

An Appellate Court has power to consider an appeal against the refusal of a Judge at first instance to grant an adjournment. Such an appeal is against the exercise of a discretion. Therefore the normal rules governing appeal against such exercise must be applied. An Appellate Court will not interfere with the trial Judge's decision unless the exercise of the discretion had caused injustice.

C

In the present case there was no attempt to offer any medical certificate as to the condition of the alleged witness; nor was it made clear that his condition was such that he could not have received the treatment in Fiji. It was not shown why he was well enough to undertake a journey to Australia yet not well enough to attend court.

D There was no indication either in the Court below, or on the appeal, of the materialty of his evidence. Counsel for the appellant could have attended to cross-examine the witnesses for the respondent (plaintiff) in order to enable the Judge at first instance to have perceived how material was the evidence of Mr Lodhia. This may have placed the trial Judge in a better position to entertain an adjournment application either at the close of the respondent plaintiff's case or after witnesses for
E it had given evidence.

The trial Judge was quite correct and had taken the appropriate course in the circumstances of refusing the application of the appellant for adjournment which had been advanced on 'flimsy and unsubstantiated grounds".

Appeal dismissed.

F Cases Referred to:

Maxwell v. Keun (1928) 1 K.B. 645
Feasey v. Dominion Leasing Corporation Ltd (1974) 1 NZLR 593.
Dick v. Piller (1943) K.B. 497.
Priddle v. Fisher & Sons (1968) 3 All E.R. 506.

G BARKER. Judge of Appeal

Judgment of the Court

This is an appeal from a judgment of Kearsley J. given in the Supreme Court at Suva on the 10th February 1984: he gave judgment for the respondent against the appellant in the sum of $3,562.18c and costs. The focus of the appeal is on the refusal of the learned Judge to grant an adjournment of the hearing at the request of the
H appellant.

The respondent issued its writ on 12th August 1983: it claimed $3,562.18c the cost of plastic materials sold and delivered by it to the appellant. In its statement of defence dated 30th August 1983, the appellant denied owing any sum to the respon-

dent and alleged that goods to the value of $3,446.15c were supplied to it by the appellant but that these goods had not been ordered by the appellant; and that the respondent had agreed to take them back but had not done so. A

The action was set down for hearing on 5th December 1983: a hearing date was allocated for 10th February 1984. When the case was called, Miss Prasad appeared as counsel for the appellant on the instructions of the appellant's Nadi solicitors; she sought an adjournment claiming that the main witness for the appellant, a Mr Lodhia, had been taken ill and had had to travel to Australia for medical treatment. Counsel for the respondent opposed the adjournment: he advised the Judge that the appellant's solicitors had been informed on the preceding day of his opposition. No medical certificate, affidavit by Mr Lodhia or other documentation was offered to the Judge. B

Kearsley J. then enquired whether any of the appellant's witnesses were present: he was told by counsel for the appellant that none was present and that she was not in a position personally to appear for the appellant if the case were to proceed. The learned Judge then observed that counsel for the appellant was not robed and commented that it appeared that the appellant presumed that the case would be adjourned. C

Counsel for the respondent again advised the Judge that he had informed the clerk to the solicitors for the appellant that he would be opposing the adjournment. The Judge then determined to proceed with the hearing which he commenced after some other chamber matters had been heard: he gave leave to Miss Prasad to withdraw, stating, quite rightly, that she was in no way at fault in the matter. D

When the action was called again, there was no appearance on behalf of the appellant: evidence was given by the general manager of the Respondent: he demonstrated that the amount claimed by the Respondent was the balance owing under a current account for goods supplied to the appellant. This witness, a Mr Falconer spoke of several oral demands on agents of the appellant not only on Mr Lodhia—the allegedly ill witness—but also on the appellant's manager, a Mr Devia. He stated that Mr Devia had admitted the purchase but claimed that the appellant had been unable to sell the goods as quickly as anticipated because of market changes. E F

Mr Falconer produced a letter he had written to Mr Devia on the 28th May 1982, following his discussions with Mr Devia and with a Mr Arjun Lal. Mr Falconer also deposed that, on the 16th June 1982, Mr Devia had promised that 75% of the debt would be paid. According to Mr Falconer, at no time before filing its defence, had the appellant ever asserted that the goods mentioned in the statement of defence were not as ordered. G

Mr Falconer had personally served the writ on the appellant on the 17th August 1983. On that day, he spoke again to Mr Lodhia who suggested that he speak with the appellant's accountant, a Mr Bhai. On the next day he spoke to Mr Bhai at Lautoka who told him that the appellant had insufficient funds to pay instalments of its debt. He asked Mr Falconer to take back half the goods left at the appellant's premises and offered to pay the resulting balance by instalments. Mr Falconer concluded his evidence with a comment on the pleading that the products were not as ordered: if one compared the quantities, on the invoice he exhibited with the quantities pleaded, it became obvious he said, that most of what was supplied had either been used disposed of or retained by the appellant. H

A Not surprisingly, in the face of this evidence Kearsley J. held that the sum claimed by the respondent was owing by the appellant and he entered judgment against the appellant in the sum claimed. Judgment was sealed on the 27th March 1984; execution was issued on the 3rd April 1984 and a nulla bona return was delivered on the 8th May 1984.

The appellant's notice of appeal was filed on the 3rd May 1984—just in time. Not
B only was no medical certificate nor affidavit relating to the health of the witness produced to Kearsley J., but there was no application to this Court to file an appropriate affidavit. There was no evidence available to the trial Judge or to this Court as to the materiality of the evidence to be given by Mr Lodhia: there was no evidence of the merits of the appellant's defence. We mention this latter aspect because the whole history of this litigation and the evidence given by Mr Falconer leave us with the suspicion that the appellant is using the process of the law to avoid paying a just
C debt.

It is clear law that an appellate court has power to consider an appeal against the refusal of a judge at first instance to grant an adjournment. Such an appeal is against the exercise of a discretion: the normal rules governing appeals against the exercise of a discretion must apply. Prima facie, the question of adjournment or not is one for the discretion of the trial Judge: an appellate court will not interfere unless the exer-
D cise of the discretion has caused an injustice. See *Dick v. Piller*, (1943) K.B. 497; *Maxwell v. Keun*, (1928) 1 K.B. 645 and *Feasey v. Dominion Leasing Corporation Limited*, (1974) 1 NZLR 593 for examples of appeals against refusals to grant adjournments.

In *Dick v. Piller*, a civil action in a County Court was adjourned part-heard to a fixed date by consent on the grounds of the defendant's illness. A week before the
E resumed hearing date, the defendant's doctor supplied a certificate to the effect that, by reason of ill health, the defendant was unable to carry on his occupation. On the basis of this certificate, his solicitors sought the plaintiff's consent to a further adjournment. The request was refused. Two days before the hearing date, the defendant's solicitors again wrote to the plaintiff's solicitors, enclosing a further medical certificate to the effect that the defendant would be unable to leave home probably
F for two weeks.

On the date of the hearing, the defendant's solicitors and counsel attended the Court. Counsel informed the Judge of the position, read the correspondence between solicitors, produced the medical certificates and offered to produce the doctor either to give oral evidence or to swear an affidavit in support of his medical certificate. The Judge refused to grant an adjournment: the hearing of the Plaintiff's case continued with the participation of defendant's counsel. At the close of the Plain-
G tiff's case, defendant's counsel again asked for an adjournment on the grounds that the defendant's evidence was vital: this application was refused. The only other witness for the defendant gave evidence: then the Judge entered judgment for the plaintiff.

The Court of Appeal held that the failure by the Judge in the circumstances to have granted an adjournment constituted a miscarriage of justice: the case was
H remitted to the County Court for a re-hearing. Scott L. J. said on page 499:

> "The case resolves itself into a short question of law. If an important witness—a fortiori if he is a party—is prevented by illness from attending the court for an

adjourned hearing, at which his evidence is directly and seriously material, what is the legal duty of the judge when an adjournment is asked for? In my view, he is satisfied (1) of the medical fact and (2) that the evidence is relevant and may be important, it is his duty to give an adjournment—it may be on terms—but he ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs. These questions may depend on matters of degree, and matters of fact may be involved (as du Parcq L. J. truly says), but on the facts of the present case I think the judge went wrong in law, because (1.) my two positive conditions were satisfied, and (2.) no suggestion was made that an injustice would result to the plaintiff."

The facts of the present case are readily distinguishing from those of *Dick v. Piller.* There, a proper request had been made for an adjournment on the grounds of the ill health of a party: the alleged grounds were substantiated by a medical certificate produced to the Judge and with an offer to have the doctor give evidence in support of his certificate. It would have been clear to the judge in that case that the defendant was a material witness: he had already heard the plaintiff's evidence which claimed an oral agreement between the parties for the training of race horses.

In the present case, there was no attempt to offer to the respondent's solicitors or to the Judge a medical certificate on Mr Lodhia, nor was it made clear that his condition was so bad that he could not have received medical treatment in Fiji; nor was it made clear why he was well enough to undertake a journey to Australia and yet not well enough to attend Court. Nor was there any indication—either then or now—of the materiality of Mr Lodhia's evidence. Two or possibly three potential other witnesses for the appellant seemed likely from Mr Falconer's evidence: none of these was present.

Counsel for the appellant could have attended the hearing to cross-examine Mr Falconer. Through the cross-examination of the plaintiff's witness, the Judge would have perceived how material the evidence of Mr Lodhia might be because he would have been placed in a better position by the appellant to entertain an adjournment application either at the close of the plaintiff's case or after all other witnesses for the defendant had given their evidence.

We sharply contrast the attitude of the appellant's counsel and solicitors with that of counsel and solicitors in *Dick v. Piller:* here was a totally unwarranted presumption apparently made by the solicitors for the appellant that an adjournment would be granted: they merely instructed Suva counsel to ask for an adjournment without providing counsel with full instructions. Kearsley J. was quite correct to observe that they had presumed that the adjournment would be granted.

Priddle v. Fisher & Sons, (1968) 3 All E.R. 506 a case referred to by Mr Chand is readily distinguishable. There the body refusing the adjournment was not a Court but an industrial tribunal. More importantly, the other party was not happy at the tribunal's proceeding without the worker being present.

We are satisfied that Kearsley J. took the appropriate course in the circumstances: he was quite right to refuse the appellant's application for an adjournment made on flimsy and unsubstantiated grounds and with a rather cavalier approach to the Court.

The appeal is therefore dismissed with costs to the respondent.

Appeal dismissed.