

## Gilpin v Fua & Lawton Limited

Privy Council  
Appeal No. 8 / 1990

19, 30 March 1990

*Appeal - grounds of appeal - failure of counsel to conduct case in accordance with instructions no ground for appeal*

The appellant appealed from a decision of the Supreme Court that the appellant pay the respondent \$4,794. The only ground of appeal relied upon was that her counsel at the Supreme Court hearing had not presented her case in accordance with her instructions.

**HELD** ; The failure of counsel to act in accordance with a client's instructions at a trial is not a ground in itself for allowing an appeal from a decision of the court.

Counsel for the appellant : Mrs T. Palelei  
Counsel for the respondent : Mr F. Hogan

### Judgment of the Privy Council

This is an appeal against the judgment of Webster J in a building dispute. Such cases are notoriously difficult and this particular case posed special problems.

In January 1987 the parties entered into an agreement whereby the Respondent company agreed to build a house for the Appellant at Longolongo. The agreed price was \$21,095. During the construction the Appellant required the Respondent to carry out certain extras.

30 On the completion of the dwelling the Respondent claimed the contract price of \$21,095, with extras of \$6,676 - a total of \$27,771. As only \$18,000 had paid the Respondent issued proceedings claiming the balance of \$9,771.

That was met with a Statement of Defence wherein the Appellant admitted extras amounting to \$3,720 (subject to confirmation of the value of some items) and a counter-claim for no less than \$36,706 of which \$30,000 was claimed as either aggravated or exemplary damages. Much of the counterclaim, which is not all that easy to follow and contains some duplication, appears to be directed primarily at the delay in completing the house. This delay was about 10 weeks during which 40 time the Appellant lived in an unsatisfactory flat owned by the Respondent, or a member of the company and later at the Dateline Hotel.

The hearing before Webster J occupied some two and a half days and the Judge inspected the house in question which he found to be "above average for Tonga."

In a careful decision Webster J reduced the Respondent's claim from \$9771 to \$7294 and allowed \$2500 on the counterclaim, making the balance payable by the appellant \$4794, which on the face of it seems a reasonably satisfactory result. Indeed the Appellant in her notice of appeal concedes that the Judge's decision was justified *on the evidence before him*. Her sole ground of appeal, as presented by 50 Mrs Palelei, was that her Counsel at the trial had not conducted the case in accordance with her instructions and in particular had failed to call witnesses the Appellant wished to have called, and generally had failed to adequately present the Appellant's case. Whether there is merit in her criticism of her legal adviser is not for us to say.

Mr Hogan referred us to the case of *Al-Mehdawi v Secretary of State for The Home Department* [1989] 3 All E.R. 843. That was a case where an over-stayer was denied the opportunity to appeal an order for deportation because of the negligence of his solicitors in failing to advise him of the date of hearing. The 60 head-note to the case reads-

"A party to a dispute who had been afforded an opportunity of presenting his case to the person deciding the dispute but who had lost the opportunity to have his case heard through the fault of the legal advisers to whom he had entrusted the conduct of the dispute on his behalf could not complain that he had been the victim of procedural impropriety or that natural justice had been denied to him, and it made no difference whether the matter in dispute raised private law or public law issues."

The Appellant in the present case is on even weaker ground than the Appellant Al-Mehdawi. Her case was presented, although not perhaps in the manner she thought appropriate. To allow the Appellant a further opportunity to present her case because she was dissatisfied with her own Counsel's performance at an earlier hearing would seriously undermine the principle of finality in decision making. If her Counsel was seriously at fault she is not left without a remedy. The appeal is therefore dismissed with no order for costs.