

IN THE COURT OF APPEL, FIJI ISLANDS
AT SUVA

Civil Appeal No: ABU116 of 2005

BETWEEN: **JAGDISH CHANDRA GOSAI** son of Ram Prasad Gosai of
Northern Press Road, Nadi, Retired, Landlord

APPELLANT
[ORIGINAL PLAINTIFF]

AND

NADI TOWN COUNCIL a body corporate established and
created by the Local Government Act

FIRST RESPONDENT
[ORIGINAL DEFENDANT]

AND **REGISTRAR OF TITLES** created and established by statutory
provision

SECOND RESPONDENT
[ORIGINAL DEFENDANT]

Appearances:

Appellant: Mr Vipul M. Mishra

First Respondent: Mr M~~K~~ Sahu Khan

Second Respondent: Mr Ropate Green

Date of Hearing: 6 February 2008

Date of Judgment: 22 February 2008

Coram: Byrne, JA

Scutt, JA

JUDGMENT

1. ISSUES IN THE APPEAL

The Appellant, Mr Gosai, appeals against an interlocutory decision made on 29 September 2005, wherein the High Court refused to dissolve a Charge lodged by the First Respondent, Nadi Town Council, against Certificate of Title No. 18653, being land of which the Appellant, Mr Gosai, is registered proprietor (the land).

2. It appears that Mr Gosai has since the lodging of this appeal died, and the estate now represents his interest. A copy of the Probate of the Estate of Jagdish Chandre Gosai is Annexure 'F' to the Affidavit of Robin Khadim Ali, Town Clerk of Nadi Town Council, sworn 4 February 2008 (Nadi Council Affidavit) and filed with the Court 5 February 2008.¹

3. Grounds set out in the Notice of Appeal are:

1. That the learned Judge was wrong in holding that the Court ought to hear full evidence before deciding whether the First Respondent had a legal right to lodge a charge against the Appellants' title to land and the Second Respondent a right to register such charge.

BECAUSE –

- (a) The Appellant's title is indefeasible and the Applicant was and is entitled to full protection of law.
- (b) The First Respondent could not lawfully affect the Appellant's rights [by] lodging a charge in absence of express and/or clear statutory provision or other legal rights.
- (c) The Second Respondent as Registrar of Titles ought not to have registered the charge and therefore the learned Judge was wrong in failing to determine the issue summarily.

4. This Court also had before it a Notice of Motion together with supporting Affidavit served and filed by the Nadi Town Council on 5 February 2008, one day before the hearing of the appeal. Nadi Town Council sought orders granting leave to adduce further evidence on the hearing of the appeal, and that time be abridged for service of the Notice of Motion to one day.

5. In addition to the Probate of Estate, the material sought to be adduced by way of the Nadi Council Affidavit included documents said to evidence agreed terms of settlement between Mr Gosai and the First Respondent which, said the First Respondent, would have been signed had Mr Gosai lived. The Nadi Council Affidavit says amongst other matters:

I wish to advise that the 1st Respondent all the time intended to settle this matter amicably with the Appellant and which in fact had been done with the agreement of the Appellant when he was alive together with his Counsel Mr Rajendra Chaudhry of Gordon and Chaudhry Solicitors of Suva and which are as follows –

¹ As the action remains in Mr Gosai's name rather than his estate, throughout this judgment the Appellant is referred to as Mr Gosai. An application will need to be made by the Appellant for a change of parties as per Order 15, Rule 8 of the High Court Rules 1988.

- (i) On the 13th of March, 2007 a letter from MK Sahu Khan & Co was addressed to the previous Solicitors for the Appellant Messrs Singh & Chaudhry Lawyers ... Annexure 'A'
- (ii) On the 10th of July, 2007 Gordon & Chaudhry replied ... Annexure 'B'
- (iii) On the 6th of August, 2007 Term of Settlement duly executed by the 1st Respondent was forwarded to Appellant's Solicitors for execution ... Annexures 'C' and 'D' ...
- (iv) So far the Terms of Settlement has not been returned to us
- (v) On the 7th of January, 2008 Nadi Town Council (1st Respondent) wrote to Messrs MK Sahu Khan & Co of Nadi instructing them to proceed with the action for compulsory purchase ... Annexure 'E'

6. The Nadi Council Affidavit further states that this evidence was 'not available when the matter was argued at the High Court Lautoka during [the] interlocutory hearing and became available only recently [and is] material to the present appeal': para 7

7. Unsurprisingly in view of the shortness of time, at the appeal there was no answering material from Mr Gosai, however, Counsel for Mr Gosai stated his instructions as being that there was no agreement on Mr Gosai's part to the terms as indicated in the documents.

8. BACKGROUND TO APPEAL

The substantive action from which the interlocutory decision in this appeal arises is part of a lengthy and ongoing matter. During its course, not only Mr Gosai but his father, Mr Ram Prasad Gosai, has died. It has involved criminal proceedings as well as the current civil proceedings. The former go back beyond 23 March 1981, when a conviction against Mr Ram Prasad Gosai – at that time the registered owner of the land – was overturned by this Court.² Mr Ram Prasad Gosai had been convicted of:

- interfering with Public Drainage works by refusing to remove the fence and allow the Nadi Drainage Board to carry out drainage works contrary to section 21(1) of the *Drainage Act* (Cap. 122);
- between January 1978 and 7 April 1978 'permitting animals to stray upon the banks and side walls of public drain within the jurisdiction of Nadi Drainage Board' contrary to section 21(e) of the *Drainage Act* (Cap. 122).

9. Counsel for Mr Gosai in this appeal put forward this Court's judgment of 23 March 1981 to support submissions that the issues raised in the substantive action yet to be heard by the High Court are identical with those in the criminal proceeding. Hence, it was said, *res judicata* should apply as against Nadi Town Council precluding it from arguing it has rights in relation to the land, in particular a right to lodge the charge in question.

² *Nadi Drainage Board v. Ram Prasad Gosai*, FCA, Criminal Jurisdiction, Criminal Appeal No. 28 of 1980, 23 March 1981.

10. The substantive action leading to the present appeal commenced on 11 March 2005 by Writ of Summons in the High Court at Lautoka. The Writ sought declarations and other relief, namely:

DECLARATION that the Defendants have unlawfully and without just or reasonable cause lodged and registered a charge against the Plaintiffs' property comprised in CT No. 18653.

DECLARATION that the Defendant Nadi Town Council is unlawfully, wrongfully making efforts to compulsorily acquire the Plaintiff's property in CT No. 18653 when in fact the [Defendant] is not entitled to acquire the Plaintiffs' said property.

- (a) Damages.
- (b) Order that charges on CT No. 18653 immediately and/or forthwith [be] removed.
- (c) Costs.

11. Time elapsed in leading up to this appeal has itself been lengthy. The High Court's ruling indicates that the interlocutory application was made by Summons issued on 6 April 2005. The hearing of the interlocutory application was 28 July 2005. Written submissions were provided to the Court on 11 and 18 August 2005. The Court's ruling now appealed against was, as noted earlier, made on 29 September 2005. As part of the Court's ruling, the substantive matter was listed for the 25 November 2005 callover so that a hearing date could be allocated.

12. In the event, there has been no hearing of the substantive matter. Rather, on 28 October 2005 Mr Gosai made application to the High Court for leave to appeal to this Court against the interlocutory ruling. The High Court ruled on 11 November 2005, stating:

The issue stated for the Court of Appeal is whether this Court was right when it refused to determine the substantive issue in the action by a summary procedure without hearing the parties. If I have jurisdiction then I grant the leave.³

13. The Court went on to observe that Mr Gosai would not 'lose the chance he already has for a substantive hearing and the matter will remain listed in the 25 November 2005 Callover so it can be assigned a hearing date'.

14. There is no indication on the Appeal Court file of what occurred at the mention on 25 November 2005. What is known, however, is that this appeal has proceeded whilst the substantive action has not.

³ *Gosai v. Nadi Town Council and Registrar of Titles* HCF Latuokka, Action No. HBC063 of 2005 (11 November 2005).

15. Notice of Appeal was filed on 16 December 2005 and served on 20 December 2005.

16. It is apparent that a great deal of work has been undertaken by Counsel for the parties, with a number of Written Submissions having been lodged with this Court, at varying dates. At the appeal, there were Written Submissions for Mr Gosai dated 9 March 2006; Written Submissions for Mr Gosai filed 4 July 2006; Written Submissions for Nadi Town Council filed 17 July 2006; Written Submissions for Mr Gosai filed 1 February 2008, and Written Submissions for Nadi Town Council filed 5 February 2008.

17. Despite the High Court's endeavour to have the substantive matter heard, no hearing has in fact taken place.

18. PARTIES' SUBMISSIONS

The parties provided substantial submissions, both written and oral, to the Court, accompanied by many helpful authorities. This served to persuade the Court of the wisdom of the High Court's original determination: namely, that the interlocutory application should be dismissed, as to obtain his remedy the 'property owner has to come to Court ... to give his evidence and challenge the evidence' of Nadi Town Council: High Court, 29 September 2005

19. For Mr Gosai, it was said amongst other matters that the charge was unlawfully registered on the land because there is neither power in the Nadi Town Council to have such a charge applied, nor is their authority in the Registrar of Land Titles to register such a charge. A charge is registerable only if it relates to unpaid rates, it was said: Written Submissions, 1 February 2008, p. 1 On the other hand, Nadi Town Council says that it has been endeavouring for many years to ensure that a drainage outlet is built and maintained on the land sufficient to serve the needs of a growing population and town community, with the area developing into a relatively high density in built space. To preserve the entitlement of Nadi Town Council to undertake the work required, and to protect against the possibility of sale of the land to a new owner without notice of Nadi Town Council's interest, it was obliged, it was said, to lodge the charge: Written Submissions, 5 February 2008, para [6]:

20. Counsel for Mr Gosai submits, however, that the Nadi Town Planning Scheme was completed in 1999, and the acquisition proposed for the drainage 'is to cover up ... negligence and nothing to do with the Town Planning Scheme': para 7 Written Submissions, 4 July 2006

21. Further, it is said for Mr Gosai, the High Court was wrong in holding that evidence ought to be heard 'because the rights to lodge and register charge must be accrued and exist when it is lodged and there must be statutory provision authority in its lodgment and registration'. This it is said is lacking: para 4, Written Submissions, 9 March 2006

22. The position advanced for Nadi Town Council is that the charge is 'a temporary measure to freeze the position of [Mr Gosai] in respect of the land until [Nadi Town Council] has been give the opportunity to regularise its position by the Crown Acquisition of Lands Act to apply to the Court authorising compulsory acquisition: Written Submissions, 5 February 2008, para [6]

23. For Nadi Town Council it is said that the Council 'needed to create an interest in order to prevent [Mr Gosai] disposing of the land prior to the cumbersome and time-consuming process of acquisition under the Crown Acquisition of Lands Act':

This is what the charge does. It creates a position of irrefutability which is not provided by the provision of a caveat especially when there is no strictly caveatable interest for [Nadi Town Council]. By the time [Mr Gosai] had instigated his civil action against [Nadi Town Council and the Registrar of Land Titles], Ministerial consent had only recently been obtained for the compulsory purchase. If consent had not been given, [Nadi Town Council] would have been obliged to withdraw the caveat: Written Submissions, 5 February 2008, paras [7] [8]

24. It was unable to proceed with the compulsory purchase, said Nadi Town Council, whilst the present litigation is ongoing for by doing so it would have been in a position 'tantamount to contempt': para [8]

25. Clearly, there is a dispute of some magnitude between the parties. It cannot be resolved summarily, nor by way of an appeal against an interim order. Yet rather than further protracted litigation, it is to be hoped, as the High Court suggested, that it may be resolved by negotiation, and that such resolution might come about speedily.

26. Taking all the above matters and the oral and Written Submissions generally into account, the High Court's words bear echoing here:

The Plaintiff's action ... raises serious issues to be tried. It will not resolve the substantive issues in that action on untested affidavits. The issues must go to trial. I have had the benefit of very full and very helpful submissions from both Counsel for the Plaintiff and Counsel for the 1st Defendant. Both Counsel are to be complimented for the quality of their submissions. Their effect however is only to reinforce the clear fact that the parties to this action have been locked in a tussle for a long time. The 1st Defendant claims to be acting as a responsible local authority in the interests of the wider community. It wants to obtain a drainage easement so that an entire subdivision can benefit from the flow-off of surface water. The Plaintiff's property is at a key point in the drainage route. The 1st Defendant says that the Plaintiff's [real] dispute may be over the amount of compensation he's been offered: at 2-3

27. Whatever the case as to the possibilities of a negotiated settlement between the parties which addresses commercial realities, insofar as the present proceedings are in issue this Court is unable to uphold the appeal.

28. APPEAL ON INTERLOCUTORY DECISION

In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court's decision in *Heffernan v. Byrne and Ors* HCF Civil Action No. HBM 105 of 2007 ((19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to *Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited* [1995] FJCA 15, ABU 0034d.95s; *Edmund March & Ors v. Puran Sundarjee & Ors* Civil Appeal ABU 0025 of 2000; and *KR Latchan Brothers Limited v. Transport Control Board and Tui Dvaulevu Buses Limited* Civil Appeal No. 12 of 1994 (Full Court).

29. As His Lordship observed, in *Edmund March & Ors* this Court said:

As stated by Sir Moti Tikaram, President Fiji Court of Appeal in *Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers* (Civ. App. No. 33 of 1996 p. 15):

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

30. Further, as His Lordship also noted, in *KR Latchan Brothers Limited* a Full Court of Appeal (Tikaram, Quillam and Savage JJ.) said:

... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in *Ashmore v. Corp. of Lloyd's* [1992] 2 All ER 486 –

Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.

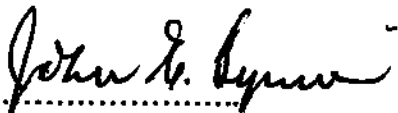
31. We agree with these observations, and adopt them in this case. The High Court's decision should stand. The charge should remain and the substantive matter be immediately reinstated in the High Court at Lautoka list, for a hearing date to be set.

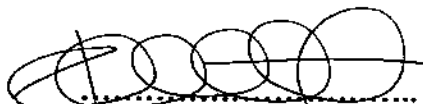
32. CORAM

The appeal was heard by the Court constituted by two Judges of the Court of Appeal in accordance with section 6 (2) and (3) of the *Court of Appeal Act* (Ch 12).

Orders

1. The appeal is dismissed.
2. The case is remitted to the High Court at Lautoka for mention and listing for hearing at the earliest possible date.
3. Costs to the Defendants of \$1000.00.


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John E. Byrne
Judge of Appeal


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Jocelynn A. Scutt
Judge of Appeal

Suva
22 February 2008

