

IN THE COURT OF APPEAL FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0100 OF 2006  
(High Court Civil Action No. HBC 447 of 2004)

BETWEEN :            LAISA DIGITAKI                            Appellant

AND:                    MOBIL OIL AUSTRALIA LIMITED                    Respondent

Coram:                Byrne, JA  
                              Hickie, JA

Hearing:             Thursday, 17 April, 2008, Suva

Counsel:             G. O'Driscoll for the Appellant  
                              S. Parshotam with S. Singh for the Respondent

Date of Judgment:   Friday, 2 May, 2008

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**J U D G M E N T**

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BACKGROUND TO THE APPEAL

[1]     This appeal concerns, in particular, the *Civil Evidence Act* 2002 and the use of hearsay evidence in civil proceedings when a notice of that fact has not been provided to the other party. Further, how does a failure to provide such notice adversely affect the weight to be given to such hearsay evidence by the trial judge in

accordance with Section 6 of the Act as to any inferences which can reasonably be drawn as to the reliability of such hearsay evidence.

[2] The only known judgment to have considered to date this part of the *Civil Evidence Act 2002* is a single judge decision of Justice Winter in *Wati v. Kumar* [2004] FJHC 358 (unreported 26 March 2004, High Court of Fiji at Suva, Civil Jurisdiction No. HBC 0214/03).

[3] In *Wati v. Kumar*, Justice Winter noted at page 3 of the judgment as reported on Paclii (unfortunately, the judgment has no paragraph numbers and there have been no Fiji Law Reports published since 2001) that:

*"In England the Law Commission in its report No. 216 (The Hearsay Rule in Civil Proceedings) recommended a simplification of the law and procedure relating to the admission of hearsay evidence in Civil Proceedings, so that as a general rule all relevant evidence including hearsay should be admissible. The Law Commission specifically proposed that the hearsay rule in civil cases should be abolished. The Commission saw no need for complex procedural safeguards but rather preferred the checks and balances of the Court assessing the probative value of evidence and according it appropriate weight. The Commission's report led to the introduction of the Civil Evidence Act 1995. That Act runs in conjunction with the CPO [Civil Procedure Rules] Part 33 which deals with miscellaneous rules of evidence in civil proceedings and provides the procedural framework for the admission of hearsay evidence for trial.*

*In Fiji the Civil Evidence Act 2002 mirrors the English legislation. Accompanying rules for the Legislation have yet to be developed. These rules would compliment [sic] and provide a practical framework for the implementation of the sensible reforms contained in the Act. In the meantime however some practical sense can be implied to these proceedings from the existing rules and inherent directive powers of the Court."*

[4] Subsequent to *Wati v Kumar*, no Civil Procedure Rules were developed in the Fiji Islands during 2004, 2005 or 2006 under the then Chief Justice who was suspended

in early 2007. Nevertheless, it is the hope of the Court that until such rules are formally developed, that this judgment will provide (as did Justice Winter in *Wati v. Kumar*) “some practical sense” to the legislation.

### THE TRIAL

- [5] On 13 May 1999, the Appellant, Ms Laisa Digitaki, completed an “application for credit” form with the Respondent company, Mobil Oil Australia Ltd (“Mobil”). This was a standard form prepared and supplied to the Appellant by Mobil. The Appellant completed Sections A to D of the form and then Section E was to be completed by the appropriate “Mobil Agent/Territory Manager”.
  
- [6] In this case, Mr Kamal Singh, “Sales and Marketing Manager”, for the Respondent company, completed Section E of the form on 14 May 1999, the day after, it had been completed by Ms Digitaki. Both parties to this appeal confirmed to the Court that Mr Singh had not signed Section E as required by the form but, nevertheless, had done so at the bottom of the form near Section G.
  
- [7] Incredibly, this single page “application for credit” form was the only documentation in relation to any agreement entered into between Ms Digitaki and Mobil.
  
- [8] At the eventual trial, held some seven years after the alleged agreement was entered into between the parties, the Respondent called and supported its case with just one witness, Mr Yogesh Chand, who had joined Mobil in 2003. Mr Chand provided evidence to the Court in relation to various documents including the application for

credit form (which had been completed by the parties in May 1999, nearly four years prior to Mr Chand joining Mobil). He also relayed to the Court conversations he had had with Mr Singh in what appears to have been 2003 (?) who, he advised the Court, was by then General Manager with Mobil Guam.

- [9] The Appellant also only called one witness at the trial and that was herself.
- [10] When the matter came before the High Court of Fiji at Suva on 28 and 29 August 2006, the Trial Judge remarked as to the unsatisfactory state of the evidence before him and the requirements placed upon him by the *Evidence Act 2002* noting in his judgment (which we have highlighted in part) the following:

*"[8] At the outset I observe that there are markedly fewer documents before the Court than one would expect in a case of this kind. I do not speculate as to the reasons for this. I confine myself to the evidence I have heard, the documents before me and the reasonable inferences which can be drawn therefrom.*

*[9] Yogesh Chand accepts that he has no direct knowledge or involvement with these transactions. He joined Mobil after the events in question. He stated his knowledgable [sic] of the documents in question and his conversations with Kamal Singh. The Plaintiffs [sic] accept that what Mr. Chand said that Kamal Singh stated is necessarily hearsay, and say it is admissible under the Civil Evidence Act 2002 but that I must make the assessments as to weight which are required by Section 6 of that Act.*

*[10] Laisa Digitaki says most of the vital conversations were held with David Robinson and Kamal Singh. Both are or were senior employees of the plaintiffs [sic]. Neither party has called either of them to give evidence.*

*[11] The plaintiffs [sic] rely upon an "Application for Credit", (document 6) ...*

*[17] There is no document in the whole of this case concerning the granting of a lease or let of the service station premises.*

*[18] Laisa Digitaki accepts that she signed document 6. She states it is clear from the face of that document and was made clear at the time to the Mobil employees that any contract would be with the company and not*

*with her personally. She says they were aware that the company had not yet been incorporated. She says that the face of the document itself shows clearly that the intention was to contract with the limited company and not herself as a private individual ...*

*[19] Ms. Digitaki relied upon the fact that Mobil had put Performance Plus Limited into liquidation for precisely the same alleged debts that are being claimed from her in this case."*

[11] The duty was on the Plaintiff to prove its case. It did not provide one witness who had been involved at the time in 1999 when the various arrangements were discussed between the parties. Instead, the Plaintiff preferred to rely upon the hearsay evidence of Mr Chand given to the Court in 2006 as to conversations he had had with Mr Singh (we are not told precisely when, perhaps in 2003), as to what had allegedly occurred between the parties some seven years before the trial. It would appear from His Lordship's judgment delivered on 7 September 2006 (as well the "Certified - True Record" completed and signed by the Trial Judge on 16 January 2007), that no details were provided by the Plaintiff company to the Court as to why Mr Singh was not available to appear at the hearing. In addition, there were no precise details of the alleged telephone conversations which had taken place between Mr Chand and Mr Singh (as one would expect in a prepared witness statement), that is, dates, times, approximate length of conversations, and a list of questions asked and responses provided.

[12] Compounding the unsatisfactory nature of the evidence, was that the only witness to testify at trial as to the events of seven years previously was the Appellant whose evidence His Lordship rejected as follows:

*"[23] Laisa Digitaki was the only witness [at the hearing] who could give direct evidence of the events and negotiations at and surrounding the signing of the credit application and any contracts at that time. Therefore, I must assess her evidence carefully as to its reliability and truthfulness.*

[24] I do not accept the evidence of Laisa Digitaki. I did not find her reliable nor am I able to accept all of her assertions.

[25] *She has produced no documents whatever to support her claim that she had a consultancy with Mobil ...*

[30] In document 6 she represented herself as the person applying for the credit from Mobil under the trading name of Performance Plus Service Station Ltd. The company incorporated some five and a half weeks later was in fact named Performance Plus Limited ....

[31] *She made an application for credit from Mobil in her own personal name, put forward the name of a non-existent limited liability company as her trading name and now apparently seeks to be absolved from liability for any debt as a result of the limit of liability of that company."*

[12] By contrast, in relation to the only other witness in the case, Mr Chand, his Lordship made the following observations:

"[35] I have also made an assessment of the evidence of Yogesh Chand. I found him to be truthful and reliable. He did not profess to go beyond the face of the documents he had examined, his knowledge of Mobil, since joining into 2003 and his conversations with Kamal Singh. He did not purport in any way to claim first hand knowledge of what Mr Singh had told him and was at pains to point out that he had asked Mr Singh certain questions and relayed what he said were the answers. **Having taken regard of the Civil Evidence Act and in particular section 6, I accept those responses.**

[36] *The failure to complete and follow up document 6 and the absence of many other documents show that in 1999 and 2000, at least in these transactions, there was a laxity about the way Mobil conducted its business.* Further, the continued granting of credit from May to December 2000 without payment for fuel already supplied and in the difficult circumstances then pertaining show there was also a lack of oversight and control. However, these in themselves do not mean that Mobil is not entitled to payment for the goods supplied and the rental.

[37] *The question is have Mobil shown, on the balance of probabilities, on the accepted evidence and documents before me, that they are entitled to payment from Laisa Digitaki in respect of the fuel and rental ...*

[42] ... Whatever name she might or might not have been trading under **I do find on balance, that it was Ms Digitaki who contracted for the supply of petrol over the period in question and is therefore liable for its payment.**

*The conversations Mr Chand related as having had with Kamal Singh and the latter's answers support this."*

- [13] Thus His Lordship found the hearsay evidence of the Mr Yogesh Chand as "truthful and reliable" in preference to the direct evidence of the Appellant.
- [14] The Appellant points to His Lordship's judgment (as well as the later prepared "Certified - True Record") and notes that nowhere in either document is it clearly evident that the Trial Judge has done (which he said he had done in paragraph 35 of his judgment), that is, *"taken regard of the Civil Evidence Act and in particular section 6"* so as to be in a position to *"accept those responses"* of Mr Singh via Mr Chand's hearsay evidence. These aspects of His Lordship's judgment form the major thrust of the Appellant's appeal.

#### THE FIRST GROUND OF APPEAL

- [15] There were four grounds of Appeal. The Court notes that during the appeal proceedings, Counsel for the Appellant withdrew ground 1(b)(i) and amended ground 1(b)(ii) so that the word "established" was changed from the past to present tense to read "establish". The First Ground of the Appeal now reads:

***"1. That the Learned Judge erred in law and fact :-***

- (a) In his interpretation and application of the Provisions of Section 6 of the Civil Evidence Act 2002, and failing to take into account the requirements provided by section 6 for weighing hearsay evidence, in particular subsection (b) (d) (e) of the Civil Evidence Act 2002.***
- (b) In his decision to accept the speculative hearsay evidence of Yogesh Chand who was neither a party nor a privy or a witness to any of the documents or transactions in dispute, as truthful and reliable, sufficient and strong enough, to establish any claim against the Defendant on the balance of probabilities."***

- [15] Although there were three other grounds argued in the appeal, we are of the view that it is this first ground which decides the success or otherwise of the appeal as if this ground is upheld, the appeal succeeds. If, however, the ground is refused then the appeal fails as there would be found to be a valid and existing contract and perhaps some adjustments would need to be made in relation to stock on hand at the time the agreement ceased which should have been discounted from the judgment sum.

### **Civil Evidence Act 2002**

- [16] The *Civil Evidence Act 2002* is divided into seven parts. Part 2 (Sections 3-9) deals with hearsay evidence. Section 4 specifies what notice is required when a party is to adduce hearsay evidence in civil proceedings. The important sections here are sections 4(1) and (4) as follows:

*"4 (1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings-*

- (a) a notice of that fact; and*
- (b) on request, the particulars of or relating to the evidence,*

*as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay.*

...

*(4) A failure to comply with subsection (1) or rules made under subsection (2)(b) does not affect the admissibility of the evidence but may be taken into account by the court-*

- (a) in considering the exercise of its powers with respect to the course of proceedings and costs; and*
- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 6."*



[17] Thus, even if the notice provisions of Section 4 are not complied with, the evidence is still admissible; however, the “considerations relevant to weighing of hearsay evidence” as outlined in Section 6 then apply. It reads:

*“6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court **must** have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following-*

- (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;*
- (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*
- (c) whether the evidence involves multiple hearsay;*
- (d) whether any person involved had any motive to conceal or misrepresent matters;*
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;*
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.”*

#### Mr Chand

[20] In the evidence given by Mr Chand for the Respondent he had advised the Trial Judge (as per “P.1” of the Trial Judge’s notes, page 2 of the “Certified - True Record”):

*“May ’99 – defendant entered agreement with Mobil. I joined Mobil in 2003.*

*It was Kamal Singh, he was General Manager Mobil Guam.*

*I took over case in 2003 I took information from Kamal Singh.”*

[21] The above evidence infers that Mr Singh was an employee of Mobil and indeed General Manager of its Guam operations in 2003. It is unclear whether he was still an employee or as to his whereabouts at the time of the hearing in August 2006,

[22] There is no explanation in His Lordship’s judgment delivered on 7 September 2006, nor in the “Certified - True Record” of the trial later certified by him on 16 January

2007), as to why no notice was provided by the Plaintiff to the Defendant prior to trial as required by Section 4 (1):

(a) that Mr Kamal Singh was not going to be called to give evidence (and the reasons); and

(b) that such evidence was to be led through the hearsay evidence of Mr Yogesh Chand (and the particulars of that evidence).

[23] In addition, it does appear at "P.1" of His Lordship's notes (page 2 of the "Certified - True Record") that there had been no exchange of witness statements prior to the hearing.

[24] There was also no indication in either His Lordship's judgment (or the "Certified - True Record" of the trial), that the Trial Judge had taken specific regard as required by Section 6 of the *Evidence Act* (the section says "***must***") "*to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular*" the six criteria listed. For example, there is no mention whether His Lordship had considered whether it would have been **reasonable and practicable** for Mobil, for whom hearsay evidence was being adduced through Mr Yogesh Chand, to have produced the maker of the original statement as a witness, that is, Mr Kamal Singh as required by Section 6 (a).

[25] According to Counsel for the Appellant (who appeared at both the trial and the Appeal), he did object to Mr Chand. In his written submissions, paragraph 7, Counsel for the Respondent states "that at no stage of trial has the appellant raised this issue" (though it is noted that different Counsel for the Respondent appeared at

trial and on the Appeal). The only notation in His Lordship's record is as follows ("P.1" of the Trial Judge's notes, pages 1-2 of the "Certified - True Record"):

"Yogesh Chand – comes in.

Plaintiff:

*Few preliminary issues.*

Court:

*Can Chand stay? Query exchange of witness statements.*

Plaintiff:

*Yes to stay. No exchange.*

Yogesh Chand (sworn)"

The very cryptic nature of these notes is self evident and cannot be condoned by this Court which should not be expected to guess what Counsel and the Trial Judge actually said in this passage. We refer to this fault again in subsequent paragraphs but will add only this: Taking notes of evidence is a tiresome and tedious but also a very necessary duty on all trial judges. The system of the recording of evidence in Fiji is most unsatisfactory but until it is changed by the introduction of an efficient recording system, judges must accept that they have a responsibility to litigants and the public to make careful and comprehensible records of the evidence in trials.

- [26] Further problems with the "Certified - True Record" of the trial were illustrated by "Document 13" which was a copy of a "Mobil Standard Contract" for the "Supply of Mobil Products". This was a blank document that the Respondent had tried to tender through Mr Chand's evidence to which the Appellant objected. The following exchange is recorded in His Lordship's notes at "P.6" (page 4 of the "Certified - True Record"):

"Doc. 13 –

Defendant:

*Object as blank and came in.*

Court:

*Agree."*

[27] So if the words "and came in" are recorded, was the objection upheld or disallowed? It is only by a close reading of His Lordship's later judgment, could it be inferred that "Document 13" was not admitted. At paragraph 11, His Lordship notes that "the plaintiffs [sic] rely upon an 'Application for Credit', (document 6)". Further, His Lordship does not refer to "Document 13" at all in his judgment but notes at paragraph 16: *"It is also accepted that no other contract documents were created, signed or supplied."*

[28] Counsel for the Appellant in his submissions before this Court highlighted that nowhere in his judgment has His Lordship discussed the criteria as set out in Section 6 in relation to Mr Chand's evidence. As Counsel argued in his written submissions (paragraph 6):

*"Had the learned trial judge taken the relevant factors regarding hearsay into account then the appellant submits that the result must necessarily have been different. That he accepted hearsay evidence while rejecting in its entirety the evidence of the only direct witness to the transactions between the parties (being the appellant herself) led to the wrong conclusions ..."*

[29] In that regard, the cross-examination of Mr Chand ("P.7" of His Lordship's notes, page 4 of the "Certified – True Record") is revealing:

"Cross Examination:

***What I tell is based on file and what K Singh told me. I joined in 2003.***

Q: *No direct personal knowledge*  
 A: *Only file and what K Singh told me."*

[30] Counsel for the Appellant submitted before us, how could His Lordship have made such a blanket finding as he did at paragraph 35 of his judgment in relation to the evidence of Mr Chand (without addressing the specific criteria in the Section as he must do) when he stated:

*"Having taken regard of the Civil Evidence Act and in particular section 6, I accept those responses."*

**Daniel Robinson, Darren Lum, Wai Tuinamanua**

[31] In her evidence, the Appellant had referred to **Daniel Robinson**, Managing Director of Mobil (recorded at paragraph 9 of His lordship's judgment as "David" Robinson), as the person who had canvassed the proposition with her of running the Walu Bay Service Station.

*"Daniel Robinson, managing director, of Mobil Oil knew he had to reduce risk portfolio. Was 80%.  
 He thought very – important we work together, to start taking back Mobil."*

[32] The Appellant also referred in her evidence to two other employees of Mobil from that time: **Darren Lum and Wai Tuinamanua**. This was recorded by His Lordship as follows ("P.15-P.16" of His Lordship's notes, pages 10-11 of the "Certified - True Record");

*"Darren Lum and Wai Tamitakala [sic]. Verbal agreement – us as team to take over and run Mobil Station.*

*Never any idea of me running it by myself. As no retail experience.*

*Agreed to run it together. I realized 2 staff of Mobil had no idea how to run it and take responsible and charge me for everything. No agreement in place to charge me.*

*May '99 I sought legal advice to create company PPL, to facilitate this.*

*I didn't want to partake, so I created company.*

*P.16 In May, Mobil insisted I sign agreement. I refused.*

*I agreed only sign in context of credit note being to PPL. There was still work in progress. Agreement didn't come about till June '99 when PPL incorporated.*

*Discussed with D. Robinson and K. Singh. They were in agreement."*

- [33] There are further notations throughout the Appellant's evidence as to discussions she had with Daniel Robinson and/or Kamal Singh such as ("P.16" of His Lordship's notes, page 11 of the "Certified - True Record"):

*"Discussed with D. Robinson and K. Singh. They were in greement [sic]."*

*"Spoke to K. Singh and he agreed."*

*"Always called and asked K. Singh."*

And further ("P.23" of His Lordship's notes, page 14 of the "Certified - True Record"):

*"Documents are all in possession of Daniel Robinson and K. Singh"*

- [34] The problems with the cryptic nature of the Trial Judge's notes were also illustrated in the Appeal when Counsel for both parties were taken to "P.22" of the Trial Judge's notes (page 14 of the "Certified - True Record") where his Lordship recorded the following from the Defendant's evidence:

*"I received payments. No requests from. I owed to 20,000 per month because of full time nature of business and my retainer fee for doing same service in Shell and B.P."*

- [35] On one reading of the Trial Judge's notes it could be inferred that the Appellant was also working as a consultant for Shell and BP. The Court was assured, however, by Counsel for the Appellant that this was not the case.
- [36] According to Counsel for the Respondent, despite problems which there may be with the "Certified - True Record" of the trial, and even though the Respondent company may have conducted their business in a less than satisfactory fashion, the "application for credit form" ("Document 6") was completed by the Appellant. She filled in the form and then it was approved the following day by Mr Singh for the Respondent company.
- [37] Therefore, Counsel for the Respondent submitted, there was a contract, albeit it may not have been a good contract, but there was a contract. In addition, he argued, the subsequent performance by the Appellant in ordering from the Respondent to supply fuel shows there was a valid contract.
- [38] In the alternative, Counsel for the Respondent pointed to the subsequent events of the Appellant in "running" the service station and ordering fuel from the Respondent, as well as the various invoices sent by the Respondent to the Appellant to the name given by the Appellant on the application for credit form, which showed that there was a contract.
- [39] Counsel for the Respondent company conceded that the one-page application for credit form was left blank in Section B "To be completed by Individual/Sole Traders" and that the Appellant had completed part 2 of that section: "To be

completed for company/partnership/trusts". Still, he argued, it made the Appellant liable as in Section A of the form, the Appellant had written down her name and address as the Applicant for credit. Also, he noted, that although the Appellant had put down the trading name of "Performance Plus Service Station Ltd" on the form, the actual name was never registered as a company. The actual company registered was "Performance Plus Ltd" on 25 June 1999.

[40] Further, Counsel for the Respondent noted, that Section E of the form "Estimated monthly requirements", (according to the evidence of Mr Chand) was completed : "\$190,000.00". This was accepted by the Trial Judge at paragraph 13 of his judgment. Even though there is perhaps an argument whether the figure reads "\$140,000" instead of "\$190,000" and as to who actually inserted those figures, there does not seem to have been a dispute about that figure or the completion of it by Mobil. Surprisingly, most of the remainder of Section E has been left blank as have Sections F and G ("the limit") in their entirety.

[41] In any event, Counsel for the Respondent submitted before this Court, whether the estimated monthly requirements were \$140,000 or \$190,000, it is not necessarily the amount which the Respondent agreed to supply to the Appellant which is the issue, rather, that the Appellant applied for credit and this was provided by the Respondent. Counsel drew the analogy of a bank providing an overdraft facility to a customer and the bank then honouring that facility even when the customer exceeded the overdraft limit. He submitted that the Respondent allowed the credit to continue (well above the monthly figure of \$190,000) and the Appellant continued to purchase the fuel on credit. Further, Counsel noted, there was no



dispute as to the amount owed. The difficulty faced by the Appellant, he concluded, was because the company she had named in the "application for credit" form as "Performance Plus Service Station Ltd" never came into existence. Thus, she was left liable for the total amount outstanding.

[41] Interestingly, the Trial Judge noted in paragraph 16 of his judgment:

*"It is also accepted that no other contract documents were created, signed or supplied. It is pertinent to note that at Box D in document 6 it states, **"I/We understand that your credit terms will be advised to us in writing". No such credit terms were supplied, if indeed they existed."***

[42] This finding is of concern to this court. If no such credit terms were supplied, then how can the Applicant be liable? It highlights even more acutely why there needed to be evidence from either Mr Singh, Mr Lum, Mr Tuinamanua and/or Mr Robinson.

[43] Another concern to this Court is the issue of the claim of \$34,373.00 for the rental of the Service Station. As the Trial Judge noted in his judgment (paragraph 17):

***"there is no document in the whole of this case concerning the granting of a lease or let of the Service Station premises."***

[43] His Lordship dealt with this issue at paragraph 21 of his judgment wherein he noted:

*"In response the plaintiffs [sic] cite the defendant's accepted e-mail of 30 May 2001 in which she seeks for a reduction in rent as a result of the events of May 2000. She does talk in the email about 'Mobil and P.Plus first agree on total amount outstanding'."*

[44] The email of 30 May 2001 was one of a number of documents attached to a letter of 8 April 2002 sent from the Respondent's lawyers to the Managing Director of Performance Plus Limited and was attached to "Document 14" tendered during the

trial. The email was from the Appellant to "Dominic Lum/South Pacific/Mobil-Notes" regarding "pp plus repayment proposal". In that email the Appellant wrote as follows:

*"Dominique,*

*I notice that the amount you quoted as adjustment in stock takeover on 23/02 is \$30,917.75 compared to our \$33,709.18. Also, you are still charging me full rental for the months of May 2000 and thereafter but no concessions made for reduced hours due to curfews, electricity cuts etc, etc. What about evaporation on total volume of fuel we purchased from day one. Shell and BP give their dealers rebates to account for this loss which is beyond the dealers [sic] control. I think it is only fair that Mobil & PPlus first agree on total amount outstanding. I'm still awaiting your reply to my yesterday's email.*

*Laisa"*

- [46] Interestingly, in a printed copy of the email attached to "Document 14", the Appellant's words "what about evaporation on total volume" had been underlined with a notation in the margin: "Not an issue to be negotiated!". This notation seems to be either initialled or signed by a 'D Lum". The bottom of the email then contains an earlier undated email to the Appellant with the sender as:

***"Dominic Lum,  
Resale Sales Manager – Fiji.  
Mobil Oil Australia Pty Limited.  
Suva. Fiji Islands.  
email: Dominic Lum@email.mobil.com."***

- [47] Counsel for the Respondent and the Appellant agreed that the above email signified that the Appellant accepted that rent was payable but was seeking a concession. Counsel for the Respondent argued it clearly made the Appellant liable whereas Counsel for the Appellant argued that the liability was for Performance Plus Ltd.

- [48] Unfortunately, Mr Lum was not called as a witness at the trial, despite the fact the Appellant's evidence was that there had been no agreement in relation to rent. Indeed, her evidence to the court had been recorded by His Lordship ("P.18" His Lordship's notes, page 12 of the "Certified - True Record") as follows:

***"Doc. 11 – Comments column, Service Station re – this is rent. I haven't paid rent at all; right from '99.***

***I only paid for fuel. This statement went to PPL accountants, accounts came with \$20,000 I charged them every month.***

***May '00 – Feb '01 – Should never have been rented.***

***Doc.14 – Email – PPL – that is my email from PPL, written by me. I was telling them from beginning there was no rental.***

***No lease, no agreement, no rental.***

***Q: Prior to 2000, they hadn't charged you rental.***

***A: No.  
They only charged me fuel."***

- [49] Under cross-examination, ("P.21" of the Trial Judge's notes, page 13 of the "Certified - True Record") the following is recorded of the Appellant's evidence:

***"PPL Debt was for supply of fuel. The lease debt came out of nowhere. I didn't know where came from. There was lease/rental debt in which wound up PPL company."***

- [50] Finally, in relation to an alleged consultancy between the Appellant and Respondent company, His Lordship rejected the Appellant's evidence stating at paragraph 6:

***"Mobil state that at no time was there a consultancy agreement for the payment of \$20,000.00 per month ... They accept that between January and June 1999 Ms. Digitaki did provide consultancy services for a total of \$13,125.00 and this sum was paid. There was no other consultancy agreement or services rendered."***

Then at paragraph 25:

*"She has produced no documents whatever to support her claim that she has a consultancy with Mobil."*

And at paragraph 27:

*"The terms of the consultancy was alleged to have been from January 1999 to August 2000 ... I do not accept this."*

- [51] This is despite the fact that in Mr Chand's evidence, which His Lordship accepted, the following is recorded ("P.2-P.3" of the Trial Judge's notes, pages 2-3 of the "Certified - True Record") that there was for a period some consultancy prior to 2000:

*"In 2000, Mobil and Exxon merged. We now also enter a legal document, responsibility and liability of each party, payment, product and employment."*

*From documents, cash disposal and remittances to Lisa, she agreed to provide consultancy to Mobil for merchandise, and operating of service station by herself."*

*In due course, paid on 4 occasions to total of \$13,000. It was ad hoc agreement, only responsible for Mobil. Nothing else in place for her or legal consultancy."*

*No request for other fees. May '99 last request and paid 1,800 something. That was when Service Station established. Thereafter no other payment."*

*... It was only to get service station started."*

- [52] In cross-examination, Mr Chand stated ("P2" of the Trial Judge's notes, page 8 of the "Certified - True Record"):

*"Jan-May '99 she was a consultant. Remittances made on specific dates. Was ad hoc basis. She charged us in time of hourly and we paid monthly."*

*Q: If she entered consultancy after this with Kamal Singh you wouldn't know."*

*A: I asked and he said there wasn't."*

- [53] Thus His Lordship was prepared to find against the Appellant in relation to the details of the consultancy (principally because there were no documents) but was

not prepared to find for the Respondent on the issue of rent even though, as noted above, he found at paragraph 17 of his judgment that there was no document produced by the Respondent “concerning the granting of a lease or let of the Service Station premises”. Instead, on the issue of rent, His Lordship relied upon an email reply from the Appellant to Mr Darren Lum who was not called at the trial, despite the fact the Appellant’s evidence was that there had been no agreement between them in relation to rent.

### THE UNSATISFACTORY STATE OF EVIDENCE

[50] In Wati v Kumar (supra), Justice Winter noted as follows (page 4 of the Paclii record):

*“Another important development introduced by the Act is **the power given to the Court to ensure the more relaxed rules allowing the admission of hearsay evidence are not abused.** Whilst evidence can no longer be excluded at a civil trial on the sole ground that it is hearsay **the Judge is still required to ensure that the evidence put before the Court under the Act is reliable and that parties do not take advantage** of this more liberal evidential regime in admitting hearsay evidence. **In fulfilling this “policing” role the Courts are required to take into consideration the guidelines provided by Section 6 in determining the weight to be adduced to the hearsay evidence** ... The grounds identified in Section 6 are guidelines for the Court to adapt to the specific facts of each case and not hard and fast rules which the Courts are bound to follow.”*

[51] In relation to Section 6 (a), Justice Winter then noted:

*“For our purposes **the most significant “policing” provision is provided by Section 6(a).** Where a party has unreasonably failed to produce the maker of a statement at trial **the Court may consider the witness to be inherently unreliable and as a result give the hearsay evidence little if any weight.** Where the reason for the witnesses [sic] absence is that he is unavailable by being overseas however it is likely that a Judge would give ‘full weight’ to the evidence.”*

[52] Whilst this Court would agree that a trial Judge must ensure that the parties do not “take advantage of this small liberal evidential regime in admitting hearsay

evidence”, at the same time, we cannot agree that where a witness is unavailable because they are overseas “it is likely that a Judge would give ‘full weight’ to the evidence”. This must depend upon the circumstances of each case.

[53] When a witness is unavailable due to their being overseas, an explanation is required by the party seeking to adduce such evidence by way of hearsay evidence through a third party. The requirements of such an explanation are clearly set out in Section 6 (a) of the *Evidence Act*. That is, “whether it would have been **reasonable and practical** for the party by whom the evidence was adduced to produce the maker of the original statement as a witness”.

[54] In such circumstances, a trial judge should invite submissions from Counsel for the parties on the issue and then rule upon it. Such ruling and the reasons underpinning it should also form part of the trial judge’s final judgment.

[55] Obviously, it would be far simpler for all involved, if, as occurred in *Wati v Kumar*, a party seeking to adduce such evidence made an application, well before the trial date, pursuant to Order 38 Rule 3 of the High Court Rules, for appropriate orders that a report or statement be admitted in evidence. Such a motion would be supported by an affidavit setting out the reasons as to why it would not be reasonable and practical to produce the maker of the original statement as a witness. That could then be heard as a separate motion which could also assist in isolating the issues for trial and, where appropriate, perhaps might assist possible settlement negotiations.

- [56] In that regard, we agree with what Justice Winter then went on to say in Wati v. Kumar (page 6 of the Paclii report):

*Although wide reaching in its implications the revision of the rules of evidence provided by the Civil Evidence Act of 2002 must be welcomed and embraced. Economies of scale and proportionality particularly in countries like Fiji with a limited ability to allocate scarce Court resources must inevitably lead to a design of systems that encourage efficiency and even handedness in civil litigation. **Constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable.***

***This is a case with a very modest claim for damages. It would in my view be out of all sense of proportion to require the plaintiff to produce the doctor to speak to his report** only because of some vague notional prejudice raised by the defendant.*

*I emphasise that the defendant has not specified any prejudice to its case. However **the legislation assumes there will be prejudice and balances that out in the ways I have described.** I find it very poor indeed that this defendant claims prejudice but has done nothing to refine his argument by way of requiring obvious extra particulars from the plaintiff or perhaps a notice that he intends discussing the matter with the doctor concerned."*

- [56] The problem is that the present case is far different from Wati v. Kumar in that:
- (a) Considering that the Plaintiff was claiming the sum of \$357,794.41 together with interest at the rate of 6% per month, this was an entirely different situation to that before Justice Winter in Wati v. Kumar where, as he said, the case was one of "a very modest claim for damages" and thus "it would ... be out of all sense of proportion to require the Plaintiff to produce the doctor to speak to his report".
  - (b) The major witness in this case was not a medical expert, nor was this an application by the Plaintiff for admission of a report or statement in lieu of the witness being required to appear at trial. Instead, this was a case where no notice was supplied as required by Section 4(1) of the *Evidence Act* which, although not affecting the admissibility of the evidence, could be taken into account by the Court

in respect of costs as well as a matter of adversely affecting the weight to be given to the evidence in accordance with Section 6 of the Act.

(c) In estimating the weight to be given to the hearsay evidence provided by Mr Chand of his conversations with Mr Singh, the Court had to consider Section 6, in particular, Section 6 (a), that is, whether it would have been reasonable and practical for the Respondent as the Plaintiff in the proceedings by whom the evidence of Mr Singh was adduced, to have actually produced Mr Singh, the maker of the original statement, as a witness. The evidence of Mr Chand was that when he joined Mobil in 2003 Mr Singh was still an employee, being General Manager of Mobil Guam. It is unclear whether at the time of trial in August 2006 this was still the case. This was a matter for the Respondent to assess and provide notice of to both the Appellant and Court, accordingly, well before trial. It failed to do so.

(d) In addition, at least in Wati v. Kumar, the Plaintiff had provided the Defendant with notification prior to trial so that the such application was able to be dealt with as a discreet motion by the Trial Judge prior to the actual final hearing. In the present case, unfortunately, the Trial Judge was put in the unenviable position of having only one witness for the Plaintiff (whose evidence was entirely hearsay) and no explanation appears on the Court Record as to why no notice was provided by the Plaintiff to the Defendant explaining the absence of Mr Singh.

(e) Further, even at the Trial, before Mr Chand gave evidence, there had been no exchange of any witness statements, leaving both the Trial Judge and Counsel for the Defendant completely unaware as to what evidence was to be given through this hearsay witness.



[57] The Appellant's first ground of appeal is directed at the Trial Judge's "interpretation and application of the Provisions of Section 6 of the Civil Evidence Act 2002" and, his "failing to take into account the requirements ... for weighing hearsay evidence, in particular subsections (b), (d) and (e)". It could well be argued that subsections (a), (c) and (f) may be just as applicable to this case. In any event, the wording of the Appellant's first ground of appeal is, in effect, a "catch all" phrase encompassing the whole of section 6 but drawing the Court's attention, in particular, to subsections (b), (d) and (e).

[58] The assessment required by Section 6 (a) as to "whether it would have been reasonable and practical" for Mr Kamal Singh to have been called as a witness for the Plaintiff present has already been dealt with above. The assessments required by subsections (b), (c), (d), (e) and (f) are as follows:

- "(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*
- (c) whether the evidence involves multiple hearsay;*
- (d) whether any person involved had any motive to conceal or misrepresent matters;*
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;*
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight".*

[58] Of concern to the Court is that the Solicitors for the parties held a pre-trial conference on 8 May 2006 where the issue as to the proposed use of hearsay evidence could have been discussed and, if not resolved, then brought back before the Court to have been dealt with as a separate motion well before the trial. Typed minutes of that pre-trial conference were provided to the Deputy Registrar of the High Court of Fiji at Suva for the Trial Judge wherein they dealt with the material

facts of the case, issues, documents and the estimated length of the trial but there was no mention in those minutes that the Trial Judge would be required to deal with the issue of admissibility of hearsay evidence from the main witness for the Plaintiff. Presumably, the Solicitor for the Plaintiff did not advise the Solicitor for the Defendant. The trial then took place some three months later. It is virtually impossible to ascertain from the Trial Judge's notes (as the official certified true record of the proceedings) as to what discussions (if any) took place during the trial in regards to the hearsay evidence of Mr Yogesh Chand.

[59] Closing written submissions were made by the Plaintiff's counsel. In relation to the *Civil Evidence Act* and the hearsay evidence relied upon by the Plaintiff to prove its case, they were dealt with in four short points:

1. The Act provides that such evidence should not be excluded;
2. The Act provides for notice but this does not affect admissibility;
3. The Act provides considerations relevant to the weight of such hearsay evidence;
4. The hearsay evidence of Mr Chand (together with the documentary evidence) is sufficient to prove the case, it is admissible subject to weight.

[60] Counsel for the Defendant preferred to make oral closing submissions. Some of the notations made by the Trial Judge from the closing address of the Defendant's Counsel were:

(a) ("P.22" of the Trial Judge's notes, page 16 of the "Certified - True Record"):

**Defendant:**

***"Chand mostly hearsay. Permissible. No huge amount of document."***

(b) ("P.30" of the Trial Judge's notes, page 18 of the "Certified - True Record"):

*"Uphold defendants evidence re how doc. 6 signed. Hers only evidence."*

(c) ("P.31" of the Trial Judge's notes, page 19 of the "Certified - True Record"):

*"Tuivanu [sic] v. S.C.C. 2000 FJHC58. (Smith v. Lucas confirmed)."*

[61] Whether the Defendant's Counsel made his objections clear enough to the trial judge, we will never know. He did in the "shorthand" record make the point that the trial judge should uphold the Defendant's evidence regarding the crucial "Document 6" (the "application for credit" form) as "hers [was the] only evidence".

[62] The reference to Tuinamuana v Suva City Council [2000] FJHC 58, was a reference to a judgment of Justice Scott in the High Court at Suva concerning a dispute as to the amount of a gratuity payment which was payable at the end of a set period of employment. Scott J noted:

*"It is a cardinal principle of construction of the terms of contracts that the meaning of a document or a particular part of a document is to be sought in the document itself: 'one must consider the meaning of the words used, not what one may guess to be the intention of the parties' (Smith v. Lucas (1881) 18 Ch.D. 531).*

*Where examination of the document does not clearly reveal its meaning extrinsic evidence may, in very limited circumstances, be admissible but those circumstances do not include drafts of the contract, preliminary agreements or letters of negotiation. And neither is it permissible to adduce evidence to show what the parties' subjective intentions were or that they were not in accord with the particular expressions used in the contract (see generally Chitty on Contracts – 24 Edn para 735)."*

[63] The point argued by Counsel for the Appellant was that His Lordship did much the exact opposite in finding for the Respondent in the present case.

[64] Although His Lordship at paragraph 9 of his judgment notes: "... that I must make the assessments as to weight which are required by Section 6", there appears virtually no assessment in the actual judgment as to the considerations which his Lordship gave in weighing that hearsay evidence. The only assessment made by His Lordship of that evidence was at paragraph 35 of his judgment wherein he noted that "having taken regard of the Civil Evidence Act in particular Section 6, I accept those responses". In our view, this is an unsatisfactory state of affairs.

[65] In most trial courts in the Fiji Islands, we are presently without the benefit of tape recorded evidence. The expectation has been for many years that trial judges would record in their own handwriting the evidence presented before them which would then be stored on the Court file with a typed copy of the judgment. Should an appeal be lodged, then the notes could be subsequently typed and later certified by the trial judge (in this case, this occurred on 16 January 2007, some four and half months after the trial) as the "Certified - True Record" of the proceedings. In other jurisdictions, prior to the introduction of tape recorded evidence, a trial judge often had the benefit of a court stenographer or "deposition clerk" to at least take down the evidence by way of shorthand writing or typewriter. Whilst this court agrees, as Justice Winter noted in Wati v. Kumar, that *"economies of scale and proportionality particularly in countries like Fiji with a limited ability to allocate scarce Court resources must inevitably lead to a design of systems that encourage efficiency and even handedness in civil litigation"*, we must seriously question whether the current state of affairs is fair to the trial judge, counsel appearing before them and the parties themselves. It is to be hoped that when the country returns to

Parliamentary democracy that the incoming Attorney-General, Chief Justice and Law Society, will look at this issue.

[66] In the meantime, this court is faced with the following unsatisfactory state of affairs in relation to this case:

(a) That an Appellant is arguing that there is virtually no record (in either the "Certified - True Record" of the proceedings or in the Trial Judge's subsequent judgment), as to the relevant criteria which the Trial Judge considered in weighing the hearsay evidence of Mr Chand – the one witness who appeared at trial for the Plaintiff;

(b) That Mr Singh as the original maker of the statements (relayed through Mr Chand's hearsay evidence), was alive, living overseas and still working as an employee of the Plaintiff company in 2003 is not in doubt. No notice was provided by the Plaintiff as to Mr Singh's unavailability nor as to why it would have been unreasonable or impractical to have him attend and give evidence at trial;

(c) That it is unclear from the evidence given by Mr Chand as to when the conversations he had with Mr Singh exactly took place. It seems to be inferred that the conversations initially occurred in 2003 (four years after the alleged agreement was entered into and three years before trial) but there may have been more recent conversations, we just do not know;

(d) That to rely upon the hearsay evidence of Mr Chand as to conversations he had with Mr Singh in 2003 and perhaps later (confirming the details of alleged conversations which took place between Mr Singh and the Appellant some seven years before the trial in 1999), is just not acceptable, particularly considering that this was not a modest claim;

(d) That the Court understands it would have been difficult for the original parties to recall details of exact conversations. To expect, however, a Court to accept as sufficient the evidence of a third party as to hearsay conversations he commenced having with one of the parties some four years after the events in question undermines the intention and spirit of the reforms introduced by the *Evidence Act* 2002.

[67] It is interesting to cite a decision on this exact issue decided very recently in Hong Kong – a region not unlike the Fiji Islands visited by many tourists and where it is feasible that witnesses for subsequent civil court proceedings may well be located overseas and thus outside the jurisdiction. In *Amrol v Rivera* [2008] HKEC 494 heard on 19 March 2008, the District Court of Hong Kong had to consider the admissibility or otherwise of hearsay evidence from an overseas witness who was unable to attend the hearing. The Plaintiff sought to admit a witness statement as evidence without calling that witnesses as she had returned to the United States of America and “could not return to Hong Kong because her husband was away and she needed to look after the children”. Thus, “the Plaintiff served a hearsay notice upon the Defendant two days before the trial was due to commence” seeking to adduce the witness’ statement as hearsay evidence (paragraph 6 of judgment).

[68] The Hong Kong legislation is somewhat different to Fiji in that Section 47 of the *Evidence Ordinance* allows a Court to exclude such evidence if pursuant to Section 47 (b) “the court is satisfied having regard to the circumstances of the case, that the disclosure of the evidence is not prejudicial to the interest of justice”. That section is then to be read in conjunction with Section 49 concerning considerations as to

the weighing of hearsay evidence. As Deputy Judge Ko in Amrol v. Rivera noted (at paragraph 14), the witness statement which the Plaintiff sought to rely upon was prepared some 15 months after the incident allegedly occurred and thus it was not only not contemporaneous but that the Plaintiff had not offered to take the witness' "evidence by video-link [from the USA] or apply for an adjournment to enable her to attend".

[69] His Honour then went on to note in paragraphs 15-16 of his judgment:

*"In my view, there are very pertinent and legitimate questions which the Defendant is entitled to ask Ms. Skellham. The Plaintiff's counsel does not dispute that. He, however, suggests that I can first examine the Defendant's denial and then go on to consider Ms. Skellham evidence if I have decided to reject the denial. I do not think that is desirable. **Both Ms. Skellham and the Defendant are referring to the same conversation. It is not practicable to assess the Defendant's denial without reference to Ms. Skellham's evidence. The Defendant will be prejudiced if she were deprived of an opportunity to cross-examine Ms. Skellham.***

*Given its controversial character, I am satisfied that the exclusion of Ms. Skellham's statement is not prejudicial to the interest of justice. I therefore excluded Ms. Skellham's statement."*

[70] Interestingly, His Honour then went on to note at paragraph 17:

***"In any event, I would have given no weight to Ms. Skellham's statement for the reasons stated above even if I had ruled it in."***

[71] What occurred in Amrol v. Rivera is very relevant to the present case and what weight should the Trial Judge have given to Mr Chand's hearsay evidence of his conversations with Mr Singh which were not contemporaneous recollections soon after the events in 1999 but Mr Singh's recollections some four years later in 2003 (if not later) as to what Mr Singh alleged was said between him and the Appellant in 1999.

[72] In her evidence (as noted above), the Appellant had referred to Darren Lum and Wai Tuinamanua as employees of Mobil with whom there was a verbal agreement that they would act as a team running this service station. There was also mention of a "Daniel Robinson" from Mobil (who, His Lordship has referred to as "David Robinson" at paragraph 10 of his judgment). The Appellant alleged that Mr Robinson was also involved in the discussions between her and Mr Singh. Neither Mr Lum, Mr Tuinamanua nor Mr Robinson were called. In addition, there is no record in His Lordship's judgment as to how he reconciled the non-appearance of these four employees (or former employees) of the Plaintiff with the evidence of the Defendant.

[73] Indeed, this was a case where not only was Mr Singh as the principal witness not called for the Plaintiff, nor were the three other witnesses (Mr Lum, Mr Tuinamanua and Mr Robinson) who were present at the time in 1999 when the arrangements were made between the parties. No explanation was given by the Plaintiff as to their whereabouts. The Respondent may well argue that they only relied upon Mr Chand's hearsay evidence and Mr Lum's email (and the latter document could be accepted on its face as a business record). Considering, however, the very different evidence given by Mr Chand (as to the hearsay evidence he had obtained from Mr Singh) which was diametrically opposed to that provided by the Appellant, it would have been appropriate to have provided at least a statement from Mr Lum. It would seem to this Court that it was open and appropriate for the trial judge to have assumed that any evidence which Mr Lum, Mr Tuinamanua and/or Mr Robinson could have given would not have assisted the Respondent's case: Jones v Dunkel



(1959) 101 CLR 298. Unfortunately, however, such inferences, have not been drawn in his Lordship's judgment.

[74] In addition, as Justice Winter said in Wati v. Kumar, “constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable.” We can only concur. This is indeed what the reforms introduced by the *Civil Evidence Act* 2002 were supposed to have overcome. Unfortunately, it appears not to have occurred in the present case.

[75] In Wati v. Kumar, Justice Winter noted (at page 7 of the Paclii record), that “each of the factors detailed in Section 6 of the Act should ameliorate most if not all defendant's concerns.” This was the balance which had been provided for by the legislation to counter the abrogation of the rule against hearsay and to provide for a fair trial to both parties. That is, if a party did not abide by the requirements of Section 4, then Section 6 came into play.

[76] On this point, it must be remembered that at the end of the day in the present case, the Respondent company carried the onus of proving their case. To do so by not providing their main witness, Mr Singh, in person to give original evidence and submit to cross-examination, or at least notice to the Defendant that they would be relying upon the hearsay evidence of Mr Chand, meant that the Plaintiff was leaving itself exposed to possible penalty, or, as Justice Winter noted in Wati v. Kumar, to a weighting exercise taking into account “each of the factors detailed in Section 6 of the Act”. Indeed, it was open to the Court to attribute very little weight or none at all, as Deputy Judge Ko did in Amrol v. Riviera, when he found that he would give

no weight to the evidence even if admitted. Unfortunately, there are just no specific details of any such assessment which occurred in the present case.

- [77] The issue of weight is an essential safeguard contained in the English and Welsh legislation upon which the *Evidence Act* of the Fiji Islands is based. When the legislation came into effect in England and Wales on 31 January 1997 (see UK Statute Law Database), it was accompanied by the 1998 *Civil Procedure Rules*. As Baroness Hale of Richmond explained in *Polanski v Conde Nast Publications Limited* [2005] UKHK 10 (at paragraphs 75-77) (later reported in [2005] 1 WLR 637 at 653-654 and [2005] 1 All ER 945 at 962-963):

*"Hence if it were thought that the courts' exclusionary powers should be made more explicit, this should be done by rules of court rather than by primary legislation ... This is clearly part of the powers of active case management which permeate the whole of the Civil Procedure Rules, all of which are subject to the overriding objective set out in CPR 1.1:*

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
- (2) Dealing with a case justly includes, so far as practicable, -*
  - (a) Ensuring that the parties are on an equal footing;*
  - (b) Saving expense;*
  - (c) dealing with the case in ways which are proportionate –*
    - (i) to the amount of money involved;*
    - (ii) to the importance of the case;*
    - (iii) to the complexity of the issues; and*
    - (iv) to the financial position of each party;*
  - (d) ensuring that it is dealt with expeditiously and fairly; and*
  - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

- [78] In *Polanski*, where the Plaintiff was seeking to give evidence in a libel suit via video link from France so that he did not have to appear at court in England (as if he did he would inevitably be arrested and extradited to the USA in relation to an

outstanding warrant for a criminal matter), Baroness Hale concluded at paragraph 80 ([2005] 1 WLR at 655 and [2005] 1 All ER at 963):

*"The Civil Evidence Act 1995 and the Civil Procedure Rules 1998 are part of a new approach to civil litigation in this country. The court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. **The court is to be trusted to evaluate the weight of the relevant evidence for itself.** The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not."*

[79] Thus, whereas the *Civil Evidence Act 1995* of England and Wales was read in conjunction with the *Civil Procedure Rules 1998*, similar rules of court have not been introduced in the Fiji Islands and until this takes place, the courts and the profession must look to the primary legislation. It does reinforce, however, the importance in the Fiji Islands as to the role of the trial judge in civil proceedings and the considerations he or she must undertake as relevant in assessing the weight to be attributed to hearsay evidence.

[80] In *R v Marylebone Magistrates Court; ex parte Andrew Clingham* (No.CO/4441/2000, 11 January 2001, Schiemann LJ and Poole J) [2001] WL 14903, the Queen's Bench Division (Admin Court), had to consider "an appeal by way of case stated" from a magistrate "on the question whether he was right to allow [hearsay] ... evidence to be admitted ... to make an anti-social behaviour order". The Court held that such evidence was hearsay but was admissible in civil proceedings pursuant to the *Civil Evidence Act 1995*, however, it then became a matter of

weight which the Court would attribute to such evidence as outlined in section 4 of the Act. Section 4 of the English Act is the same as section 6 of the *Civil Evidence Act 2002* of the Fiji Islands.

[81] As Lord Justice Schiemann noted in *ex parte Clingham* at paragraph 17:

*"The most obvious effect of a recognition that the evidence in question is hearsay evidence is that, **in considering what weight to give to the evidence, s.4 of the Civil Evidence Act will need to be borne in mind.**"*

And then at paragraph 19:

*"I do not accept that in all circumstances evidence which can not be cross-examined is not probative of anything. Such a holding would be contrary to the Common Law – which has always allowed hearsay evidence in some circumstances – and to the Civil Evidence Act section 2(4). Nor do I think it is a sensible course for a court to look at particular evidence and, if it comes to the conclusion that its weight in all the circumstances is so negligible that it is not probative, then to exclude it. This is an artificial complication. The evidence can be admitted. If its weight is slight or it is not probative the judge can say so. **If he comes to an unlawful conclusion his decision can be appealed.**"*

[82] In essence, this is why the Appellant succeeds in the present case. Whilst Mr Chand's evidence of his conversations with Mr Singh may have some probative weight, unfortunately, His Lordship has not provided in his judgment any details as to the relevant considerations he undertook (in particularly the criteria as set out in section 6) "from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence".

[83] Whilst it is true that the Appellant in the current case could have issued a summons in an attempt to have Mr Singh, Mr Lum, Mr Tuinamanua and/or Mr Robinson attend Court, this overlooks the issue as to whether they would have been compellable (especially, if any or all were now living overseas), not to mention the

logistics of locating the whereabouts of employees or former employees of the Respondent as well as to the costs involved in having them attend.

[84] The rule against hearsay has been abrogated in civil proceedings in the Fiji Islands so that evidence is admissible even if notice requirements are not complied with and then the legislation has given the task to the trial judge to attribute appropriate weight to the evidence by taking relevant considerations into account (compared with other jurisdictions such as Australia and Hong Kong where such evidence can be excluded or severely restricted if the interests of justice so require.) This has meant that the task allocated to the trial judge in Fiji by Section 6 of the Act "in estimating any weight to be given to hearsay evidence", is crucial to the fair operating of the Act (as the evidence cannot be excluded). Thus, the proper evaluation of that task is essential if there is to be a fair trial for both parties to an action.

[85] In relation to the onus of proof which was carried by the Respondent at trial, it is important to recall the words of Justice Dixon (as he then was) in Briginshaw v Briginshaw (1938) 60 CLR 336, when he stated at p.362:

*"But 'reasonable satisfaction' is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or **the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.** In such matters 'reasonable satisfaction' should not be produced by **inexact proofs, indefinite testimony, or indirect inferences.**"*

[86] Applying the above to the present case, it is noted that the Respondent did not comply with the notice requirements of Section 4 of the *Evidence Act*. The Trial

Judge recorded no considerations relevant to the weighing of the hearsay evidence of Mr Chand and, in particular, how he had dealt with the mandatory requirements set out in section 6 which states that “the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and, in particular” the various six criteria set out by the legislation. Indeed, it seems that the Trial Judge gave Mr Chand’s hearsay evidence full weight and simply concluded at paragraph 35: “Having taken regard of the Civil Evidence Act and in particular section 6, I accept those responses.”

- [87] The Plaintiff carried the onus of proof in this case to satisfy the tribunal on the balance of probabilities. To rely upon the hearsay evidence of Mr Chand (despite providing no notice of that intention nor a witness statement prior to trial), together with the cryptic way much of the evidence has been recorded, can only lead this Court to conclude that (following Dixon J’s judgment in Briginshaw v Briginshaw) the gravity of the consequences following from a particular finding against the Appellant as occurred in this case are considerations which must affect the answer to the question as to whether the issue has been proved to the reasonable satisfaction of the tribunal? In such matters, reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Unfortunately, in our view this is what has occurred in this case with the Trial Judge doing his best to deal with a Plaintiff who did not comply in either law or in spirit with the requirements of the *Evidence Act 2002*. For these reasons, the appeal must succeed.

[88] In view of the above, the matter must be submitted for re-trial. This is unfortunate considering it is now some nine years since the initial discussions and the “application for credit” form was completed in May 1999. The interests of justice, however, demand that a re-trial must take place. As we have noted a number of times in this judgment, this is not a very modest claim and to find against an Appellant in such circumstances based on such evidence works against the interests of justice and in our view the reforms envisaged by the introduction of the *Civil Evidence Act 2002*.

[89] As we are allowing the appeal, we do not consider it necessary to deal with grounds 2, 3 and 4 of the appeal.

### COSTS

[90] Even though the Appellant has succeeded in her appeal, the Court is of the view that each party should carry their own costs in relation to this appeal. Both parties met, prepared and signed minutes of a pre-trial conference held on 8 May 2006. The issue as to the availability or not of witnesses and how the Court would deal with that pursuant to sections 4 and 6 of the *Evidence Act 2002* were not raised in those minutes filed with the Deputy Registrar of the High Court of Fiji at Suva.

[91] The result was it then placed an intolerable burden on the Trial Judge to deal with the matter with virtually no documents and only one witness who was present during the period from 1999 to 2001. The submissions of either Counsel at the opening and closing of the trial would appear to have not really assisted the Trial

Judge by properly addressing this issue and requirements of Sections 4 and 6 of the Act.

[92] Not only has the behaviour of the Respondent company by not complying with the notice provisions of Section 4 not assisted the smooth conduct of the trial, the Appellant must also wear some responsibility in that the objections recorded as taken during the trial are somewhat vague to say the least (even with acknowledgment made as to the cryptic nature of the notes of the Trial Judge). Further, there was no evidence, it would appear, placed before the Trial Judge as to what attempts, if any, were made by the Defendant to provide other documentation and/or witnesses to be summoned in response to the Plaintiff's case. In the circumstances, we believe that each party should be responsible for their respective costs of the appeal.

[93] Despite the criticisms made as to the conduct of the trial by the Respondent, it is appropriate to note that Counsel for the Respondent (and his junior) who appeared on the Appeal took no part in the trial at first instance and their conduct before us was beyond reproach. In that regard, the Court was assisted in considering this Appeal by the oral submissions of Counsel for both parties with the Appellant and Respondent conceding points against their interest and clarifying a difficult record of proceedings. This has been appreciated by the Court. Any errors in this judgment are the Court's alone.

#### **PREPARING FOR A RE-TRIAL**

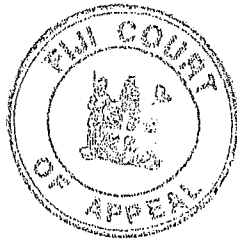
[94] In returning this matter to the Master for allocation of a new trial, we suggest that

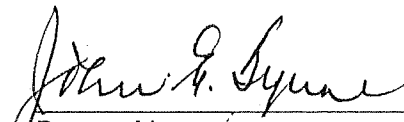


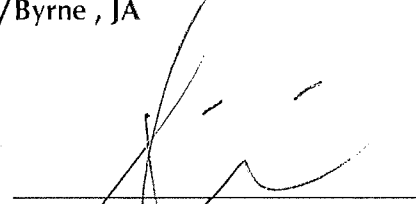
the parties, in conjunction with the Master, hold a further pre-trial conference prior to allocation of a new hearing date and agree upon what witnesses are to be called and what appropriate notices will need to be given pursuant to Section 4 (1) and the particulars relating to that evidence. A party which intends to call a third party to provide hearsay evidence if the original maker is no longer available, should provide a statement as to that witness' unavailability and annex to that affidavit the attempts made to locate that witness. Such affidavit should be provided to the Court and the other party well in advance of the trial.

[88] **ORDERS**

1. The Appeal is allowed.
2. The matter is to be listed for mention before the High Court Master within 28 days of this judgment to be given priority for a new trial.
3. Each party to pay their own costs of the appeal.



  
Byrne, JA

  
Hickie, JA

Solicitors:  
O'Driscoll & Seruvatu, Suva, for the Appellant  
Parshotam & Co, Suva, for the Respondent