

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

CIVIL APPEAL NO. ABU0083 OF 2007S
(High Court Civil Action No. 534 of 2005S)

BETWEEN: COVEC (FIJI) LIMITED

Appellant

AND: ATENDRA SINGH

Respondent

Coram: Pathik, JA
Powell, JA
Lloyd, JA

Hearing: Wednesday, 29th October 2008, Suva

Counsel: K. Qoro for the Appellant
N. Lajendra for the Respondent

Date of Judgment: Friday, 7th November 2008, Suva

JUDGMENT OF THE COURT

Introduction

- [1] By Notice of Appeal and Grounds of Appeal dated 20 December 2007 the appellant Covec (Fiji) Limited ('Covec') appeals against a ruling on the quantum of damages made by Coventry J ("the trial judge") in the High Court on 16 November 2007 wherein he assessed damages to be paid by the appellant to the respondent in the sum of \$586,416.55. That ruling refers to judgment on liability having been given by the trial judge sometime earlier. The judgment on liability giving rise to the ruling on quantum appears to be a default judgment first

entered on 16 November 2006 and then clarified by the trial judge with a further and more detailed default judgment on 23 November 2006.

- [2] In the second of those default judgments dated 23 November 2006 the trial judge entered judgment in default against the appellant for general damages for breach of contract; for other damages said to flow from breach of the contract; for the costs of rehabilitation work due under the contract together with interest and an order for costs. On 23 November 2006 the trial judge ordered the heads of damage we have just outlined to be assessed. Unfortunately, that assessment did not take place until one year later on 12 November 2007 and in the absence of the appellant or his counsel who clearly had notice of the assessment hearing but did not appear. Nevertheless, the trial judge proceeded to deliver his ruling on the assessment of damages a few days later on 16 November 2007.
- [3] It is clear from the appellant's Notice of Appeal and written submissions that in reality Covec is not seeking to appeal the assessment of damages but rather seeking to appeal the default judgment of the trial judge dated 23 November 2006, in which judgment the trial judge clarified his earlier judgment of 16 November 2006 and entered judgment in default for the plaintiff (the respondent in this Court) with damages to be assessed at a later time. In that judgment the trial judge also ordered the continuation of a Mareeva injunction over a number of vehicles owned by Covec. We were told at the hearing of this appeal that those vehicles are worth at least \$50,000.00.
- [4] In its Notice of Appeal Covec does not specifically appeal the default judgment of 23 November 2006 making it liable to pay damages for breach of contract to the respondent Attendra Singh ('Mr Singh'). On any view an appeal by Covec against that default judgment is well out of time. Yet at the commencement of this appeal Covec sought leave to appeal out of time the default judgment entered by the trial judge on 23 November 2006.
- [5] There are many issues of relevance to Covec's application for leave to appeal out of time. Mr Singh has been well aware for a number of years of the nature of Covec's defence on the merits and it appears to have been the subject of full argument before the trial judge on 27 September 2006. The nature of the

defence is simple and has never changed. Further, although it is technically correct that Covec has only appealed the assessment of damages, this assessment goes hand in hand with the finding on liability. In the case of *Disciplinary Services v Naiveli* [2003] FJSC 14 the Supreme Court confirmed the applicability in Fiji of a long established Australian and British common law principle that on an appeal from a final judgment it is open to an appellant to seek to question any interlocutory or other order which was a step in the procedure leading up to the final judgment. The Supreme Court also confirmed that on an appeal from a final order an appellate court can correct any interlocutory order which affected the final result.

[6] We are of the view that the final orders in the High Court in this matter were the orders made by the trial judge on 16 November 2007 and sealed by the High Court on 26 November 2007. It is these orders that finally order judgment for the plaintiff Mr Singh and on one view of the chronology of what took place any earlier orders or judgments were just steps on the way to the final orders and were in the nature of interlocutory orders or judgments. Applying the reasoning of the Supreme Court in *Disciplinary Services v Naiveli* to the facts of this case we feel we have the power to entertain an appeal against the trial judge's default judgment of 23 November 2006. At the hearing before us Mr Qoro, counsel for Covec both in this Court and the court below, explained that there were several reasons why he didn't appeal the default judgment of 23 November 2006 in a timely manner. Firstly, because it was just one in a series of judgments and rulings delivered by the trial judge in this case, each of which Mr Qoro regarded as interlocutory and the correctness of which he believed could be considered on an appeal from the final orders to be made by the trial judge. Secondly, because his continued repetition of his client's defence on the merits was simply being ignored by the trial judge and he considered it best to argue the merits of the defence on appeal after final orders were entered.

[7] We do not want to be seen as in any way encouraging the bringing of appeals out of time but in the unique circumstances of this case we are of the view that on balance Mr Qoro has clearly and cogently explained the reasons for Covec not appealing the default judgment in a timely manner and we are persuaded to

grant Covec leave to appeal the default judgment of 23 November 2006. This is particularly so given there was full argument by both parties before the trial judge as to the defence on the merits. We also take into account that counsel for Mr Singh quite fairly conceded that any resulting and relevant prejudice suffered by Mr Singh can be reflected in an order for costs.

- [8] As far as we can ascertain from the appeal bundle, on 27 September 2006 the trial judge heard full and vigorous argument from both parties on Covec's application to set aside the original default judgment including the merits of Covec's defence, but despite the obvious merits of Covec's defence (first made known to the High Court and Mr Singh in an affidavit dated 28 August 2006 on behalf of the appellant and filed in the High Court on the same day) the trial judge entered judgment in default. The reason the trial judge gave for entering judgment in default was Covec's failure to abide by an earlier order to deposit with the High Court the sum of \$102,311.10 by 25 October 2006. Surprisingly, the trial judge does not appear to have considered the merits of Covec's defence or the reasons given by Covec for its failure to file a defence within the time provided by the rules (as detailed in the affidavit of 28 August 2006 filed with the High Court). Covec's defence was quite simple. It averred that the contract giving rise to the plaintiff's claim was void ab initio and illegal as it required Ministerial consent, which consent had not been obtained. And that as a result neither party to the contract had any right to sue for damages for breach of its terms.
- [9] The respondent's submissions in this Court amounted to an argument that the trial judge was entitled to enter default judgment and that Covec should not be allowed to appeal that judgment out of time. Yet in oral argument counsel for Mr Singh had no alternative but to accept the merit of Covec's defence. In granting leave to Covec to appeal out of time we have also taken into account not only those factors discussed above but also the explanation given in an affidavit filed by Covec on 28 August 2006 for the delay in filing a defence, which delay in our opinion was adequately explained. In our opinion the trial judge erred in entering judgment in default.

[10] Before turning to the brief facts of the case we should briefly refer to an authority cited to us in argument by Mr Lajendra, counsel for Mr Singh. This is the judgment of this Court in *Shailend Shandil & Anor v Island Network Corporation Limited* (Civil Appeal No.ABU 46/2004). The case was cited by counsel in support of his argument that this Court should not grant Covec leave to appeal the default judgment of 23 November 2006. On its face the case is authority for the proposition that leave should not be granted to allow an appeal out of time from the entry of a default judgment. But when examined closely the facts of that case are clearly distinguishable from the instant case. That case was dealing with a situation, unlike the instant case, where no defence on the merits had ever been filed or fully argued. Further, this Court in that decision did not appear to have been referred by counsel to the judgment of the Supreme Court in *Disciplinary Services Commission v Naiveli*. We do not regard the decision as deciding that in no circumstances can there be an appeal out of time to this Court from a default judgment.

[11] Counsel for Mr Singh also submitted that the Court of Appeal Act and Rules do not allow Covec to appeal the default judgment out of time. We do not agree. Section 12(2)(f) of the Court of Appeal Act empowers this Court to grant leave to Covec to appeal the default judgment, which judgment for the reasons given by us above we regard as interlocutory.

[12] Rule 22 of the Court of Appeal Rules gives this Court wide powers to make any necessary orders to ensure the real question in controversy between the parties is determined on the merits. The real question in dispute between the parties in this case is the legality of the lease executed by the parties on 5 April 2003. Covec raised that issue on several occasions in the lower court and to do justice in this case it should be allowed to do so again in this Court.

The Brief Facts

[13] On 5 April 2003 Mr Singh as lessor and Covec as lessee executed a lease for a period of five years over a quarry known as Waivola, a piece of land of approximately six acres in size. The lease specifically stated that '*The parties agree that this lease is exclusively for the purpose of the lessee extracting and/or*

quarrying rocks and common stones from the said land' and further stated that the land was to be used for no other purpose but the extraction and/or crushing of rocks and stones. Rent for the five year period was stated to be in the sum of \$5,000.00 and *'in consideration for this lease agreement'* royalties (plus a premium payment) during the term of the lease were fixed at \$3.50 per cubic metre of rock/stones extracted.

- [14] The lease agreement was said to be subject to the approval of an environmental impact assessment report ('EIA') by the Department of the Environment, which EIA report was, *inter alia*, to detail proposed rehabilitation of the site. The lease was silent as to which party was responsible for paying the costs of the rehabilitation. The lease also stated that should the lessee during the period of the lease abandon its road project or commercial enterprises in Fiji that would be a breach of the contract and failure to remedy such breach after being given 14 days notice by the lessor to do so would entitle the lessor to cancel the lease and take possession of the land.
- [15] On 4 August 2003 the parties to the lease executed a variation to the lease dated 5 April 2003 but those variations are of no relevance to this appeal.
- [16] Covec is a Fijian limited liability company whose only two shareholders at the material time were China National Overseas Engineering Corporation ('CNOEC') of Beijing, China (198,000 shares) and Hu Hui Meng of China (1,999 shares). Covec was apparently a company formed in Fiji in 2001 to carry on CNOEC's business here. That business included Covec contracts with Fiji government departments for the building of roads, hence the need for the subject lease so as to quarry and crush the rocks and stones to be used by Covec in the fulfilment of those road building contracts. Documents were tendered and exhibited before Coventry J which showed CNOEC and Hu Hui Meng to be a foreign company and foreign national respectively. The respondent himself in his statement of claim pleaded that Covec's *'shareholders are foreign nationals'* (see clause 12 of Statement of Claim filed with the High Court on 31 March 2006). We fail to see how it could ever have been seriously suggested that CNOEC and Hu were not a

foreign company or foreign national respectively under the legislation relevant to the facts of this case.

[17] It is clear from both the pleadings filed in the High Court and from the evidence adduced both by way of affidavit and orally with accompanying business records that by late 2005 the parties were in serious disagreement as to the quantities of materials quarried and the amounts of royalties owing to Mr Singh from Covec. The parties could not reach agreement and a civil suit was commenced by Mr Singh in the High Court claiming damages for alleged breach of contract on the part of Covec. It is clear from the Statement of Claim that the various heads of damages claimed by Mr Singh all flow from alleged breaches of the terms of the contract. This was accepted by counsel for Mr Singh in argument before us. Damages claimed included unpaid royalties for materials quarried, the cost of rehabilitating the site and finally damages for royalties Mr Singh could have expected to receive had Covec continued to perform its road construction contracts with the Fiji Public Works Department. All these heads of damage were the subject of the assessment hearing before the trial judge on 12 November 2007 and which form part of his damages and costs ruling in the sum of \$586,416.55 delivered by him on 16 November 2007. During the course of the litigation and at the request of Mr Singh the trial judge ordered a Mareeva injunction to issue over a number of motor vehicles owned by Covec, which injunction continues in effect to this day. The injunction was ordered based on fears that Covec's officers might sell all its assets and its officers might depart the country, leaving nothing to satisfy the amount of any successful judgment Mr Singh might obtain.

[18] We have outlined above the course of the various hearings before the trial judge and the basis of the claim of the plaintiff Mr Singh. Covec's defence to the claim was relatively simple. In separate skeleton submissions filed by Covec in the High Court on 14 October 2007 and on 13 November 2007 Covec outlined its defence on the merits. The defence can be summarised as follows: Mr Singh's claims all arose from alleged breaches of the lease dated 5 April 2003; on its face

that contract was a lease on land (greater than one acre in size) entered into by a non-resident company which lease required the prior consent in writing of the Minister responsible for land matters (under the provisions of s6(1) of the Land Sales Act); the Minister had not given the necessary written consent and as a result the lease agreement was void ab initio for illegality and neither party could sue for damages for breach of its terms. As we have observed above, this defence was made known to both Mr Singh and the trial judge at an early stage of the litigation.

Principles of law applicable to the merits of Covec's defence to Mr Singh's claim

[19] We have outlined above all the relevant facts and circumstances relating to Covec's defence on the merits of Mr Singh's claim. It is quite apparent from the pleadings and indeed the trial judge's ruling on the assessment of damages that all of Mr Singh's claims flow from the terms of the contract. If the contract (lease) falls then so does the basis for all of Mr Singh's claims. The legality of the lease agreement falls to be determined by the application to the facts of the case of the provisions of the Land Sales Act.

[20] Section 6(1) of the Land Sales Act provides:

"6(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre."

[21] In our view it is unarguable that the lease the subject of this case is anything other than a lease over land and the lease as executed falls squarely within the terms of s6(1). The words 'take on lease any land' mean precisely what they say (see Gonzales v Akhtar [2004] FJSC 2 and Tokomaru Ltd v Port Denerau Marina Ltd [2005] FJHC 676). This conclusion is strengthened by the word 'land' being defined in s2 of the Land Sales Act as including 'quarries'. The lease itself in terms describes the land the subject of the lease as a quarry of some 6 acres in

size. Both parties agreed that the relevant Minister did not give his prior consent in writing to the execution or making of the lease.

- [22] Section 2 of the Land Sales Act provides certain definitions relevant to the facts of this case, as follows:

'non-resident' means an individual or a company not a resident as hereinafter defined:

'resident' in the case of an individual means an individual who is a Fiji citizen or an individual whose home is in Fiji and who has been resident in Fiji for not less than seven years at the date of the dealing or in the case of a company means a company, the controlling interest in which is held by a resident ...'

'controlling interest' means an interest by which a shareholder or shareholders is or are able to control a company...'

- [23] Applying the above definitions to the salient facts as outlined above it was patently obvious that Covec was a non-resident company for the purposes of the Land Sales Act as it was clearly controlled by a non-resident shareholder, namely CNOEC, a Chinese company. So much was accepted by the pleadings in Mr Singh's Statement of Claim.

- [24] What then flows from the evidence and the relevant legislation? To answer this question we need go no further than applying to the facts of this case the reasoning of the Supreme Court of Fiji in **Gonzales v Akhtar** and of the High Court of Fiji in **Tokomaru Ltd v Port Denerau Marina Ltd**, both of which cases consider the effect of the provisions of s6(1) of the Land Sales Act. Those cases decide that s6(1) is a clear and unequivocal declaration by the Legislature that in the public interest the particular types of contract referred to in the sub-section shall not be entered into without the written consent of the Minister. Further, that any contract or lease entered into in breach of the express prohibition stated in the sub-section can only be regarded as void ab initio, illegal, and unenforceable. The result is that neither party to the lease agreement the subject of this case can sue for breach of any of its terms.


Conclusion

[25] However unjust it might seem to Mr Singh to allow Covec to raise its own contravention of s6(1) as a defence, the public interest prevails and we must allow the appeal (cf *Australian Broadcasting Corporation v Redmore Pty Ltd* (1998) 166 CLR 454 at 465). However given the harshness of the application of the law to the moral strength of Mr Singh's claim, and given the not always excusable delay on the part of Covec at various stages of the litigation, we feel that in allowing Covec's appeal from the default judgement we should reflect the resultant prejudice suffered by Mr Singh in our final orders.


Orders

[26] For the above reasons we order that

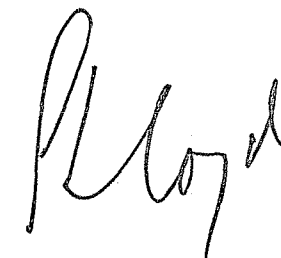
- (1) The appeal be allowed,
- (2) The default judgment entered by Coventry J on 23 November 2006 be set aside,
- (3) Judgment for the plaintiff in the sum of \$586,417.55 ordered by Coventry J on 16 November 2007 and sealed by the High Court on 26 November be set aside,
- (4) The appellant to pay its own costs of the Appeal and of the action before the High Court,
- (5) The appellant to pay the respondent's costs both of the Appeal and of the action before the High Court with costs fixed at \$30,000.00.
- (6) The Mareeva injunction granted by Coventry J be dissolved, but only after payment by the appellant of the respondent's costs.



Pathik, JA



Powell, JA



Lloyd, JA



Solicitors:

Qoro Legal, Lautoka for the Appellant
Lajendra Law, Suva for the Respondent