IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0034 OF 1995
(Judicial Review 6/88 - Lautoka)

BETWEEN:

KELTON INVESTMENTS LIMITED AND
TAPPOO LIMITED — Applicants

and

1) CIVIL AVIATION AUTHORITY OF FIJI — 1st Respondent

2) MOTIBHAI & COMPANY LIMITED — 2nd Respondent

Mr C.B. Young for the Applicants
Mr S. Inoke for the 1st Respondent
Mr G.P. Lala for the 2nd Respondent

Dates of Hearing: 18 May 1995, 26 June 1995
Date of Decision: 18 July 1995

DECISION

(Chamber application for (i) Leave to appeal against an interlocutory order, (ii) stay of interlocutory order pending determination of appeal)

The nature of applications

There are two applications before me - one for a stay order and the other for leave to appeal from an interlocutory order. The joint Applicants are Messrs Kelton Investments

Limited and Tappoo Limited. However, Counsel for the 1st Respondent (CAAF) has stated that he supports both the applications and has filed written submissions accordingly.

Although there is currently in force a temporary stay order until delivery of this decision, granting or refusing of a stay order pending determination of the intended appeal will depend on whether or not I give leave to appeal.

I propose, therefore, to deal with the application for leave to appeal first.

The Order of 10 May 1995

The order in question was made by Sadal J. in chambers in the Lautoka High Court on 10 May 1995 in Judicial Review Action No. 6 of 1988. His order as sealed on 15 May 1995 reads as follows:

> "....
>
> *UPON APPEARANCE by request of His Lordship of C.B. Young for the Applicant*
>
> *UPON REQUEST made by this Court on the 5th day of May, 1995 to Mr. Inoke of Counsel for the First Respondent and Mr. Cowey of Counsel for the Second Respondent to produce for inspection by this Court a copy of the Agreement dated the 17th day of August, 1994 made between the Civil Aviation Authority of Fiji the First Respondent and Duty Free Traders (Fiji) Limited to see if there was any breach of the order of this Court made on the 6th day of October, 1988*
>
> *AND UPON the Applicants' refusal as stated in the letter dated the 8th day of May, 1995 to produce a copy of the said Agreement*

IT IS HEREBY ORDERED that the Applicants produce to this Court for inspection as stated above a copy of the said Agreement between Duty Free Traders (Fiji) Limited and Civil Aviation Authority of Fiji as well as information on the shareholding of Duty Free Traders (Fiji) Limited on or before the 19th day of May, 1995.

....."

Brief background to the making of the Order

A brief background to the making of the 10 of May order is as follows.

On 5 October 1988 the 2 Applicants initiated Judicial Review proceeding No. 6 of 1988 in the High Court at Lautoka. On 6 October 1988 Sadal J. granted leave for Judicial Review and also made an ex parte injunction order in the following terms:

".....

AND IT IS FURTHER ORDERED that pending the determination of this application or until the Court orders otherwise the Civil Aviation Authority of Fiji and its servants agents or officials be restrained from accepting any tender to operate the duty free shop concession in the Nadi Airport Terminal Building in terms of the advertisement appearing in the Fiji Times on the 13th day of August, 1988 or otherwise AND for an Order restraining the Civil Aviation Authority of Fiji either by itself or by its servant agents or officials from entering into any contact pursuant to the said invitation for tenders as advertised in the Fiji Times on the 13th day of August 1988."

On 20 December 1993 the 2nd Respondent applied to the Court to dissolve the injunction and dismiss the Action for want of prosecution.

On 17 August 1994 an agreement was made between CAAF and Duty Free Traders Limited in relation to concession at the Nadi International Airport. The shareholders of Duty Free Traders Limited were Tappoo Limited, Kelton Investments Limited and Ba Provincial Council.

On 10 February 1995 Messrs Young & Associates, in response to an enquiry by Sadal J., advised the Lautoka High Court of the above facts and also that the Agreement of 17 August 1994 was not relevant to the application before the Court in Judicial Review Action No. 6 of 1988.

On 12 April 1995 Sadal J. granted the 2nd Respondent's application to dissolve the 1988 injunction and dismissed the whole of the Judicial Review Action for want of prosecution. This decision is currently under appeal (see FCA Civil Appeal No. 27 of 1995).

The need for leave to appeal from an interlocutory Order

Section 12(2)(f) of the Court of Appeal Act provides that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court.

However, before I commence to deal with the leave application it is necessary for me to refer to the contention

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of Mr Inoke (Counsel for the 1st Respondent) that no leave is necessary because Judge Sadal's order of 10 May 1995 was not interlocutory in nature.

In my view there is no merit in Mr Inoke's contention. The order made by Sadal J. was clearly an interlocutory one because it did not finally determine the cause, matter, application or proceeding in hand, i.e. whether there was a breach of his injunction at a time when it was in force. The matter in hand could be regarded as a new proceeding or application albeit initiated by the Judge himself. The learned Judge's order was but a preliminary step in finding out whether there was a breach and if so whether they were grounds for initiating contempt proceedings. Upon receipt of the information sought he may well decide that there was no need for any further action and thus finally dispose of the matter. Whether one takes the "order approach" or the "application approach" in my view the order of 10 May was an interlocutory one (see *White v Brunton* [1984] Q.B. 570).

I will now proceed to deal with the leave application before me. If I refuse leave then I need not deal with the stay application because there will be nothing to stay pending appeal.

principles on which leave is normally granted or refused

It is Mr Young's contention that leave should be granted because there are special circumstances surrounding the making of the order and that the intended appeal raises a point of general importance, in that whether the learned Judge had jurisdiction to make the order following dismissal of the substantive Action; and without any application by any party.

I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see *Hubball v Everitt and Sons (Limited)* [1900] 16 TLR 168).

Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:

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5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries 104 ALR 621 at 623 lines 29-31).

5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell (1936) 56 CLR 221 at 224).

5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.

5.5 Even "if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.

5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:

> *"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result." '*

Court's views re leave to appeal

The important point to remember about jurisdiction is that the injunction was in force when the alleged or possible breach took place, i.e. when the agreement was signed on 17 August 1995. The fact that the injunction was discharged subsequently does not deprive the Court of its right to

enquire if the Court's order was flouted when the injunction was in force. If the Judge's order was, prima facie, clearly without jurisdiction or plainly wrong affecting substantive rights then I would have had no difficulty in granting the leave sought and also the stay application. But the situation here is the reverse. Prima facie, the Judge had, in my view, jurisdiction to make the order he did. Every Judge must be allowed to protect and maintain the dignity and authority of his Court. Otherwise the judicial system will fall into disrepute and the authority of the Courts will be compromised and their influence diminished. This is neither in the public interest nor in the interest of legal practitioners. The Courts derive their authority and respect largely from the sanctions that attach to orders they make.

Whilst it is true that the order of 10 May was made in somewhat unusual circumstances (in that it was made in chambers without any application from any party to the Judicial Review Action which had already been disposed of) there is nothing unusual or exceptional about the order itself. Courts are littered with legal precedents confirming their authority to initiate or cause to be initiated contempt proceedings. The initial step taken by the Judge in this instance was in the interest of the Applicants also because it gave them an opportunity to support their contention by producing the Agreement.

In my view the order did not determine substantive rights.

Nor would compliance with the Judge's order do injustice or irreparable harm to the Applicants if leave is not granted. If the Agreement is commercially sensitive (as alleged) then it could be delivered to the Court's Registry in a sealed envelope addressed to the Judge marked "Confidential". Counsel for the 2nd Respondent has indicated that he was not interested in sighting the Agreement and has indeed suggested that the Agreement could be delivered to Court in a sealed envelope.

If the Agreement did not flout the injunctive order no harm can be done by producing it to the Court. But if it did breach the injunction then there can be no doubt that it should be produced and an explanation made. Contempt proceedings do not automatically ensue whenever a Court order is breached or apparently breached. Normally the alleged contemnor is given an opportunity to show cause or purge his contempt.

In my view the intended appeal against the interlocutory order of 10 May 1995 does not raise any point of law of any general importance, at least none which should be decided at this stage by the Court of Appeal.

If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore, no injustice can result from refusing leave to appeal.

The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

Orders

I, therefore, make the following orders -

(i) Application for leave to appeal refused.

(ii) Application for stay order pending appeal dismissed.

(iii) Applicants to pay 2nd Respondent costs of the proceedings before me.

Sir Moti Tikaram
President, Fiji Court of Appeal

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