

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

CIVIL APPEAL NO. ABU0075 OF 1998S
(High Court Civil Action No. 383 of 1997)

BETWEEN:

FAL INSURANCE (FIJI) LIMITED

Applicant

AND:

CONSORT SHIPPING LINE LIMITED

Respondent

In Chambers: The Hon. Justice Ian R. Thompson, Justice of Appeal

Counsel: Mr R.K. Naidu for the Applicant
Mr H. Lateef for the Respondent

Date of Judgment: Thursday, 11 February, 1999

DECISION IN CHAMBERS

The applicant is seeking leave to appeal against an order of Scott J. in the High Court that an action by the respondent be stayed and the matter referred to arbitration. Leave is required because the order is interlocutory (Court of Appeal Act (Cap.12) s.12(f)).

The facts in this case are almost Gilbertian. The respondent is a shipowner; two of its vessels were lost at sea. The applicant is an insurance company; it insures the respondent against loss of its vessels. A dispute arose regarding the applicant's liability to compensate the respondent for the loss of the two vessels. The insurance policy, referred to as the respondent's "standard marine hulk policy", provides that all differences between the parties are to be referred to the decision of an Arbitrator. The respondent's solicitors, apparently unaware of that provision, caused a writ to be issued out of the High Court claiming damages for the sinking of the ships. The applicant then gave notice of its intention to defend the action. Notwithstanding that the provision for mandatory referral to arbitration was a term of the applicant's standard

policy, *it* did not move to have the action stayed until the requirement had been met. Instead, *the respondent's solicitors*, having obtained a copy of the policy, did not proceed with the action and serve a statement of claim but themselves applied for a stay and referral of the matter to arbitration. Even though the requirement of referral was part of the applicant's standard policy, the applicant opposed the respondent's application! It wished the action to proceed in the High Court without referral for arbitration. However, Scott J. granted the application, stayed the action and referred the matter for arbitration.

The applicant sought Scott J.'s leave to appeal against his order. He refused leave. The applicant is now seeking leave from this Court. The grounds on which it makes the application are that Scott J. erred in not finding that the respondent had agreed to vary the insurance contract to allow disputes to be adjudicated by the High Court or had waived its right to have the dispute referred to arbitration and was estopped from exercising it. A further ground is that Scott J. erred in not holding that section 5 of the Arbitration Act (Cap.38) precluded the respondent requiring referral to arbitration after it had commenced the action in the High Court.

The parties have agreed to present their submissions in respect of the application in writing, without any oral hearing. Both have provided me with written submissions.

This Court is reluctant to encourage appeals against interlocutory orders; such appeals usually protract the period during which the action in the High Court remains undetermined. In some cases that may be justifiable but, before it will grant leave, this Court

must be satisfied that the interests of justice will be properly served by granting it. More particularly, it must be satisfied that the interests of justice will not be adequately served by allowing the interlocutory order to stand. Generally, allowing a judge's discretion exercised on a point of practice or procedure to stand is less likely to affect adversely the interests of justice than one which determines substantive rights. These principles are so well-established or self-evident that no useful purpose is served by citing authorities for them.

It is to be noted that Clause 3:13 of the applicant's standard marine hull policy provides that "*no waiver or variation of any rights, terms or conditions of [the] policy shall be effective unless agreed to by us in writing*". Apart from its opposition to the grant of the stay and to the referral of the matter to arbitration, there is nothing before me to suggest that the applicant has ever been asked by the respondent to agree with it that *the applicant* should waive its right to have the dispute referred to arbitration; in particular there was no such waiver before the respondent commenced its action. So the respondent was not seeking to take advantage of any concession by the applicant by commencing the action.

In my view the applicant's attempt to rely on section 5 of the Arbitration Act is misconceived. That section requires a party seeking to have an action stayed to show that he "was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration." It is difficult to see why the commencement of the action by the respondent's solicitors before they became aware of the requirement of arbitration in the applicant's standard policy should be regarded as preventing the respondent from showing that it was not in breach of the requirement of section 5, that is to say

that at all relevant times it was "*ready and willing to do all things necessary for the conduct of the arbitration*". The commencement of an action in a court of law will often indicate a lack of such readiness and willingness but I agree with Scott J. that it will not necessarily do so and, more particularly, that in the circumstances of the present case it did not do so.

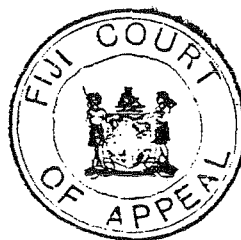
In the High Court, according to Scott J. in the reasons for his decision refusing leave to appeal, counsel for the applicant gave as the applicant's only reason for not being willing to have the matter referred to arbitration the fact that it "preferred to stay in the High Court because that is where the plaintiff commenced the proceedings". In his written submission supporting his application to this Court he has said that the issue of how the requirement of section 5 of the Arbitration Act is to be applied is one of general importance, that difficult questions of law have to be decided and that Scott J's order has altered the applicant's substantial rights. With respect, I find those submissions totally unconvincing.

The matter in dispute between the parties is pre-eminently suited to determination by arbitration by an arbitrator with experience of ships, their navigation, marine accidents and marine insurance. Doubtless that is why the applicant made it a term of its standard policy that referral of disputes to arbitration was to be mandatory. In those circumstances I can find no good reason why the instant dispute should not have been referred to arbitration. I cannot accept that the applicant will suffer detriment from the referral ordered by Scott J. Nor can I accept that any important questions of law are raised that require determination by this Court.

I am satisfied that Scott J.'s order of stay and referral to arbitration serves well the interests of justice and the sound administration of the judicial system. The applicant has, therefore, failed to satisfy me that leave should be granted to it to appeal against the order. The application must be dismissed; the applicant is to pay the respondent's costs of this application, which I fix as \$200.

Orders:

- (1) Application dismissed;
- (2) Applicant to pay the respondent \$200 as its costs of this application.



I. R. Thompson
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Mr Justice Ian R. Thomson
Justice of Appeal

Solicitors:

Messrs. Lateef & Lateef, Suva for the Appellant
Messrs. Munro Leys & Company, Suva for the Respondent