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

CIVIL APPEAL NO ABU0035 OF 2002
(High Court Civil Action No. HBC 312 of 1998)

BETWEEN:	FIJI BANK EMPLOYEES UNION	*Appellant*
AND:	BLUE SHIELD (PACIFIC) INSURANCE LIMITED	*Respondent*

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Tuesday 20 May 2003, Suva

Counsel: Mr R. Naidu for the Appellant
Mr S. Sharma for the Respondent

Date of Judgment: Friday 30 May 2003

JUDGMENT OF THE COURT

This appeal arises out of a Summary Judgment application by the respondent in the High Court. In a judgment delivered on 12 July 2002 by Scott J, the Judge ordered that the appellant be given leave to defend the Summary Judgment application conditional on the payment into Court of $10,000.

The appellant now appeals against that order.

Background

In 1992 the appellant took out a medical insurance policy for the benefit of its members with the respondent. The policy was renewed from time to time.

In 1997 the appellant was faced with revised premium rates and new policy terms and conditions which were to be imposed by the respondent on renewal of the policy. The appellant successfully sought cheaper premium rates from another insurer.

On 21 November 1997 the appellant wrote to the respondent and stated, inter alia:

> *" On this account my Executive Council has now confirmed for Fiji Bank Employees' Union NOT to renew its policy with Blue Shields.*
>
> *A last premium for the policy term with yourselves will be for the fortnight ending 20/11/97 which will be paid before the expiry date of our policy."*

By a letter dated 24 November 1997 the appellant made a claim in respect of a terminally ill member. Overseas treatment was requested on his behalf.

By a fax dated 25 November 1997 the respondent stated, inter alia:

> ***"As you are aware, fortnightly premiums are currently being remitted to us on an arrears basis. Since you had advised us, via your letter dated 21/11/97, that the last premium will be remitted to us for fortnight ending 20/11/97 (pay number 25) we had cancelled cover effective 20/11/97.***
>
> ***Given the above, we have no choice but to decline the above claim."***

By a letter dated 26 November 1997 from the appellant to the respondent it was stated, inter alia:

> ***"We are disappointed that Blue Shield has declined the above claim and cancelled our Medivac Policy Cover effective 20/11/97 when in fact our policy was due to expire on 12/12/97"***

There was then a change of tack by the respondent. By a fax dated 3 December 1997 the respondent advised the appellant that it was prepared to proceed with the evacuation of the appellant's sick member but pointed out that the medical insurance cover ceased at midnight on 11 December 1997 and that the respondent would therefore not be paying for any costs incurred beyond that date.

In fact the appellant's sick member had died on the previous day, 2 December 1997.

Early in the following year further correspondence passed between the appellant's solicitors and the respondent. For the appellant it was alleged that the refusal to urgently evacuate the sick member as requested in the letter of 25 November 1997 had resulted in an absence of urgent specialist treatment overseas

and the death of that member. It was claimed that the refusal was wrongful and in breach of contract. The respondent denied these allegations.

The respondent for its part alleged in a letter dated 25 February 1998 that there were premiums which were outstanding and unpaid. It demanded $16,015.26 by 10 March 1998. The appellant did not comply with the respondent's demand.

The Respondent's action

Proceedings, at the suit of the respondent, then followed. On 12 June 1998 the respondent, as plaintiff, commenced an ordinary action out of the High Court against the appellant as defendant. The respondent sought to recover $16,015.26 in respect of unpaid insurance premiums.

The appellant filed a defence. It denied that it was indebted to the respondent for the sum claimed, or any sum at all, and it raised a counterclaim alleging a breach of contract by the termination by the respondent of the insurance cover on 20 November 1997. The appellant claimed that the respondent's claim be dismissed and that the respondent pay damages to the appellant for breach of contract. The amount of the damages was not specified.

The Summary Judgment application

By notice dated 13 February 2001 the appellant's solicitors sought a pre-trial conference. A conference did not however take place. Five and a half months later, on 31 July 2001 the respondent took out a summons against the appellant seeking summary judgment for the amount claimed in the statement of claim in the action and the dismissal of the appellant's counterclaim. The summons was supported by a short affidavit exhibiting copies of the appellant's letter of 21 November 1997 and the respondent's letter of 25 February 1998. The deponent, Sekopa Waqa, deposed that the appellant had no valid defence to the plaintiff's claim and that the counterclaim was "a sham". Mr Waqa alleged that the appellant had expressly acknowledged being indebted to the respondent in the letter of 21 November 1997 but had failed to honour its obligation to pay the amount due.

The appellant filed an affidavit in reply by Diwan Shankar, the National Secretary of the appellant. Mr Shankar deposed:

> ***"... that (the respondent) had agreed to provide insurance cover for (the appellant's) members up to 12 December 1997 and in breach of the agreement between (the respondent) and (the appellant) (the respondent) terminated the insurance cover on 20 November 1997 as a result of which (the appellant) has suffered loss and damages"***

Mr Shankar asserted in his affidavit that the appellant had a valid defence and a counterclaim against the respondent and that the counterclaim might well exceed the respondent's claim. He also drew attention to the delay of three years

after the filing of the statement of defence and deposed that the action was now ready for trial.

The respondent's summons for summary judgment came on before Scott J. After hearing argument the appellant as we have stated above was given leave to defend upon payment into Court forthwith of the sum of $10,000.

The judgment under appeal

The Judge categorised the defence as a bare denial and stated that the affidavit raised defences which could not "as things stand" be raised at a trial. Likewise he said that the counterclaim "as presently pleaded is obviously unarguable".

The Judge recited the relevant prerequisites for the granting of summary judgment. In spite of his criticisms of the defence, he held that he was entitled to look beyond the pleadings to the affidavit in opposition to discover whether the defendant had disclosed an arguable defence. He then went on:

> ***"Before taking that step however, I have to be satisfied that the plaintiff's supporting affidavit verifies the facts upon which the plaintiff's claim is based (see O14r2) . It is at this point, as I see it, that the plaintiff faces a difficulty.***
>
> ***As has been seen, the plaintiff's largely unparticularised claim to be owed money by the defendant was met with a bare denial. Despite the denial however, Mr Waqa did not offer any further proof that the amount claimed was indeed owed beyond stating on oath this was the case. No copies of***

business records such as statements of account or computer printouts were annexed to his affidavit as is the usual practise."

The Judge then went on to criticise Mr Shankar's affidavit which he described as:

"... difficult to understand, appeared to be self-contradictory in parts and would seem to be plainly at variance with its own disclosed correspondence."

The Judge next observed:

"If the plaintiff's claim had been supported by some form of corroborating documentary evidence I should have been reluctant to allow the defendant leave to defend. But it is my experience of Fiji that calculations by banks, insurance houses and other businesses are not at all infrequently incorrect."

The Judge thereupon gave the appellant leave to defend on the condition set out above.

The appeal

In the appellant's notice of appeal and in its written submissions it raised a number of grounds of appeal including delay on the part of the respondent in seeking summary judgment. In our view the appeal can be dealt with quite shortly.

The appellant desires to defend the action. The effect of Scott J's judgment is that the appellant defeated the summary judgment application of the respondent and it can now defend the claim on condition that it pays $10,000 into Court (which it has since done).

The appellant's essential complaint is the imposition of the condition. In its notice of appeal the appellant complained that the Judge wrongly exercised his discretion and that he should have granted unconditional leave to defend. The appellant did not however either in its notice of appeal or in its written submissions articulate any arguments concerning the imposition of the condition by the Judge.

When Mr Naidu counsel for the appellant opened the appeal, in answer to a question from the Court, he confirmed that the appellant wanted to defend the claim and that its real complaint on this appeal was the requirement that it had to pay $10,000 into Court as a pre-condition of its defence to the claim. Mr Naidu did not however assist us any further on the condition point beyond submitting that the appellant's affidavit evidence raised issues which in the event led the Judge to conclude that the appellant was entitled to defend the claim albeit conditionally. Mr Sharma for the respondent conceded in answer to a question from the Court that the Judge did not give any specific reason or reasons for deciding to exercise his discretion to impose the payment condition. Mr Sharma made a faint submission that reading the judgment as a whole the Judge had "some reservations" about the appellant's defence. Beyond that point Mr Sharma was unable to support the condition imposed by the Judge. In the High Court the condition was not sought by

the respondent in the event of the Judge concluding that the appellant should be granted leave to defend. Indeed Mr Sharma in his oral submissions said that the finding of the money by the appellant "did not make any difference" to the respondent. He added that there was no disquiet on the part of the respondent as to the appellant's financial ability to meet a judgment.

Our decision

Order 14 r4(3) provides:

> ***" 4(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.***

Plainly the Court on the hearing of a summary judgment application has a discretion to grant leave to defend either unconditionally or conditionally but that discretion must be exercised judicially.

The condition of the payment into Court or the giving of security is nowadays more often imposed than formerly. See 1991 Supreme Court Practice Volume 1 page 154; Fieldrank Ltd v E. Stein [1961] 1 WLR 1287 (CA) 1288-89; but there must still be a good reason or good reasons for the imposition of such a condition. For example: (a) There is a real doubt about the defendant's good faith in

advancing its defence (b) the defence can be categorised as a "sham" (c) the likely inability of the defendant to be able to meet an adverse judgment.

Here as we have already noted the Judge did not give any specific reason for the imposition of the condition other than to say "in all the circumstances" he was giving the appellant leave to defend upon payment into Court forthwith the sum of $10,000. In the absence of any stated reasons by the Judge we have looked at the relevant circumstances disclosed in the case.

As we have recorded earlier there was an allegation by the respondent's deponent that the appellant did not have a valid defence to the claim and that the counterclaim was a "sham". The appellant's deponent Mr Shankar deposed to the contrary. While the Judge was critical of Mr Shankar's affidavit he did not make a condemnatory finding on the defence. There had been no suggestion by the respondent that there was bad faith on the part of the appellant or that it would have any difficulty in meeting the respondent's claim if its defence failed.

We have reached the conclusion that the Judge wrongly exercised his discretion in imposing the payment condition. In this case there was not a sufficient justification for it and we therefore propose to delete it.

Earlier we mentioned the delay ground of appeal. We record that Counsel for the appellant insisted, although stating that the attack on the imposition of the condition was the real complaint of the appellant, that the delay point should

remain a live issue in this Court. In our view the delay point was irrelevant to the outcome of the appeal and the respective positions of the parties. We therefore do not propose to deal with it.

Result

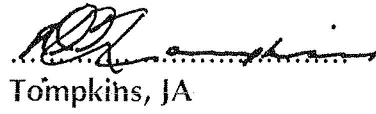
The appeal is accordingly allowed. The order made in the High Court is amended by the deletion of the words "upon payment into Court forthwith a sum of $10,000 (ten thousand dollars)."

Costs

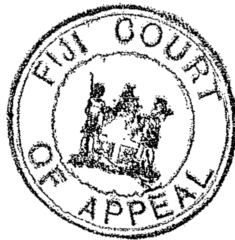
The appellant has succeeded on a point which was not taken by that party at the hearing It emanated from the Court. As well the appellant persisted with the delay point which was an irrelevant ground of appeal. For these reasons we make no order as to costs.

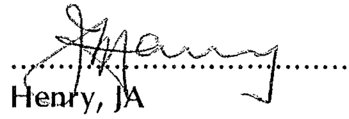
Payment out

We order that the sum of $10,000 which was paid into Court by the appellant be now paid out by the Registrar to that party.

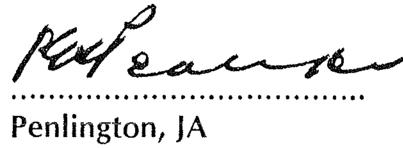


Tompkins, JA





Henry, JA



Penlington, JA

Solicitors:

Messrs Sherani & Co., Suva for the Appellant
Messrs Patel, Sharma & Assoc., Suva for the Respondent