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

CIVIL APPEAL NO. ABU0061 OF 2006S
(High Court Civil Action No. HBF 32 /05L)

BETWEEN: TOWER INSURANCE (FIJI) LIMITED

*Appellant*

AND: B. L. NAIDU AND SONS LIMITED

*Respondent*

Coram: Randall Powell, JA
Thomas Hickie, JA
Chandra Datt, JA

Hearing: Thursday, 3rd July 2008, Suva
Tuesday, 8th July 2008, Suva

Counsel: A. Sudhakar for the Appellant
D. Gordon for the Respondent

Date of Judgment: Tuesday, 8th July 2008, Suva

---

JUDGMENT OF THE COURT

---

[1] This is an appeal from the decision of Connors J who on 30 January 2006 gave leave to the appellant petitioner to withdraw and discontinue its winding up petition and ordered that the petitioner pay the respondent's costs assessed as on an indemnity basis.

[2] The appellant sought a stay of, and leave to appeal, the indemnity costs order. On 15 March 2006 Connors J refused both the stay and leave application and ordered that the appellant pay the costs of those applications on an indemnity basis.

[3] By Notice of Appeal dated 16 June 2006 the appellant seeks to substitute costs on "a standard scale" for "indemnity" in relation to the 30 January 2006 order and seeks to set aside the further orders made on 15 March 2006, namely orders dismissing its application for leave to appeal and a stay.

[4] An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred: ***House v The King*** [1936] 55 CLR 499

[5] It is the law that where a judge departs from the ordinary costs order the judge should give reasons for such departure. However *"where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the judge in making the order"*: ***English v Emery Reinbold*** *[*2002] 3 All ER 385 at 395-396

[6] The reasons the trial judge gave for making an award of indemnity costs were recounted in the 15 March 2006 judgment. In short the appellant, having on 4 November 2005 filed a petition to wind up the respondent for a debt of $1,137.50, actively persisted with the application in the face of an affidavit filed by the respondent on 15 November 2005 highlighting various difficulties with the petition. The most basic difficulty was that no demand had been made upon the registered office of the respondent in accordance with the Companies Act, namely 193 Victoria Parade Suva which had been the respondent's registered office since 5 February 1998. The petition had been served on the respondent's previous registered office, at 68 Suva Street, Suva.

[7] Following the respondent's affidavit of 15 November 2005 the appellant made enquiries of the Office of the Registrar of Companies and appears to have been incorrectly advised as to the registered office of the appellant, at least until 12 January 2006.

[8] In these circumstances the trial judge's decision to award indemnity costs against the appellant seems somewhat harsh but it is not possible to conclude that the exercise of his discretion in ordering indemnity costs on 30 January 2006 miscarried, subject to what is said in paragraph 15 below.

[9] When this matter came before the Court of Appeal for hearing there was nothing in the Court Record to indicate that leave to appeal had been obtained.

Section 12(2)(e) of the Court of Appeal Act provides that no appeal as to costs only shall lie "*without leave of the Court or the judge making the order*".

[10] At the Court of Appeal hearing the appellant sought by oral application to obtain leave from the Court and much of the hearing was taken up with this leave application. In support of the leave application the merits of the appeal were considered albeit briefly, the Court indicating that although the appeal itself had some merit it was minded to refuse leave. The appellant, it was said, in proceeding with the appeal, knowing that it needed leave to do so and knowing that no leave had been given, had abused the processes of the Court.

[13] The Court also indicated to the parties that it was likely to make no order as to the costs of the appeal because the respondent ought have made an application to the Court challenging the appeal for want of leave as soon as the Notice of Appeal was served or shortly thereafter. The attention of the Registry should have been drawn to the incompetence of the appeal at an early stage. Alternatively a Notice of Motion

seeking to strike out the appeal should have been filed. At the very latest the Callover Judge's attention should have been drawn to this apparent defect.

[14] Shortly after the conclusion of the hearing the Court was provided with a copy of an order made by 7 June 2006 the former President Justice Gordon Ward in chambers pursuant to which leave to appeal was granted and the costs orders stayed pending the determination of the appeal. Both parties were represented at this leave application and the order was entered on 23 June 2006. No reasons were given by Justice Ward for giving leave, which is a most extraordinary matter. However it must be assumed that the former President was of the opinion that the appeal was arguable, contrary to the express finding of Connors J.

[15] However it was not only extraordinary but extremely aggravating firstly that the Order giving leave was not included in the Court Record and secondly that neither party's counsel was aware that leave had been given. Be that as it may, the course that the Court was contemplating, namely refusing leave to appeal and making no orders as to costs, is no longer appropriate. However equally it is not appropriate, given the constraints on the Court's time and the subject matter of this appeal, to allow further Court time for oral submissions in these proceedings. The Court has carefully considered the record and the written submissions, has allowed further short oral submissions today, and, as stated above, is of the opinion that the exercise of the trial judge's discretion to award indemnity costs on 30 January 2006 did not miscarry except to the extent that those costs were not fixed by the trial judge.

[16] There was evidence before the trial judge on 30 January 2006 as to the costs claimed to have been incurred by the respondent. One document in the Court Record suggests that the respondent's costs approached $16,000 and the respondent was asking for costs of $12,000. In this Court's opinion the trial judge should have fixed the costs order of 30 January 2006. This should have been done to bring the dispute between the parties, where costs were already out of all proportion, to a

definite end, instead of leaving the possibility of further costly disputes over the assessment of indemnity costs. The trial judge having failed to fix the costs this Court will do so and fix them in the sum of $8,000.

[17] The appeal against the indemnity costs order of 15 March 2006 must, however, be allowed. The order was made on the basis that there was no arguable appeal issue and therefore no basis for a leave application. The subsequent granting of leave by Justice Ward demonstrates that, in his view at least, the appeal was arguable. The 15 March 2006 order for indemnity costs must be vacated and in its place an order made that the appellant pay the respondent's costs on the standard basis fixed at $1,000.

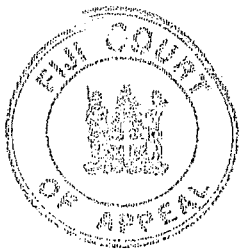
[18] Whatever the position may have been in 2006, this Court wishes to make it clear that in 2008 and beyond leave to appeal on costs alone should only be granted in exceptional cases. There is a very good reason why the Court of Appeal Act requires such appeals to be permitted only with leave and that is to discourage such appeals except in exceptional cases, firstly because cost orders are discretionary and appeals are likely to fail and secondly because the costs of an appeal will often greatly exceed the value of subject of the appeal.

[19] This appeal succeeds in part. Each party having had some measure of success there will be no orders as to the costs of the appeal.

[20] The orders of the Court are that the costs orders of Connors J of 30 January 2006 and 15 March 2006 be varied so that the words "on an indemnity basis" are replaced by "fixed at $8,000" in respect of the 30 January 2006 order and "fixed at $500.00" in respect of the 15 March 2006 order

Powell, JA

Hickie, JA




Datt, JA

Solicitors:

A.K. Lawyers, Ba for the Appellant
Gordon and Company, Lautoka for the Respondent