WASAWASA FISHERIES LTD v COMPETITIVE FOODS AUSTRALIA LTD (CBV0002 of 2003S)

SUPREME COURT — APPELLATE JURISDICTION

FATIAKI P, MASON and WEINBERG JJ

17, 21 May 2004

Corporations — shares — renouncement of agreement — removal of company from register — restoration of company to register — Companies Act (Cap 247) ss 340(1), 340(2), 340(3), 340(4), 340(5), 340(6), 341 — Exchange Control Act(Cap 211) ss 10(1), 20(1), 20(2) — Limitation Act — Supreme Court Act 1998 ss 7(3)(a), 7(3)(b), 7(3)(c).

Wasawasa Fisheries Ltd (the Petitioner) held shares in Fresh Fish Exporters (Fiji) Ltd (Fresh Fish). The Petitioner decided to issue shares to Competitive Foods Australia Ltd (the Respondent). Subsequently, the Reserve Bank of Fiji (Reserve Bank) acting pursuant to the Exchange Control Act (Cap 211) gave permission for the shares to be issued to the Respondent with certain conditions.

The Respondent was a resident outside Fiji since it was incorporated in Australia. Hence, permission was required from the minister before shares could be issued to the company pursuant to s 10(1) of the Exchange Control Act, which permission was neither sought nor obtained. The Respondent applied for a validation certificate from the Reserve Bank to which the minister has delegated his power on the issuance of validation certificate under s 20(2) of the Exchange Control Act. The Reserve Bank issued such a certificate to the Respondent on 29 July 1999.

However, it seemed that earlier on 18 March 1999 the Petitioner decided to renounce any agreement it may have had with the Respondent particularly on the issuance of shares. The Petitioner advised the Respondent of the said decision.

In 2000, the Registrar of Companies removed Fresh Fish from the register which meant the company ceased to exist. In 2001, the Respondent filed a petition in the High Court, which sought to have Fresh Fish restored to the register pursuant to s 340(6) of the Companies Act (Cap 247) and claimed to be entitled to make an application on the basis that it was either a member or creditor of Fresh Fish.

The High Court ordered the name of Fresh Fish restored to the register of companies and held that compliance be made pursuant to s 340(6) of the Companies Act by all concerned. The Petitioner appealed to the Court of Appeal but the appeal was dismissed.

Subsequently, the Petitioner filed a petition for special leave to appeal from the judgment of the Court of Appeal and submitted that the judge erred: (1) in fact and in law in finding the Respondent a member or creditor of Fresh Fish within the meaning of s 340(6) of the Companies Act; (2) in finding that Fresh Fish was at that time struck off the register "carrying on business or in operation", or that it was "otherwise … just that the company be restored to the register"; and (3) in the exercise of his discretion by ordering Fresh Fish restored to the register when there was no evidence sufficient to warrant adopting that course.

Held — (1) The principles that govern the reinstatement of a company whose registration was cancelled are well-established throughout the common law world. However, the matter is now regulated by specific statutory provisions. Generally, a court may reinstate a company on the application of any member or creditor aggrieved by the cancellation if it is satisfied that the company was, at the time of cancellation, carrying on business or in operation, or if the court was otherwise satisfied that it was just that the registration be reinstated. It was established that there was ample evidence to support the conclusion by the primary judge that the Respondent was a member of Fresh Fish under the provisions of the Companies Act and it was just that Fresh Fish be restored to the register. There is no lack of jurisprudence when a company can be said to be "carrying on

business", or can be said to be "in operation". It would be rare to grant special leave where the issue challenges the exercise of discretion and which exercise was challenged only on the basis of an alleged paucity of evidence. Moreover, the Petitioner in its application did not raise any error on the part of the primary judge or the Court of Appeal in its finding that the respondent was a member of Fresh Fish when it was removed from the register.

Petition dismissed.

Cases referred to

Fresh Fish Exporters (Fiji) Ltd v Wasawasa Fisheries Ltd (Admiralty Action No 4 of 1992); *Fresh Fish Exporters (Fiji) Ltd v Wasawasa Fisheries Ltd* [1998] FJCA 22; *Re Blenheim Leisure (Restaurants) Ltd (No 1)* [2000] BCC 554; [1999] EWCA Civ 1963; *Joseph Hunter v Investment Properties Ltd* (Civ App 6/1977); *Re Albion Machine Co* [1929] 1 DLR 274; *Re Bayswater Trading Co Ltd* [1970] 1 All ER 608; *Re Cambridge Coffee Room Association Ltd* [1952] 1 All ER 112; *Re Harvest Lane Motor Bodies Ltd* [1969] 1 Ch 457; [1968] 2 All ER 1012; *Re J J Weeks Constructions Pty Ltd* (1982) 31 SASR 96; 7 ACLR 102; *Re L Carroll Ltd* [1975] 1 NZLR 79; *Re New Timbiqui Gold Mines Ltd* [1961] Ch 319; [1961] 1 All ER 865; *Re Outlay Assurance Society* (1887) 34 Ch D 479; *Re Phoenix Extended Gold Mines Ltd (No 2)* [1903] St R Qd 183; *Re Timothys Pty Ltd* [1981] 2 NSWLR 706; (1981) 6 ACLR 823; *Giuseppe Ruggiero v Allessandro Bianco* [1998] FJCA 58; *Wasawasa Fisheries Ltd v Fresh Fish Exporters (Fiji) Ltd* [1999] FJSC 4, cited.

C. B. Young for the Petitioner

R. A. Smith for the Respondent

[1] Fatiaki P, Mason and Weinberg JJ. This is a petition for special leave to appeal from a judgment of the Court of Appeal delivered on 11 April 2003. By that judgment, the Court of Appeal dismissed an appeal against the decision of Pathik J, in the High Court at Suva, ordering that the name of a company, Fresh Fish Exporters (Fiji) Ltd (Fresh Fish) be restored to the Register of Companies, and that s 340(6) of the Companies Act (Cap 247) be complied with by all concerned.

[2] The principal grounds on which the petition is based are essentially as follows:

(a) that Pathik J erred in fact and in law in finding that Competitive Foods Australia Ltd (Competitive Foods), the Respondent to this petition, was a "*member*" or "*creditor*" of Fresh Fish within the meaning of those terms in s 340(6);

(b) that Pathik J erred in finding that Fresh Fish was at that time was struck off the register, "*carrying on business or in operation*", or that it was "*otherwise … just that the company be restored to the register*"; and

(c) that Pathik J erred in the exercise of his discretion by ordering that Fresh Fish be restored to the register when there was no evidence sufficient to warrant adopting that course.

The background facts

[3] Fresh Fish was incorporated as a company limited by shares on 6 September 1988. Wasawasa Fisheries Ltd (Wasawasa) held shares in that company. In its capacity as a shareholder, it resolved to issue shares to Competitive Foods. The shares were issued on 31 March 1989. Subsequently, and by letter dated 5 June 1989, the Reserve Bank of Fiji, acting pursuant to the Exchange Control Act (Cap 211), purported to give permission for the shares to issue to Competitive Foods, subject to certain conditions.

[4] Because Competitive Foods was incorporated in Australia, and was therefore resident outside Fiji, permission was required from the minister in order for shares to be issued to that company. Section 10(1) of the Exchange Control Act provides:

> Except with the permission of the Minister, no person shall in Fiji issue any security or, whether in Fiji or elsewhere, issue any security which is registered or to be registered in Fiji, unless the following requirements are fulfilled, that is to say:—
>
> (a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and
>
> (b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.

[5] For reasons that are not apparent, the permission of the minister was neither sought, nor obtained, prior to shares being issued to Competitive Foods. In *Giuseppe Ruggiero v Allessandro Bianco* [1998] FJCA 58 (*Ruggiero*), the Court of Appeal held that any permission granted after the issue of shares in contravention of s 10(1) did not retrospectively validate an initial unlawful issuance of such shares.

[6] It was necessary, therefore, in order to validate the issue of the shares, to obtain a certificate of validation pursuant to s 20(2) of the Exchange Control Act. That subsection provides:

> Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the competent authority, and the said acts shall have effect accordingly.

[7] On 5 May 1999, Competitive Foods, by its solicitors, applied for a validation certificate from the Reserve Bank, to which the minister had delegated his power under s 20(2). On 29 July 1999, the Reserve Bank purported to issue such a certificate. However, as will become apparent, Wasawasa had earlier, on 18 March 1999, "*renounced*" any agreement that it may have had with Competitive Foods under which shares would issue to that company. It had advised Competitive Foods of that decision.

[8] On 13 June 2000, the Registrar of Companies removed Fresh Fish from the register. That meant that the company effectively ceased to exist. It was that act, on the part of the registrar, that led to the application by Competitive Foods to have Fresh Fish reinstated.

The petition for reinstatement

[9] On 17 May 2001, Competitive Foods filed a petition in the High Court seeking to have Fresh Fish restored to the register, pursuant to s 340(6) of the Companies Act. It claimed to be entitled to make that application on the basis that it was either a "*member*" or "*creditor*" of that company.

[10] Section 340(6) provides:

> If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court, on an application made by the company or member or creditor before the expiration of 10 years from the publication in the Gazette of the notice aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation, or otherwise that it is just that the

> company be restored to the register, order the name of the company to be restored to the register and, upon a certified copy of the order being delivered to the registrar, for registration, the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may, by the order, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

[11] The petition filed by Competitive Foods seeking reinstatement of Fresh Fish to the register set out in some detail the basis upon which that order was sought. It stated that in April 1989, there had been an extraordinary general meeting of the then shareholders of Fresh Fish, namely Grahame Southwick and Margaret Southwick. The meeting resolved that Fresh Fish should issue 734,998 "A" class, and 10,000 "B" class, shares.

[12] The "A" class shares would carry one vote per share, together with certain dividend and return of capital rights. The shares were fully paid and would be allotted as follows:

Wasawasa Fisheries Ltd	234,998 shares
Competitive Foods Aust Ltd	375,000 shares
Gabridde Pty Ltd	125,000 shares
	734,998 shares

[13] The meeting also approved the transfer by Grahame and Margaret Southwick of two shares to Wasawasa bringing its total holding to 235,000. At that point, the records of the company listed Competitive Foods as holding just over 51% of the voting shares of Fresh Fish. Indeed, shortly thereafter, Competitive Foods received a certificate under the common seal of Fresh Fish certifying that it held 375,000 voting shares in that company.

[14] The petition for reinstatement stated that Competitive Foods was aggrieved by the fact that Fresh Fish had been struck off the register. It claimed that it would be just and equitable for that company to be restored to the register. It undertook to ensure that any statutory obligations that Fresh Fish might be required to meet would be discharged in the event that the company was reinstated.

The case in favour of reinstatement

[15] Competitive Foods submitted before Pathik J, and before the Court of Appeal, that the issues raised in this proceeding had to be viewed against the background of a long history of disputation and litigation between the parties. Fresh Fish had succeeded on no fewer than three occasions against Wasawasa in proceedings brought before the court. See generally *Fresh Fish Exporters (Fiji) Ltd v Wasawasa Fisheries Ltd* (unreported, Admiralty Action No 4 of 1992), *Fresh Fish Exporters (Fiji) Ltd v Wasawasa Fisheries Ltd* [1998] FJCA 22 in the Court of Appeal, and *Wasawasa Fisheries Ltd v Fresh Fish Exporters (Fiji) Ltd* [1999] FJSC 4 in the Supreme Court.

[16] Following the dismissal of Wasawasa's appeal by the Supreme Court, Fresh Fish began proceedings to enforce the earlier judgment of the Court of Appeal in its favour. The Supreme Court published its judgment on 10 March 1999. However, as previously noted, on 18 March 1999, just over a week later, Grahame Southwick wrote to Competitive Foods, on Fresh Food's letterhead, purporting to "*renounce*" any agreement on the part of Fresh Fish to sell or issue

375,000 "A" class shares. Enclosed with that letter were what purported to be "*minutes*" of a meeting of shareholders of Fresh Fish. The minutes recorded that the company's agreement to issue shares to Competitive Foods, and to its other non-resident shareholders, had been "*renounced*". Competitive Foods claimed that this action represented a "*last ditch*" attempt by Grahame Southwick to defeat the various judgments that had previously been given against Wasawasa.

[17] As a result of the ongoing dispute between Fresh Fish and Wasawasa, the affairs of Fresh Fish had fallen into disarray. No annual general meetings were held after 1991. Nor were any annual returns filed. Eventually, in accordance with normal practice, the Registrar of Companies gave notice, in the *Fiji Government Gazette* of 12 March 2000, of his intention to remove the name of Fresh Fish from the register unless good cause could be shown as to why that should not happen.

[18] Competitive Foods did not learn of the registrar's intention until late May 2000. The 3-month period of notice that the registrar had been obliged to provide was then about 2 weeks from expiry. There was little that could be done in the remaining period to prevent the company's name from being removed from the register. There was not enough time to arrange for any meeting of the company's shareholders, or to take steps to arrange for the company to file returns. Eventually, as noted earlier, the name of Fresh Fish was removed from the register with the effect that the company was dissolved.

[19] Although Fresh Fish was in considerable disarray by reason of the matters mentioned above, Competitive Foods argued that it was still operational. It was entitled to, and was in the process of, levying execution against Wasawasa upon the judgment handed down by the Court of Appeal on 29 May 1998, and later affirmed by the Supreme Court. That judgment, which was for the return of a boat, was said to be worth not less than $500,000. Competitive Foods also claimed that Fresh Fish had assets that exceeded that amount.

[20] Competitive Foods claimed that by reason of the shares that had been allotted to it in 1989 it was a shareholder, and therefore a member, of Fresh Fish. It claimed in the alternative that it was a creditor of that company. It said that Fresh Fish owed it an amount of not less than $92,544, and that the existence of this debt was confirmed by the fact that it was recorded in the audited accounts of Fresh Fish to 30 June 1991.

[21] Competitive Foods next claimed that there was ample evidence to support the conclusion reached by Pathik J that it was just that Fresh Fish be restored to the register. The only entity likely to be adversely affected by that order was Wasawasa. It was difficult to see how it could be other than "*just*" for that company to be subject to enforcement proceedings in relation to a substantial judgment debt.

The case against reinstatement

[22] The principal complaint made by Wasawasa against the judgment of Pathik J was that his Lordship had failed to address the arguments that it had advanced in opposition to the application to have Fresh Fish reinstated to the register.

[23] Wasawasa submitted that before Competitive Foods could succeed in its application for reinstatement, it had to demonstrate that it was either a member or a creditor of Fresh Fish as at 13 June 2000, the date on which that company was struck off the register. In addition, Competitive Foods had to establish either

that Fresh Fish was "*carrying on business or in operation*" or that it was "*otherwise just*" that it be restored to the register.

[24] Wasawasa submitted that it was clear that Competitive Foods had not been a shareholder in Fresh Fish prior to 29 July 1999, which was the date on which the Reserve Bank purported to issue a certificate pursuant to s 20(2) of the Exchange Control Act. It relied upon *Ruggiero* as support for that proposition.

[25] Wasawasa then submitted that the validation by the Reserve Bank had come too late to render Competitive Foods a shareholder in Fresh Fish. That was because the meeting held on 18 March 1999, in which the shareholders of Fresh Fish purported to "*renounce*" the agreement to issue the 375,000 "A" class shares to Competitive Foods, predated the action by the Reserve Bank. The decision on that date by the shareholders to terminate that agreement was taken on the basis that the Reserve Bank had not, by that stage, given permission for the shares to be issued. In addition, it was submitted that the shares should not be issued because they had not been paid for. It was contended that both Competitive Foods and another company called Gabridde to which shares had been issued had, by their conduct, made it clear that they were not prepared to pay for them in full. Accordingly, so it was submitted, Competitive Foods had never been a shareholder, and therefore had no standing to petition the court to have Fresh Fish restored to the register on that basis.

[26] Wasawasa then submitted that it was equally clear that Competitive Foods was not, as at 13 June 2000, a creditor of Fresh Fish. By that date, any claim that it may have had against Fresh Fish involving a sum of $92,544, or any other sum, was statute-barred.

[27] As regards whether Fresh Fish was "*carrying on business or in operation*", Wasawasa submitted that there was simply no evidence to support that conclusion. Wasawasa noted that Mr Southwick gave uncontradicted evidence that after his employment with Fresh Fish terminated in March 1992, the business and operation of that company came to an end.

[28] Wasawasa submitted that even if Fresh Fish had begun the process of levying execution against it, once the Supreme Court judgment had been delivered, such conduct did not amount to carrying on business, or being in operation. And even if it did, there was no evidence that the process was still taking place as at 13 June 2000.

[29] Finally, Wasawasa submitted that Competitive Foods had the onus of placing before the court sufficient material to enable it properly to assess the justice of the case. According to Wasawasa, Pathik J had concluded that it was "*otherwise just*" to reinstate Fresh Fish without any evidence having been placed before him to explain why that company had not filed any annual returns since 1991 or why, given the company's history, it would be just to restore it to the register.

The judgment of the Court of Appeal

[30] The Court of Appeal dealt with each of these contentions in a judgment that was detailed and comprehensive.

[31] The court began by noting that s 340(6) had to be read in conjunction with s 340(1)–(5). Those provisions set out in detail the procedures that had to be followed before the registrar could strike a company off the register.

[32] The Court of Appeal then referred to s 341, which provides that where a company is dissolved, all property and rights vested in that company prior to its dissolution shall, subject and without prejudice to any order which may at any

time, be made by the court under s 340, be deemed to be bona vacantia, and accordingly belong to the state. Section 341 was said to demonstrate that the legislature intended that orders under s 340(6) were to override the divesting effect that s 341 would otherwise have.

[33] The Court of Appeal then set out its understanding of the ingredients for a successful application under s 340(6). It said that an applicant for relief under that subsection had to satisfy the court of at least two matters. These were:

(1) that the applicant was the company, or a member or creditor of the company; and

(2) that at the time the company was struck off the register, it was carrying on business or in operation *or* that it was otherwise just that the company be restored to the register.

[34] It was noted that if at least one of the matters in each of these two paragraphs were established, the court would be empowered to make an order that the company be reinstated. It was further noted that s 340(6) recognised that persons, particularly third parties, might be disadvantaged by such an order. The subsection empowered the court, if it thought it just to do so, to give such directions and make such provisions for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. Pathik J had not given any direction, or made any provisions pursuant to the subsection. However, he had ordered that the subsection "*be complied with by all concerned*".

[35] The Court of Appeal next turned to the specific contentions raised by Wasawasa. It set out in detail the evidence that had been led before Pathik J. That evidence disclosed that Mr Southwick had, at one time, been the local manager of Fresh Fish. About 3 years into its operations, that company became involved in a major dispute with Wasawasa, and with Mr Southwick. Eventually Fresh Fish brought proceedings against Wasawasa for the recovery of a fishing boat known as "*Sunbird*" and also for damages for its unlawful detention. After a hearing in the High Court, an appeal to the Court of Appeal, and then an appeal to the Supreme Court, the proceedings terminated in favour of Fresh Fish. Wasawasa was ordered to deliver up the vessel to Fresh Fish within 14 days. The issue of damages was remitted to be determined by the High Court. No damages had yet been assessed.

[36] The Court of Appeal observed that the parties had been asked, during the course of the appeal, about the location of the vessel. The answers provided by counsel for both parties were described as "*vague and unhelpful*".

[37] The Court of Appeal rejected the contention that the purported allotment of shares to Competitive Foods had been unlawful because it contravened the provisions of the Exchange Control Act. It noted that the certificate issued by the Reserve Bank on 29 July 1999 recited that certain shares in Fresh Fish had been, in March 1999, issued to Competitive Foods and, at the same time, entered in the company register of Fresh Fish. It also noted that the Reserve Bank had in 1999 granted permission for the issue of those shares on 5 June 1989 and that the failure to obtain such permission, before issue, had been inadvertent and innocent.

[38] Competitive Foods relied upon the certificate issued by the Reserve Bank. It said that any illegality which may have attended the allotment of the shares did not invalidate the issue of the shares because the certificate operated to cure any illegality. Wasawasa replied to that submission by relying upon *Ruggiero*.

[39] The Court of Appeal distinguished *Ruggiero* on the basis that, in that case, the letter from the Reserve Bank had been written after Mr Bianco had rescinded the agreement in question because there had been a total failure of consideration. It followed that he was entitled to recover the sum of $100,000 that he had paid before any question of validation under s 20(2) arose. In other words, *Ruggiero* was a case where a contract had been lawfully rescinded before the relevant certificate was issued. The contract was thus at an end. The facts in *Ruggiero* were in stark contrast with the facts in the present case. Here, there was a company with three major shareholders. Competitive Foods held the majority of the voting shares and was therefore in a position to control the company. The action taken by Wasawasa on 18 March 1999 involved treating the shares issued to Competitive Foods as having been unlawfully issued. Effectively, Wasawasa treated the shares as non-existent, thereby enabling it to control Fresh Fish. It was only by virtue of that conduct that Wasawasa was able to "renounce" the issue of the shares to Competitive Foods.

[40] The Court of Appeal observed:

> The reality of the matter was that it was Wasawasa, not Fresh Fish, that was taking this action. The action was taken to nullify the effect of the judgment recovered by Fresh Fish against it.
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> But, in our opinion, it was not within Wasawasa's power to take this course. It was not dealing only within its own affairs as was the case in *Ruggiero*. No question of renunciation arose. It was seeking to disturb a long standing allotment of shares to which it had not only agreed but also effected. The contract for the issue of the shares had long since been completed. There was nothing more to be done. Wasawasa's remedy was to make application to the Court for the rectification of the register of shareholders. The application would have needed to join all shareholders and it would have been for the Court and not Wasawasa unilaterally to determine whether the other shareholders were lawfully entitled to retain their shares; see Ford's Principles of Corporations Law, 7th ed (1999) at 845–6, particularly concerning purported alterations of its share register made unilaterally by a company.
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> In our opinion the purported renunciation of the allotment of the shares to Competitive Foods in the letter of 18 March 1999 was of no legal effect. The subsequent issue by the Reserve Bank of the certificate under s 20(2) of the Exchange Control Act validated the issue of the shares retrospectively. In substance it said that acts done in March 1989 comprising the issue and transfer of the shares, being acts which were prohibited by the Exchange Control Act were to be, and were always to have been, as valid as if they had been done with the permission of the Reserve Bank.
>
> It follows that unless the purported renunciation of the allotment of the shares on 18 March 1999 was valid, the allotment was not unlawful. As we have said, it is our opinion that the renunciation had no legal effect. Thus Competitive Foods remained a shareholder after 18 March 1999. All taint of illegality in relation to the allotment disappeared with the issue of the certificate under s 20(2) of the Act.

[41] The Court of Appeal concluded, on the basis of this reasoning, that Pathik J had correctly determined that Competitive Foods was a shareholder of Fresh Fish.

[42] The next matter raised was whether Pathik J's alternative finding that Competitive Foods was a creditor of Fresh Fish in the sum of $92,544 was correct. Mr Southwick, in his affidavit, had denied that Competitive Foods was owed any money by Fresh Fish. The Court of Appeal concluded that there had been insufficient evidence adduced regarding this debt to have enabled his Lordship to conclude that the debt existed. Accordingly, this aspect of

Wasawasa's argument was accepted. It should be noted that the Court of Appeal did not find it necessary to determine whether the Limitation Act point raised by Wasawasa had been made good.

[43] Having found that Competitive Foods was a shareholder but not a creditor of Fresh Fish, the next question considered by the Court of Appeal was whether Fresh Fish, at the time it was struck off the register, was carrying on business or in operation. Competitive Foods did not suggest that Fresh Fish was then carrying on business. However, it submitted that Fresh Fish was most definitely in operation. It relied particularly on the fact that at the time of the striking off, Competitive Foods, as the controlling shareholder of that company, was setting in train steps to enforce the judgment to which Fresh Fish was entitled as a consequence of the Supreme Court decision on 10 March 1999.

[44] The Court of Appeal concluded that there was a substantial question as to whether Fresh Fish was "*in operation*" at the time it was struck off the register. In the circumstances, it considered that it would be preferable to leave that question, and deal with the alternative limb, namely whether it was "*otherwise just*" that Fresh Fish be restored to the register. It concluded that there was no doubt that Pathik J had correctly determined that issue. Competitive Foods was a major shareholder in Fresh Food. Fresh Food had a judgment against Wasawasa for the delivery of the vessel "*Sunbird*" and for damages for its unlawful detention. If the unilateral action taken by Wasawasa on 18 March 1999 was invalid, as the Court of Appeal had concluded, there was a strong necessity for some investigation to be conducted into what had happened to the vessel after March 1999, and particularly after July 2000, when Fresh Fish was deregistered.

[45] The final matter was the question of discretion. The Court of Appeal concluded that there was no basis for the submission by Wasawasa that the exercise of discretion by Pathik J had miscarried. It is unnecessary for present purposes to set out the reasoning by which the Court of Appeal came to that conclusion. It is sufficient simply to note the following observations by that court:

> We consider that the matter which should be given the most weight in relation to discretion is the fact that two shareholders were unlawfully removed from the share register of a company, subsequently struck off the register at a time when, so far as the evidence discloses, the company had two valuable assets, a ship and a claim for damages ordered to be assessed by the Court. In effect their property was expropriated without their knowledge or consent.
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> Purported dealings with the vessel before the company was struck off the register were, on both Pathik J's and our conclusions, done without the consent or approval of the majority shareholders. Any such dealings may well prove to have been done in contravention of Wasawasa's obligations to other shareholders and in breach of their fiduciary obligations by those acting as directors after the purported renunciation of the share allotments. These matters together with the absence of evidence from Wasawasa of any real prejudice persuade us that there was no miscarriage of Pathik J's discretion. We consider that the appeal should be dismissed.

[46] The Court of Appeal finally came to the orders to be made. Although it had reservations about the form of the second order made by Pathik J, it determined that that order should not be disturbed. However, it granted leave to either party to apply on notice to Pathik J or any other judge of the High Court for such variations of his Lordship's second order as they may be advised. The formal orders of the court were that the appeal be dismissed with costs, which the court fixed at $1500, and that there be liberty to apply on the terms previously indicated.

The petition to this court

[47] Mr Young, who appeared on behalf of Wasawasa, conceded with commendable candour that he could not establish that the petition raised "*a far-reaching question of law*" or "*a matter of great general or public importance*" within the meaning of those expressions in s 7(3)(a) and (b) of the Supreme Court Act 1998. He submitted, however, that the petition did raise "*a matter that is otherwise of substantial general importance to the administration of civil justice*" within the meaning of s 7(3)(c).

[48] Mr Young noted that it was by no means uncommon for companies in Fiji to be struck off the register, and thereby dissolved. He referred to evidence in the proceeding that showed that the Registrar of Companies had struck off a total of 58 companies on 14 April and 13 June 2000. He submitted that there was no case law in Fiji, apart from an obiter statement by Gould VP in *Joseph Hunter v Investment Properties Ltd* (unreported, Civ App 6 of 1977), as to the meaning of the word "*just*" in s 340(6) of the Companies Act. He submitted that it was a matter of substantial general interest to the administration of civil justice to have this court provide guidance as to how the discretion conferred under that subsection should be exercised. He further submitted that the failure by Competitive Foods to provide any adequate explanation as to why Fresh Fish had not filed annual returns since 1991 made it impossible for the primary judge, or the Court of Appeal, to be satisfied that it was "*just*" to reinstate the company. He submitted that although both the primary judge and the Court of Appeal had referred to various New Zealand cases dealing with the principles of reinstatement, neither had applied those principles, thereby creating a different body of precedent regarding the proper exercise of the discretion. According to Mr Young, the overseas authorities all required that an explanation be given as to why the company had ceased trading before any order for reinstatement could be made.

[49] Mr Young also referred to a passage in the judgment of the Court of Appeal where their Lordships observed that "*there is need for some investigation of what happened to the vessel after March 1999, and particularly after July 2000 when Fresh Fish was deregistered*". According to Mr Young, in making that statement the Court of Appeal failed to appreciate that Wasawasa had, on 29 March 1999, transferred the vessel back to Fresh Fish.

[50] Mr Smith, for Competitive Foods, submitted that the petition did not raise any matter that was of substantial general interest to the administration of civil justice. He submitted that the phrase "*otherwise just*" in s 340(6) conferred upon the court a discretion of the widest scope, and that every case had to be considered in light of its own particular facts. He submitted that there was no hard and fast rule that required an explanation to be given as to why a company had not filed returns for a number of years before being struck off, and as a condition of a grant of reinstatement. In the present case, the reason was obvious, having regard to the history of the matter. Moreover, once it became plain that Fresh Fish had succeeded in its claim for the return of the vessel, and that it had a substantial asset, namely the judgment in its favour, it was overwhelmingly clear that it was in the interests of justice that the company be reinstated. Otherwise, Mr Southwick would succeed in what was a transparent attempt to avoid enforcement proceedings being taken by Fresh Fish against Wasawasa.

[51] After hearing argument on the issue of whether special leave should be granted, the court concluded that leave should be refused. The principles that govern the reinstatement of a company whose registration has been cancelled are well-established throughout the common law world. The effect of striking off is to dissolve the company. At common law, all the ordinary consequences would follow from this. However, the matter is now regulated everywhere by specific statutory provisions.

[52] It is true that the court retains power to wind up a company which has been struck off. It does not appear to be essential that the company should be restored to the register before being wound up. However, in *Re Cambridge Coffee Room Association Ltd* [1952] 1 All ER 112, Wynn-Parry J said that it was "*desirable*" that this should be done. See also *Re Phoenix Extended Gold Mines Ltd (No 2)* [1903] St R Qd 183. Contrast *Re Albion Machine Co* [1929] 1 DLR 274 where it was said that restoration to the register was an essential prerequisite to winding up.

[53] In general, a court may reinstate a company on the application of any member or creditor aggrieved by the cancellation if it is satisfied that the company was, at the time of cancellation, carrying on business or in operation, or if the court is otherwise satisfied that it is just that the registration be reinstated. There is a wealth of authority dealing with when a company can be said to be "*carrying on business*", or can be said to be "*in operation*". See for example *Re Outlay Assurance Society* (1887) 34 Ch D 479 which held that these criteria were satisfied where a company, at the time of striking off, was carrying on business only for the purpose of winding up voluntarily and realising its assets.

[54] There is also a considerable body of authority dealing with the alternative criterion that it be "*otherwise just to reinstate*". See for example *Re L Carroll Ltd* [1975] 1 NZLR 79 where it was held that in considering whether it would be just to restore a company to the register, the personal circumstances of the individual shareholders could be taken into account. In that case, the application to restore the name of the company to the register was based upon the desire to take advantage, for taxation purposes, of accumulated losses of the company in embarking upon a new venture. There was evidence before the court as to why the company had not complied with its obligations to file annual returns. There were only two shareholders, and the company had plainly been insolvent for some years. In addition, the principal shareholder had been in ill health, necessitating extensive medical and hospital treatment. O'Regan J ordered reinstatement. His Honour gave no indication that it was a condition of doing so that a detailed explanation for past default be provided.

[55] In *Re Blenheim Leisure (Restaurants) Ltd (No 1)* [2000] BCC 554; [1999] EWCA Civ 1963 (26 July 1999) Nourse LJ, referred with approval to several earlier decisions by judges of the Companies Court. His Lordship described reinstatement proceedings as "*a curious form of quasi-administrative proceedings*" whereby the court, on being satisfied of various matters, exercises a power given by the legislature to resuscitate by restoration to the register a company which is then deemed to have continued to exist at all times. No orders are made in favour of any person for money or other relief of any sort. The applications are regularly and frequently made and habitually decided without the intervention of any extra person. His Lordship went on to say that the practice is to order reinstatement "*if a real advantage will accrue to the contributories or creditors of the company from its revival, and if all defaults are remedied*". Once

again, it is significant to note that there was no requirement that an explanation be provided, whether detailed or otherwise, of why annual returns had not previously been filed.

[56] It may be just that there be reinstatement to enable the company to pursue a claim by legal proceedings to provide funds for persons having claims on it. See also *Re Timothys Pty Ltd* [1981] 2 NSWLR 706; (1981) 6 ACLR 823 and *Re J J Weeks Constructions Pty Ltd* (1982) 31 SASR 96; 7 ACLR 102.

[57] Finally, it goes without saying that there is a great deal of authority dealing with the meaning of terms such as "*member*" or "*creditor*" in the context of reinstatement. See for example *Re New Timbiqui Gold Mines Ltd* [1961] Ch 319 at 325–6; [1961] 1 All ER 865 per Buckley J; *Re Harvest Lane Motor Bodies Ltd* [1969] 1 Ch 457 at 462; [1968] 2 All ER 1012 per Megarry J; and *Re Bayswater Trading Co Ltd* [1970] 1 All ER 608 at 609 per Buckley J. In many countries, including Australia, the relevant legislation now uses the broader concept of any person "*aggrieved*".

[58] As indicated earlier, after hearing Mr Young on the issue of special leave, we were not persuaded that the case raised a matter that was of substantial general interest to the administration of civil justice. The power to reinstate a company that has been struck off the register is necessarily one that will be exercised in a wide variety of circumstances. It would be wrong to lay down any fixed rule that states that a party seeking reinstatement must provide a detailed explanation as to why annual returns have not been filed. Sometimes, the explanation will be apparent from the surrounding circumstances, and appropriate inferences can be drawn. That is not to say that it may not be important, where registration has been cancelled for failure to lodge returns, for the applicant to provide an explanation for that failure and also to provide an undertaking that the company will bring its records up to date and pay all its fees. However, the reason why it may be important to provide an explanation is to enable the court to be satisfied that the company will, from the time of its reinstatement, comply with its obligations, and not because the historical record must in some way be perfected. It would be rare indeed for this court to grant special leave where all that is in issue is a challenge to the exercise of a discretion regarding a relatively routine matter of this kind. That is particularly so when the manner in which the discretion was exercised is challenged solely upon the basis of an alleged paucity of evidence.

[59] Because the court refused special leave to appeal, it did not proceed to hear argument regarding the substantial merits of the appeal. It should be noted, however, that Mr Young did not, in support of the application for special leave, rely upon any supposed error on the part of the primary judge, or of the Court of Appeal, in finding that Competitive Foods was relevantly a "*member*" of Fresh Fish as at the date upon which Fresh Fish was struck off. That of itself is a telling point. We could not, ourselves, discern any error in the reasoning at first instance, or on appeal to the Court of Appeal, with regard to that issue. Had it been necessary to do so, we would also have refused special leave on the basis that neither the decision at first instance, nor the decision of the Court of Appeal, was attended with any doubt.

[60] It was for these reasons that special leave was refused, and the Petitioner was ordered to pay the Respondent's costs.

Orders

(1) The application for special leave to appeal be refused.

(2) The petition be dismissed.

(3) The Petitioner pay the Respondent's costs.

Petition dismissed.