

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NO. 47 OF 1983

Between:

BISH LIMITED

APPELLANT

- and -

SHELL FIJI LIMITED

RESPONDENT

D. Whippy for the Appellant
F.G. Keil for the Respondent.

Date of Hearing: 28th March, 1984.

Delivery of Judgment:

JUDGMENT OF THE COURT

Speight, J.A.

In the main action the Plaintiff (Shell) sued the Defendant (Bish) for damages, being -

- (a) the amount paid for the purchase and installation of fire fighting equipment at its Walu Bay premises, which equipment proved defective and
- (b) damages not as yet quantified.

The Defendant denies liability and says that malfunction if any was due to fault by the Plaintiff's employees, and alternatively if the equipment was defective, the responsibility should be passed to its New Zealand suppliers - Ullrich Exports Limited.

The Defendant accordingly applied for leave to issue a Third Party Notice against Ullrich Exports Limited

and for leave to serve out of the jurisdiction.

In a Decision of 16th August, 1983, Kermode J. dismissed both applications, and the Defendant now appeals.

The Supreme Court Practice 1967 recognises two forms of procedure which may be used in appropriate cases.

- 1. In ordinary circumstances, where a Defendant has entered an appearance but has not filed a Statement of Defence a Third Party Notice may be issued as of right. (Order 16/1). Thereafter the defendant who filed the third party notice must by summons served on all parties apply to the Court for directions. (Order 16/4).

At the hearing of such summons the Plaintiff or the Third Party may raise any objections to the issue and the application may be dismissed, thereby terminating the third party notice.

In this case the Defendant did make an application before it had filed its Defence, but it did not apply under Rule 1, for with the proposed Third Party in New Zealand, leave for service out of the jurisdiction was required.

- 2. Consequently, and, as we think, sensibly, application for leave to issue was made under Order 16/2. On such application the matter can be dealt with ex parte, leaving objections to flow from the application for directions under Rule 4, or the judge can direct a summons to issue.

In the ordinary course we think the latter is the preferable course so that objections can be taken early, and we think the learned Judge would have done so in this case but for the fact that the fate of the Third Party Notice was so much dependent on the allied application for leave to serve outside the jurisdiction - and it was to this latter part of the application for leave that attention was primarily directed, including considerations relevant under Order 11.

Under that order the Court was examining rule 1(f) as to whether the Bish contract with Ullrich was made or to be performed within the jurisdiction. Was Fiji the proper law of this contract? The Judge expressed himself as not satisfied that the proof before him demonstrated jurisdiction. Had he made such an order then it seems almost inevitable that the proposed Third Party would avail itself of the procedure for applying to set aside as set out in notes 11/4/6 and 11/4/7 of the White Book (1967).

That being so it could be envisaged that complicated and drawn out litigation lay ahead, concerning the issues between the Defendant and the Third Party - litigation which could have little relevance to the issues between the Plaintiff and Defendant, which are straightforward.


Indeed we note that whereas the Plaintiff's order was for a new motor, the Defendant has admitted that a secondhand one was supplied, so the substantive action should be capable of prompt determination.

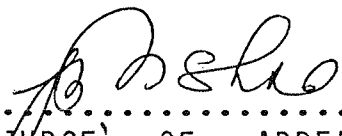
Usually questions of delay to the Plaintiff in pursuing its claim will be raised only on the application for directions under Rule 4 of Order 16, but as is pointed out in note 16/2/3, the issue of a Third Party Notice is discretionary, and in the special circumstances of this case we think the Judge rightly used that discretion, at the earlier stage, leaving the Defendant to pursue its

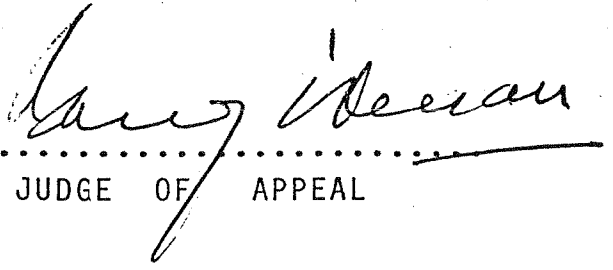
4. 68

more complicated litigation in separate proceedings.

The appeal is dismissed but as Mr. Keil appeared only as a matter of courtesy to the Court, and not at the behest of the Appellant, there will be no order for costs.


.....
JUDGE OF APPEAL


.....
JUDGE OF APPEAL


.....
JUDGE OF APPEAL