IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 67 OF 1990
(High Court Judicial Review No. 29 of 1989)

BETWEEN:

REDDY'S ENTERPRISES LIMITED — APPELLANT

-and-

GOVERNOR OF THE RESERVE BANK OF FIJI — RESPONDENT

Mr. B. C. Patel for the Appellant
Mr. M. Scott for the Respondent

Date of Hearing : 5th November, 1993
Date of Delivery of Judgment : 11th November, 1993

FURTHER JUDGMENT ON COSTS

Reasons for judgment in this matter were published on 14th December 1992. At the conclusion of them we stated (p.13):

> *"Instead of spending further time and money in litigation the parties might see fit to take some other course"*

This was followed by (ibid):

> *"The parties may wish to consider what order for costs, if any, should be made, and if they cannot agree, to make submissions. The fact is that there was no need to bring the proceedings at all; the appellant could have waited until the Bank took proceedings or threatened to do so. On the other hand the bank claimed a right to have the money repatriated, and was prepared to assert their claim before the Judge and on appeal"*

We doubt if we could have made it clearer that, at that stage, we were inviting the parties to save further costs and delay by agreeing to an order that each side should pay its own costs, a result which we then felt was the sensible one. We can hardly claim that our message achieved its object, if it was received and understood, when almost 11 months later we were required to consider a further 10 documents, comprising two notices of motion, four affidavits, 29 pages of submissions, and 72 pages of citations from reported cases and text books, most of which, naturally enough, were quite irrelevant to the question of how we should decide the matter of costs in this case and upon its own facts and events. We have also had oral submissions from counsel, both of whom came from overseas to argue this matter of costs.

We might add that virtually the whole of the affidavit evidence related to events which occurred after the decision was given in the High Court and while the appeal to this Court was pending - matters which were not before this Court and played no part at all in the decision given by it. Whether, if any order for costs in favour of one side or the other were to be made here, any of the costs relating to these activities or of their subsequent presentation to this Court would be allowed on taxation is not a matter of concern for us.

Prima facie the party succeeding on an appeal is entitled to an order that the costs of the appeal should be paid by the other party and if the decision in the Court below is overturned, and

the appellant had been ordered to pay the costs there, entitled to have that part of the order set aside as well. Whether that prima facie approach should be followed is dependant upon consideration of a number of factors, which, of course, are peculiar to the particular case and none other.

The relevant facts are set out in the reasons for judgment and we do not propose to repeat them. The appellant sought permission to retain the insurance monies off-shore for its own pecuniary benefit upon the basis that the law required it to obtain permission. It explored what means it could to obtain permission. It then brought these proceedings which did not seek any order about the applicability or otherwise of s.26 of the Act. At the hearing in the High Court counsel for the appellant commenced his opening by stating that this was a "Test case" (record p.112). The learned Judge found in favour of the bank upon the basis, we believe, of an incorrect construction of the Act, but made no order for costs in its favour, so that each side, as a result, was required to bear its own costs.

As we said in our reasons for judgment there was no requirement upon the appellant to commence these proceedings in the sense that any enforcement action had been begun to compel it to repatriate the off-shore funds, although a reason has now been given to the Court why it wished to avoid being subjected to any such action. We point out also that the original request made to the Governor of the Reserve Bank for permission to retain the funds off-shore was upon the basis that the appellant would reap

a substantial pecuniary benefit from doing so. In our opinion it was perfectly entitled to do so, but it only requested any permission "not beyond June 1991", pending the construction of a new hotel in place of the one that was destroyed. There is no suggestion that any of this money has since been repatriated, nor used for the construction of a new hotel.

It is noted also that the appellant did not appeal against that part of the order in the High Court which, in effect, required each party to pay its own costs, and has not sought to include any such costs in its present claim.

In all the circumstances we are of the opinion that the proper order is that each side should pay its own costs.

We were asked to assess a sum appropriate to be paid by the respondent in respect of the appellant's costs of the appeal in the event that we made an order that the respondent should pay them. In the light of our decision that becomes academic, but it is to be noted that there was no suggestion that this Court did not have the power to make such an order. We say nothing about whether it would have been appropriate in this case to do so.

The formal order is:

Each party is ordered to pay its own costs of the appeal.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Mr. Justice Michael Scott
Justice of Appeal