

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

CIVIL APPEAL NO. ABU0029 OF 1998
(High Court Civil Case No. HBC0228/96S)

BETWEEN: BUBBLE UP INVESTMENTS AND

1st Applicant

BASHEER AHMAD SHAH

2nd Applicant

AND:

CARLTON BREWERY (FIJI) LTD

Respondent

In Chambers: The Hon. Justice I. R. Thompson. Justice of Appeal

Date of Decision: Friday, 27th November 1998

DECISION IN CHAMBERS

On 23 May 1996 Byrne J. in the High Court granted the respondent an injunction restraining *inter alios* the two applicants from doing certain acts. Those acts were essentially selling the first applicant's products in bottles marked as bottles of the respondent. On 30 April 1998 the applicants appeared before His Lordship; they were alleged to have breached the injunction. He recorded that the applicants "pleaded guilty" to breaching the injunction. He dealt with the matter as a criminal contempt and on 22 May 1998 sentenced each of the applicants to pay a fine of \$15,000. He did not expressly convict them, as he had earlier convicted two other persons for breaches of the same injunction, but he sentenced them as though he had convicted them. The fine was to be paid within seven days; in case of default by the first applicant, distress was to be levied and, in case of default by the second applicant, he was to be committed to prison for three months. The second applicant's passport was required to be delivered to and retained by the Registrar.

On 4 June 1998 the applicants filed in the registry of this Court a notice of appeal seeking to have that order set aside. Their grounds for seeking leave to appeal are that the acts which were held to constitute contempt of court did not do so, that, if they did, the penalties imposed were harsh and excessive, and that matters which should not have been taken into account were taken into account in imposing them. On 8 July 1998 they took out a summons seeking stay of the sentence or alternatively bail until the appeal is heard and determined. On 30 July 1998 both parties agreed before Tikaram P. that section 21(1)(c) of the Court of Appeal Act (Cap. 12) required that leave be obtained before the appeal could be commenced. He directed the applicants to make that application within 21 days.

An application for leave has been made and has now to be dealt with together with the application for a stay or bail. There is also an application for an order that the second applicant's passport be returned to him at least for a period of at least two weeks.

The High Court has the same powers as the High Court of Justice in England to deal with cases of contempt of its authority (High Court Act (Cap.13), section 18). The distinction between criminal contempt and civil contempt made by the English courts is, I believe, applicable in Fiji. The contempt of court which Byrne J. found to have been committed occurred in respect of an injunction granted in a civil action.

A criminal contempt is an act "calculated to bring a court or a judge of the court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts" (*R. v. Gray* [1900] QB 36,40). The acts

of contempt alleged against the applicants were not done in the face of the Court; nor was their nature such that they were directed primarily at the Court. Rather they were directed at the respondent. It is arguable that, if they constituted contempt of court, it was civil contempt, that they did not amount to criminal contempt and that the judge had no power to treat them as such. However, the appellants have not framed their appeal on that basis. It is necessary, therefore to deal with the present applications on the basis that they pleaded guilty to acts constituting criminal contempt and that they were sentenced on that basis.

Nevertheless, in their submission in support of their stay application they have contended that the acts admitted constituted a civil contempt and not a criminal contempt. If the order made by Byrne J. was in respect of civil contempt, it was a final order and the applicants would have a right to appeal against it without leave. That being so, I consider that leave to appeal should be granted; as the contempt was dealt with as a criminal attempt that leave is to be given under section 21(1)(c) of the Court of Appeal Act.

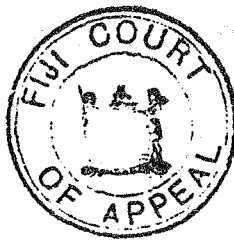
It is convenient to deal with both the application for stay or bail and the application for release of the second applicant's passport together. The applicant has filed an affidavit, to which are exhibited statements of account in respect of the first applicant prepared by an accountant for income tax purposes. In the affidavit the second applicant says that over the past two years the value of business carried on by the first applicant has reduced substantially and that a bank to which it owes a substantial debt might take proceedings to wind it up if it had to pay \$15,000. Because in statements of account prepared for income tax purposes the value shown of assets after depreciation has been allowed for those purposes often does not reflect

their real current value and expenditure items like depreciation do not reflect the actual amount spent in the tax year, caution is required in placing reliance on them in proceedings such as these. Nevertheless, they do support the second applicant's statement that the level of sales has reduced and that the first applicant is substantially indebted to a bank. The second applicant does not, however, give any details of his own personal assets or income to show that he does not have adequate means to pay the fine imposed on him without suffering severe financial hardship or being forced into bankruptcy.

There is no evidence before me who are the shareholders in the first applicant but it appears that it is a small family company; that is to say, it is the corporate persona of the members of the family. Certainly there is no evidence which might lead me to any other conclusion. The second applicant has not shown in his affidavit that he does not have the financial means not only to pay the fine imposed on him personally but, if he wishes to prevent his company being round up, to put sufficient funds into it to enable it to pay the fine imposed on it. There is no risk that, if the fines are paid and the appeal succeeds, the amount paid will not be refunded to the applicants.

On the basis of the evidence before me, therefore, I refuse to grant a stay of the orders made against the first and second applicants or an order for bail. Essentially for the same reasons I am not satisfied that the passport of the second applicant should be returned to him before he has paid the fine or served the default sentence of in imprisonment.

Orders: The applications for stay or bail and for release of the second applicant's passport are dismissed. The applicants are to pay the respondent's costs in respect of those applications, which I fix as \$300 in total. Leave to appeal is granted, subject to the applicants paying those costs to the respondent within 7 days of the date of this order; costs of the application for leave are to be costs in the appeal. The notice of appeal is to be filed and served within 14 days of this order.



I.R. Thompson
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Justice I.R. Thompson
Justice of Appeal

Solicitors:

Messrs. G.P. Shankar and Company, Suva for the Appellants
Messrs. M.B. Patel and Associates, Suva for the Respondent