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

CIVIL APPEAL NO.ABU0010 OF 2000S
(High Court Civil Action No. HBC0480 of 1997S)

BETWEEN:

PORTS AUTHORITY OF FIJI

Appellant

AND:

C & T MARKETING LIMITED

Respondent

In Chambers: The Hon. Justice Ian Thompson, Justice of Appeal

Hearing: Monday, 1 May 2000, Suva

Counsel: Mr. D. Sharma for the Appellant
Mr. R. Smith and Mr. Haniff for the Respondent

Date of Decision: Friday, 5 May, 2000

DECISION

The application before me is to strike out the appeal, which is against the judgment delivered in the High Court by Byrne J. on 28 October 1999. In the High Court the appellant had applied by originating motion, pursuant to section 12(2) of the Arbitration Act (Cap 38), to set aside an award made in the arbitration of a dispute between the parties. The High Court has power to set aside such an award if the arbitrator has misconducted himself. On 20 May 1998 the learned judge had delivered an interlocutory judgment in which he had found that the arbitrator had not misconducted himself in any of the ways alleged by the appellant, and in which he had also ordered that the matter be referred back the arbitrator to complete his task by determining the amount of damages which the appellant had to pay to the respondent. The arbitrator had then completed the arbitration and had awarded damages of $501,412.63. In his judgment dated 28 October 1999 Byrne J. confirmed the award and dismissed the originating motion.

The appellant applied to the High Court on 17 November 1999 for leave to appeal to this Court. However, when the application came on for hearing on 15 February 2000, the appellant withdrew it and instead obtained an extension to 23 February 2000 of the time for commencing an appeal. On 23 February 2000 it lodged its notice of appeal alleging, in essence, that the arbitrator had misconducted himself in finding in the respondent's favour on the question of liability.

The first ground on which the present application to set aside the appeal is based is that the appellant was not entitled to commence its appeal. Mr Sharma submitted that the judgment delivered on 28 October 1999 was not a decision of the High Court sitting in first instance, so that section 12(1) of the Court of Appeal Act (Cap. 12) was not applicable. He drew attention to the current English legislation relating to arbitration, under which leave is required to appeal to the Court of Appeal against the judgment of the High Court of Justice in respect of an appeal to it against an arbitrator's award. However, the Arbitration Act (Cap.38) currently in force in Fiji contains no such provision. Section 12 provides simply that the High Court may set aside an award. O.73 r.1(1)(b) of the High Court Rules requires that an application to the Court to do that be made by origination motion, as occurred in the present case. The High Court dealing with such an application made by originating motion is doing so as a court of first instance and not exercising an appellate jurisdiction. That being so, Byrne J.'s judgment delivered on 28 October 1999 is a decision such as is referred to in section 12(1)(a) of the Court of Appeal Act; so there is a right of appeal against it and leave is not required.

The next ground of the application to strike out the appeal is that the appeal is out of time. Mr. Sharma submitted that His Lordship had determined in his interlocutory judgment

on 20 May 1998 that the arbitrator had not misconducted himself in finding in the respondent's favour on the question of liability, that that was the judgment against which the appellant had to appeal if it wished to challenge that finding and that consequently an appeal lodged even as early as November 1999 would have been out of time. That submission is clearly misconceived. By definition an interlocutory judgment is not a final judgment; a party dissatisfied with it has no *right* to appeal against it; he must obtain leave to do so (Court of Appeal Act, section 12(2)(f)). The final judgment incorporates the interlocutory judgment and the dissatisfied party then has a right to appeal against the decisions made in the interlocutory judgment.

The next ground of the application is that there is no right of appeal because the arbitration agreement contained a provision that the arbitrator's award was to be final. Mr Sharma pointed out that the current English legislation, the Arbitration Act 1979, section 3, expressly precluded appeals where there was such a provision in the arbitration agreement. That Act provides for appeals to the High Court of Justice against arbitration awards; section 3 precludes such appeals where there is an exclusion clause in the arbitration agreement. If the law in Fiji contained such a provision, the High Court would not have had jurisdiction to entertain an appeal against the arbitrator's decision. However, section 12(2) of the Arbitration Act (Cap.38) expressly confers power on the High Court to entertain an application to set aside an award. There can be no basis for applying the English legislation in Fiji as though it related to appeals from the High Court to the Court of Appeal.

The remaining grounds of the application all concern matters which the English legislation requires to be taken into account before leave can be given to commence an appeal. As discussed above, in Fiji section 12(1)(a) of the Court of Appeal Act gives a right of appeal

and leave is not required. So there can be no basis for implying that the provisions of the English legislation should be adopted as part of the relevant law in Fiji.

In the course of making his submissions Mr Sharma drew to my attention that the grounds of appeal are broader than the grounds on which the notice of originating motion, as amended, was based. That is not a matter raised in the respondent's summons to set aside the appeal. Having given consideration to whether, in spite of that, I should strike out some of the grounds of appeal, I have come to the conclusion that it is better that they be left to stand as they are and for the parties to make to the Court, when the appeal is heard, their submissions on the proper scope of the appeal.

Accordingly the application to strike out the appeal is dismissed. The respondent is to pay the appellant the costs of this application in any event. I fix the costs as $300.

FIJI COURT OF APPEAL

Ian Thompson

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Mr. Justice Ian Thompson
Justice of Appeal

Solicitors:

Messrs. R. Patel and Company, Suva for the Appellant
Messrs. Munro Leys and Company, Suva for the Respondent

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