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

CIVIL APPEAL NO. ABU0044 OF 2002S
(High Court Action No. HBE66 of 2001S)

BETWEEN:

WASAWASA FISHERIES LIMITED

Appellant

AND:

COMPETITIVE FOODS AUSTRALIA LIMITED

Respondent

Coram: Reddy, P
Kapi, JA
Sheppard, JA

Hearing: Wednesday 26th February 2003, Suva

Counsel: Mr. C.B. Young for the Appellant
Mr. R.A. Smith for the Respondent

Date of Judgment: Friday, 11th April 2003

REASONS FOR JUDGMENT OF THE COURT

This appeal is brought by the appellant ("Wasawasa") against a judgment of the High Court which resulted in the making of an order pursuant to s.340(6) of the Companies Act (Cap 247) ("the Act") , that the name of a company, Fresh Fish

Exporters (Fiji) Limited ("Fresh Fish") be restored to the register of companies and an order that s.340(6) of the Act "be complied with by all concerned". Wasawasa seeks to have these orders set aside. The respondent, Competitive Foods Australia Limited ("Competitive Foods"), the successful applicant in the High Court (Pathik J.), contends that the orders should not be disturbed.

Section 340(6) of the Act needs to be read in conjunction with s.340(1), (2), (3),(4) and (5) thereof. The six subsections are as follows:-

> *"(1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company, by post, a letter inquiring whether the company is carrying on business or in operation.*
>
> *(2) If the registrar does not, within 30 days of sending the letter, receive any answer thereto, he shall, within 14 days after the expiration of the said period of 30 days, send to the company, by registered post, a letter referring to the first letter, and stating that no answer thereto has been received, and that, if an answer is not received to the second letter within 30 days from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.*
>
> *"(3) If the registrar, either receives an answer to the effect that the company is not carrying on business or in operation, or does not, within 30 days after sending the second letter, receive any answer, he may publish in the Gazette, and send to the company, by post, a notice that, at the expiration of 3 months from the date of the notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved:*

Provided that the registrar shall not be required to send the letters referred to in subsections (1) and (2) in any case where the company itself or any director or secretary of the company has requested him to strike the company off the register or has notified him that the company is not carrying on business.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe, either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of 6 consecutive months, the registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).

(5) At the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the company, or the liquidator, as the case may be, strike the name of the company off the register, and shall publish notice thereof in the Gazette and, on the publication in the Gazette of this notice, the company shall be dissolved:

Provided that---

(i) the liability, if any, of every director, officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and

(ii) nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register.

(6) 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."

Of some relevance to the construction of s.340(6) is s341 which provides that, where a company is dissolved, all property and rights vested in the company, before its dissolution shall, subject and without prejudice to any order which may at any time, be made by the Court under s340, be deemed to be bona vacantia and shall accordingly belong to the State. The words we have emphasised tend to show that the legislature intended that orders under s.340(6) were to override the divesting effect that s341 would otherwise have. The words "at any time" emphasise that it matters not when the order is made.

At the outset it may be noted that an applicant for relief under s.340(6) of the Act must satisfy the Court of at least 2 things. These are:

1. That the applicant is the company, or a member or creditor of it.

2. That at the time the company was struck off the register, it was carrying on business or in operation;

or

otherwise it is just that the company be restored to the register.

If at least one of the matters in each of these paragraphs is established to the satisfaction of the Court, the Court is empowered to make an order that the name of the company be restored to the register. 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. The section recognises that persons, particularly third parties, may be disadvantaged by such an order and empowers the Court, if it thinks 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. No directions or provisions were made by the High Court pursuant to this part of s.340(6).

But, as mentioned the Court did make an order that s.340(6) "be complied with by all concerned". That is not an order giving directions or making provisions of the kind contemplated by the latter part of s.340(6). No argument concerning that particular order was put to us. There is a question in our minds as to whether

the Court had power to make it. It may have been included to emphasise the fact that the effect of an order under s.340(6) may go beyond the immediate parties. It affects the status of the company. If such an order is made, it restores the company to life and it is deemed never to have been dead. See the decisions of the Queensland Court of Appeal in R v. Heilbronn (1999) 150 FLR 43 and the English Court of Appeal in Tymans Ltd v. Craven [1952] 1 A.E.R. 131.

This could have the effect of bringing back into existence rights and obligations that might otherwise have been extinguished. Thus an order under s.340(6) may have quite a dramatic effect, not only on an otherwise extinct company, but on its shareholders, creditors and debtors who may not have been parties to or notified of the proceedings to revive it.

But all that is provided for by the force of the section itself once the Court makes an order. We shall return to this matter later when we consider the form of the orders which need to be made on this appeal.

We turn now to consider the questions of substance which arise for determination. The first of these is whether Competitive Foods is a member or creditor of Fresh Fish.

The learned primary judge concluded that, at the relevant time, Competitive Foods was both a shareholder and a creditor of Fresh Fish. Wasawasa claims that these findings were erroneous. In order to determine the two questions one needs to have regard to the evidence and to the parties' submissions.

The evidence relied upon by Competitive Foods is to be found in an affidavit sworn by Patrick Boyle on 17 April 2001. Mr Boyle describes himself as a consultant. He said that he had been involved in the affairs of Fresh Fish since its incorporation in 1988. He said that the affidavit was made on the basis of his own knowledge and from information available from records of the company which were still in his possession. He said that he had read the petition and that the statements contained in it were correct. In support of that statement, Mr Boyle annexed copies of a large number of documents to the affidavit. We shall refer to these as necessary.

So far as we have been able to tell from the record which we have, there was no objection made at the hearing at first instance to any part of Mr Boyle's affidavit nor any objection taken to the admissibility of any of the documents referred to in the affidavit. Mr Boyle was not cross-examined nor was there any cross-examination of Mr Southwick who gave evidence by affidavit for Wasawasa.

Before we refer to the affidavit evidence, we need to refer to the petition. Paragraph 4 of it deals with a number of matters. We do not refer to them all. Voting shares issued by Fresh Food were described as "A" shares; non-voting shares were described as "B" shares. Three parcels of voting shares were allotted. Competitive Foods was allotted 375,000 of these. 359,998 were allotted to two other shareholders, one of which was Wasawasa. Before this allotment only the two subscriber shares had been issued, one each to Mr Southwick and his wife. These were transferred to Wasawasa rounding its holding off to 235,000. Another company, Gabridde Pty Limited, held the remaining 125,000 shares which were allotted. Thus Competitive Foods held a majority of the "A" class or voting shares.

A copy of the certificate issued by Fresh Food to Competitive Foods in respect of its 375,000 "A" shares is annexed to Mr Boyle's affidavit.

The statements made in paragraph 5 of the petition disclose that Mr Southwick was the local manager of Fresh Fish. A copy of his service agreement is in evidence. Paragraph 5 of the petition says that about 3 years "into operations", Fresh Fish "fell into dispute with Wasawasa" and Mr Southwick. Fresh Fish sued Wasawasa for the recovery of a fishing vessel known as "Sunbird" and for damages for its detention. After a hearing in the High Court and appeals to the Court of Appeal and then the Supreme Court, the litigation terminated in favour of Fresh Fish. The three judgments were annexed to Mr Boyle's affidavit. The formal order

made in the proceedings is to be found in the judgment of the Court of Appeal, the appeal from which having been dismissed.

The order made by the Court of Appeal was to the following effect. It was declared that Fresh Fish was the lawful owner of the ship "Sunbird" and ordered that within 14 days Wasawasa deliver it to Fresh Fish. The issue of damages was remitted to the High Court for determination by it. No damages have yet been assessed.

In the course of the argument before us, questions were asked by the Court about the present whereabouts of the vessel and in whose possession it now is. To say the least, the answers given by both counsel were vague and unhelpful. The orders made by the Court of Appeal establish that the vessel was owned by Fresh Fish. What the position now is, we do not know. We shall return to this matter later on.

Paragraph 6 of the petition refers to a number of matters. The Supreme Court dismissed the appeal from the Court of Appeal on 10 March 1999. However on 24 March 1999 Competitive Foods received a letter dated 18 March 1999 under Mr Southwick's signature, in the words of the petition, "purporting to 'renounce' any agreement to sell or issue 375,000 "A" class shares to Competitive Foods". The letter is in evidence. It was written on Fresh Fish's letterhead.

One of the principal matters relied upon by Wasawasa is a contention that the purported allotment of shares to Competitive Foods, at least in the circumstances of this case, was unlawful because it contravened the provisions of the Exchange Control Act (Cap 211). The matter is referred to in para 22 of Mr Southwick's affidavit. There he says that Wasawasa's resolution "to terminate the agreement to issue shares to Competitive Foods and Gabridde was done on the basis that the Reserve Bank had not given permission to issuing those shares.

On 29 July 1999 the Reserve Bank issued a certificate pursuant to s.20(2) of the Exchange Control Act. That section and s.20(3) provide as follows:-

> *"(2) 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. (Amended by Legal Notice 112 of 1970.)*
>
> *(3) Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act."*

The certificate which was issued was as follows:

> *"CERTIFICATE PURSUANT TO SECTION 20(2). EXCHANGE CONTROL ACT*

WHEREAS certain shares in Fresh Fish Exporters Fiji Ltd., were in March 1989 issued to certain non-residents as per Annexure A hereto, and at the same time were entered in the company register of Fresh Fish Exporters Fiji Ltd.;

WHEREAS no consent or permission was sought from or granted by the Reserve Bank of Fiji under the Exchange Control Act for such issue and entry at such time;

WHEREAS Reserve Bank of Fiji consent and permission was granted for such issue and entry upon 5th June, 1989 pursuant to a letter of request dated 22nd May, 1989;

WHEREAS the above omission to seek and obtain Reserve Bank of Fiji approval prior to June, 1989 is shown to be inadvertent and innocent;

NOW IN PURSUANCE of the powers vested in the Reserve Bank pursuant to Section 20(2) of the Exchange Control Act and Legal Notice No.98 of 1981, I HEREBY FOR AND ON BEHALF OF THE RESERVE BANK OF FIJI CERTIFY in relation to the shares above described that acts done in March 1989 comprising the issue and transfer of the shares, being acts which were prohibited by the Exchange Control Act, are to be, and are always to have been, as valid as if they have been done with the permission of the Reserve Bank, and the said acts have effect accordingly.

DATED THIS.....29th..... day of July, 1999

.....Sgd.....
Barry Whiteside
Chief Manager, Financial Markets"

Appended to the certificate was a list of the shares in respect of which the certificate was issued. These included those issued to Competitive Foods and Gabridde. The application for the issue of the certificate was made by solicitors on

behalf of Competitive Foods after receipt of the letter of 18 March 1999 notifying Competitive Foods that the allotment of shares had been "renounced".

It remains to mention para 9 of the petition in which a number of allegations are made concerning matters which attempt to explain how it came about that annual returns were not filed by Fresh Fish after 1991. These matters are also dealt with in Mr Southwick's affidavit. The result is that the Court is faced, as was Pathik J. with a number of allegations and counter allegations. Neither Mr Boyle nor Mr Southwick was cross-examined. Thus the Court is in no position to determine questions of responsibility for the state of affairs which developed. Understandably Pathik J. did not attempt that exercise. In the circumstances there would have been little point in his doing so.

We have now said enough about the evidence and the overall circumstances of the case to come to the questions to be decided.

The first question with which we deal is whether Competitive Foods is a shareholder of Fresh Fish. Competitive Foods relies on the certificate issued by the Reserve Bank pursuant to s.20(2) of the Exchange Control Act. It says that any illegality which may have infected the allotment of the shares to it has no invalidating effect because the certificate and s.20(2) of the Act both retrospectively and prospectively made legal what, until the issue of the certificate, was illegal.

The answer made by Wasawasa to that submission is based on the decision of this Court in Ruggiero v. Bianco, Civil Appeal No. ABU0061 of 1997. The facts of that case naturally differ from these and it is to statements of principle that one must go to determine the relevance of the case to the present one. After referring to s.20(2) of the Exchange Control Act (at p.8), the Court said (at pp8-9):

> ***"This subsection empowers the Minister to issue a certificate to validate what had previously been invalid. In our view this provision does not help Mediterranean in this situation. The subsequent validation by certificate made pursuant to this section relied upon by Dr. Sahu Khan, assuming for the moment that there was such a validation, was made on 20 September 1995. It is contained in a letter from the Reserve Bank of Fiji to which had been delegated the Minister's powers under the Act. This letter is well over a month after Mr Bianco had rescinded the agreement for a total failure of consideration. It follows that Mr Bianco was entitled to recover the $100,000.00 he had paid from Mediterranean before any question of validation under s.20(2) arose. It may be that the issue of shares is declared valid, on the assumption that he letter of 20 September was a s.20(2) validation, but that does not have any effect upon Mr Bianco's by then established right to recovered the money paid which had come into existence upon the rescission of the contract. The issue of the shares, originally in pursuance of Mediterranean's obligations under the contract, was illegal; retrospective validation of the issue in September, even if made, could not make that issue comply with the obligation in the contract because by then the contract no longer existed. To affect Mr Bianco's rights it would have had to have been made while the contract was still in effect and before it was rescinded."***

Ruggiero was a case where a contract was lawfully rescinded before the certificate under s.20(2) of the Act was issued. The contract was made between two parties. One party had justifiably rescinded it before the certificate was issued. The

contract was thus at an end. Here the case involves a company in which there were three major shareholders. Competitive Foods held the majority of the voting shares and was thus able to control the company. On 18 March 1999 Wasawasa, about a week after its appeal to the Supreme Court had failed, no doubt acting on advice, took a precipitate course of action. It treated the shares issued both to Competitive Foods and to Gabridde Pty Limited as having been unlawfully issued. Effectively it treated them as non-existent thus, so it considered, enabling it to control Fresh Fish. Purporting to act in this way, it "renounced" the allotment of shares to the two companies.

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.

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.

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. In this respect we refer to s.20(3) of the Exchange Control Act which makes it clear that s.20(2) does not extinguish criminal liability. So the legislative intention

was that a certificate would retrospectively validate transactions although they were unlawful yet preserve criminal responsibility.

It follows that, in our opinion, his Lordship was correct in his conclusion that Competitive Foods was a shareholder of Fresh Fish.

His Lordship also found that Competitive Foods was a creditor of Fresh Fish in the sum of $92,544.00. In its written submissions Competitive Foods makes reference to the accounts of Fresh Fish to 30 June 1991. But those accounts, although they might in items which show totals of various classes of liabilities, include this indebtedness, do not show it specifically.

Paragraph 10 of the petition contains a statement that Fresh Fish is indebted to Competitive Foods in the sum in question. It is said that the sum is included in the audited accounts of the company to 30 June 1991. Mr Southwick in his affidavit denies that Competitive Foods is owed any money by Fresh Fish.

It follows that the only evidence about this matter is the bare statement in para 10 of the petition said to be correct by Mr Boyle in his affidavit, and Mr Southwick's bare denial in his affidavit. The onus lay upon Competitive Foods to prove that the debt existed. We do not regard its proof as sufficient. We are not satisfied that Competitive Foods case in this respect was made out.

Before we leave this part of the case, there are to matters to be noted. Firstly, there were arguments put to us on behalf of Wasawasa based on the Limitation Act (Cap 35). It claimed that, in any event, the debt was time barred before the purported cancellation of Fresh Food's registration. Competitive Foods made submissions in response to this. Because we are not satisfied that the evidence establishes that the debt is owing, these submissions do not arise for consideration and we have not dealt with them.

The second matter concerns the question whether so much of Mr Boyle's affidavit as simply asserts the correctness of the allegations has any probative value. We have not dealt with this matter so far because we have not thought it necessary to do so. In reaching our conclusion on the question whether Competitive Foods was a shareholder we have relied entirely on the documents copies of which were annexed to Mr Boyle's affidavit. There was no objection taken to the admissibility of any of those including Fresh Food's accounts. But, unfortunately for Competitive Foods the accounts are not specific enough to provide the proof which it needs.

The position so far then is that we are satisfied that Competitive Foods is a shareholder but not a creditor of Fresh Fish. The next question then is whether Fresh Food, at the time it was struck off the register, was carrying on business or in operation. Competitive Foods does not suggest that Fresh Fish was then carrying on business but it does submit that it was in operation. It relies particularly on the fact

that at the time of the striking off, it, as the controlling shareholder of Fresh Fish was setting in train steps to enforce the judgment to which Fresh Food was entitled as a consequence of the decision of the Supreme Court on 10 March 1999. But, as will be seen, there is an issue about whether that was really the case.

We think that there is a substantial question whether Fresh Food was "in operation" at the time it was struck off the register. There are a great many authorities on the question particularly in England but also, to a degree, both in Australia and New Zealand. We doubt whether an analysis of these would make the position any less uncertain. That is because each case must depend on its own facts and no case is factually similar to this one.

In the circumstances, we think the preferable course is to leave the question of whether Fresh Fish was in operation at the relevant time and come to the question whether "it is otherwise just that Fresh Food be restored to the register.

We have no hesitation in saying that we are satisfied that it was just that Pathik J. made the order which he did. On our findings, Competitive Foods and also Gabridde are major shareholders in Fresh Food. Fresh Fish has a judgment against Wasawasa for the delivery of the vessel "Sunbird" and for damages for the unlawful detention of the vessel yet to be assessed.

There appears to be or to have been a mortgage over the vessel. This is shown in at least one of the documents annexed to Mr Boyle's affidavit. That document is included in an affidavit sworn by Mr Southwick in the earlier proceedings not in these. The mortgage either is or was to the Fiji Development Bank. The amount of the mortgage is not shown. The mortgage was apparently given by Wasawasa but it was ordered to transfer the vessel to Fresh Fish. In Mr Southwick's earlier affidavit, there is reference to correspondence in which the Bank's consent to the transfer of the mortgage to Fresh Fish was sought.

Also annexed to that affidavit is a bill of sale dated 29 March 1999 by which the vessel was transferred to Fresh Fish. The bill of sale was executed under the common seal of Wasawasa in the presence of Mr Southwick and apparently, also under the common seal of Fresh Fish although this appears only inferentially in the record. The Fresh Fish seal was also affixed in Mr Southwick's presence.

Of course, by 29 March 1999, Wasawasa had taken the precipitate action it did to cancel the allotment of shares to Competitive Foods. But the documents just referred to show clearly that Fresh Fish was not only entitled to the vessel; it became registered as its owner. If the unilateral action taken by Wasawasa on 18 March 1999 is invalid and of no effect as we have concluded is the case, there is the need for some investigation of what happened to the vessel after March 1999, and particularly after July 2000 when Fresh Fish was deregistered.

All these considerations lead us to the conclusion that it was just to restore the name of Fresh Fish to the register. We are in agreement with Pathik J.'s conclusion to this effect. It follows that we also agree with him that he had jurisdiction to make an order under s.340(6) of the Companies Act.

The remaining question is that of discretion. In deciding this question we have obtained assistance from a consideration of the judgment of Laddie J. in Re Priceland Ltd [1997] 1 BCLC, ChD, 467. Again it is a case on its own facts but the sentiment found in the judgment especially at pp476-7 is that, if the Court has jurisdiction to make an order to a particular effect, it ought to exercise that jurisdiction unless there is a convincing reason why it should not do so. That is in accordance with general principle.

Here Wasawasa has submitted that Pathik J.'s exercise of discretion miscarried. That was said to be because the learned judge gave insufficient weight to the neglect and delay of Competitive Foods in relation to the affairs of Fresh Food's and its own interests. For the most part the matters relied upon are recounted in Mr Southwick's affidavit. Also relied on was the fact that Competitive Food's evidence "comes to a complete halt on 29 July 1999" when the Reserve Bank issued its certificate. These proceedings were not commenced until the petition was filed on 11 April 2001. There was thus a period of over 20 months, when as far as the evidence discloses, nothing was done by Competitive Foods. We

agree that there should have been an explanation for this, particularly as the issue of the Bank's certificate meant, as Competitive Foods thought and we have found, that effectively Fresh Food had never ceased to exist.

But, if Competitive Food's evidence is deficient, so is that of Wasawasa. Presumably it took the view that the issue of the Bank's certificate had no effect on the purported cancellation of the other shareholdings. So until Pathik J.'s order on 1 June 2002 it apparently acted on that basis. But all this is our own speculation. There is no evidence to show that it was in fact the position. And one does not know what happened after Fresh Food was struck off the register in July 2000. What happened to the ship, by then registered in Fresh Food's name since March 1999. As mentioned, questions asked by the Court about this in the run of the argument were not the subject of any satisfactory answer.

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.

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.

Before we conclude, we wish to emphasise to the parties that since 1 July 2002, the date of Pathik J.'s order, Fresh Fish has resumed and continued its existence. That is providing an office copy of his order was served on the Registrar. If it was not, the order has had no force or effect. On the assumption that the order was served, the point we make is that, if either or both parties want the company to operate, they need to take care that the provisions of the Companies Act are complied with by the filing of annual returns and so on. Otherwise they run the risk that the company will be treated as defunct by the Registrar and once again struck off.

Perhaps one or other of the parties should consider instituting proceedings for winding up on the ground that it is just and equitable that that should be done. This would seem a sensible course because the commercial relationship which formerly existed between the two parties has completely broken down.

We come finally to the orders to be made. Earlier in this judgment we said something about the second order made by Pathik J. On reflection, we do not propose to disturb it. We have not heard argument about it. What we propose to do instead is to grant leave to either party to apply on notice to Pathik J. or any other judge of the High Court for such variations of his second order as they may be advised.

The orders we make are as follows:-

1. The appeal be dismissed.

2. The appellant pay the respondent's costs which we fix at $1500.00.

3. There be liberty to either party to apply on 7 days notice, to Pathik J. or any other judge of the High Court, for such variation of the second order made by Pathik J. as they may be advised to seek.

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Reddy, P

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Kapi, JA

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Sheppard, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellant
Munro Leys, Suva for the Respondent

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