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

CIVIL APPEAL NO ABU0047 OF 2002
(High Court Civil Action No. 342 of 2001S)

BETWEEN:

JOHN KNIGHT WATERHOUSE (JUNIOR) and
MARGARET ANN WATERHOUSE

Appellants

AND:

WILLIAM WATERHOUSE and
ROBERT WATERHOUSE t/a
"Waterhouse Group"

Respondents

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Wednesday 21 May 2003, Suva

Counsel: Mr P. Knight for the Appellants
Mr V. Kapadia for the Respondents

Date of Judgment: Friday 30 May 2003

JUDGMENT OF THE COURT

This is an appeal against a judgment of Scott J wherein he entered summary judgment in favour of the respondents for the sum of $569,000. He held that the appellants did not have a reasonably arguable defence to the respondents' claim.

Background

The respondents are turf accountants. They are in partnership. They trade under the name "Waterhouse Group". They operate betting shops throughout Australia.

In Fiji there was another partnership which also carried on the business of turf accountants. It was called "Grants Waterhouse Agency". It commenced business in the 1970's. The partners were John Knight Waterhouse Snr, now deceased, William Waterhouse (one of the respondents) and Francis Peter Grant. The Fiji partnership conducted a number of betting shops in Fiji.

These three persons were equal one-third partners. The business was run essentially by Francis Peter Grant with periodic input by William Waterhouse. John Knight Waterhouse Snr (Waterhouse Snr) was not actively involved.

William Waterhouse and Waterhouse Snr were brothers.

Waterhouse Snr died in July 1998. The appellants are the executors of his estate . One appellant John Knight Waterhouse Jnr (Waterhouse Jnr) is a son of Waterhouse Snr. The other appellant is a daughter of the deceased. Neither of the appellants were actively involved in the Fiji partnership.

Apart from annual charity races held at Nadi, there is no organised horse racing in Fiji. The shops operated by the Fiji partnership provided facilities to bet on race meetings held in Australia.

The respondents, that is the Australian partnership, provided information services to the Fiji partnership to enable the punters in Fiji to place their bets on horse races in Australia. The information provided included fields, jockeys, barrier draws, numbers, scratchings and prices. A radio broadcast of each race in Australia was relayed to Fiji by telephone so that it could be broadcast live in the Fijian betting shops as the races took place.

In providing these services the Australian partnership incurred telephone, teletext and other charges. The claim which is the subject of the action and later the Summary Judgment application is for the alleged outstanding balance owed by the Fiji partnership to the Australian partnership for the services just referred to.

The accountants for the business were KPMG from 1991 onwards. As well they were the auditors from 1995 onwards.

In early 1998, Waterhouse Snr expressed concern about the way that the Fiji partnership was being conducted. Waterhouse Jnr visited Fiji and made some inquiries on his father's behalf. Following these inquiries Waterhouse Snr commenced an action in the High Court of Fiji (Action 148/1998). On 9 March 1998 Ross George McDonald was appointed by an order of the High Court as the receiver and manager of the Fiji partnership. The application rested on allegations that the business of the Fiji partnership had not been conducted properly, that the annual accounts, as prepared, did not accurately state the true position of the business and that there had been a misappropriation of funds of the business by one or both of the other partners. Waterhouse Jnr has deposed in the present proceedings that an area of concern was the expenses that were being charged by the respondents for the services provided by them.

After taking over as receiver and manager Mr McDonald continued the Fiji partnership business and continued to deal with the Australian partnership.

On 1 April 1998 Mr McDonald engaged the services of KPMG to investigate the financial records of the Fiji partnership for the year ended 31 December 1997.

Waterhouse Snr died on 1 July 1998. KPMG issued its special investigation report later in that month. It was in the nature of a special audit.

KPMG recorded that allegations had been made of "excessive payments" in relation to the charges made by the Australian partnership. KPMG noted that no written agreement existed in relation to those charges and that they had not been previously disputed. The

accountants examined each category of alleged excessive charges. They found that the telex and technical assistance charges were standard charges and were supported by invoices and that the Sydney office charges, which were not fixed as they related to expenses such as salaries and telephone charges incurred in the Sydney office were faxed to the Fiji partnership. The accountants commented that they were paid through an ANZ Visa account without any proper authorisations from the relevant statutory authorities. Such payments were in the opinion of KPMG in violation of the Exchange Control Regulations and Income Tax Regulations. KPMG also pointed to a VAT liability to the IRD totalling $8,483.71 and at least $5,541in turnover tax on certain credit betting transactions.

In April 2000 Mr McDonald, sold the business for $515,000 to a company controlled by the respondents.

After the sale, Mr McDonald continued to hold the proceeds of sale.

The respondents' action

Frustrated by this situation, the respondents issued a writ in the High Court on 6 August 2001 naming the appellants as the first defendants, Francis Peter Grant as the second defendant, William Waterhouse as the third defendant and Mr McDonald as the fourth defendant. The respondents alleged that the amount due and owing by the Fiji partnership to the Australian partnership, as at 31 May 1999, was $569,000 and that that sum was still outstanding in spite of demands for payment. Judgment was sought for that sum.

Francis Peter Grant and William Waterhouse acknowledged service and stated that they did not intend to contest the proceeding.

Mr McDonald acknowledged service and stated that he did intend to contest the proceeding. Later he advised the Court that he did not intend to contest the proceeding and that he would take a neutral position.

After further and better particulars were sought by the appellants and satisfied the appellants filed a defence and counterclaim.

The appellants admitted the provision of services by the Australian partnership and the making of payments for these services from time to time. Essentially the appellants defence was that all the legitimate charges had been paid and/or that such charges were excessive. The appellants denied owing the sum claimed.

The counterclaim mounted by the appellants related to amounts in the Fiji partnership's account concerning partnership capital. They alleged that $47,421 was owed by the Fiji partnership to the appellants as executors of Waterhouse Snr's estate and that the sum of $87,793 was owed to the partnership by the respondent, William Waterhouse.

The respondents filed a reply and defence to the counterclaim. They denied that the charges were either excessive or had been paid and put the appellants to strict proof thereof. In their defence to the counterclaim the respondents denied the appellants'

counterclaim and stated that no claims could be made on the respondents for partnership capital until after all the creditors (including the respondents) had been paid.

On 19 April 2002 the respondents applied to strike out the counterclaim on the grounds that it did not disclose a cause of action against the respondents.

Summary judgment application

On 9 July 2002 the respondents took out a summons to enter summary judgment for the amount claimed in the action.

There was extensive affidavit evidence both in support and in opposition.

Waterhouse Jnr in his affidavit relied on the qualifications in the KPMG report. As well he contended that his late father did not see the annual accounts of the Fiji partnership, that he had not approved the payment of the charges, and that this being so the appellants were entitled to have the charges properly accounted for and justified. The respondents adduced evidence disputing the assertion that Waterhouse Snr had not seen the accounts.

The respondents produced the audited accounts of the Fiji partnership from 1995 to 2000. They also produced a letter dated 4 December 2001 from KPMG to the respondents' solicitors. It contained a summary of the balances as per the audited accounts

of the Fiji partnership owed by that partnership to the respondents from 1994 to 2000. We now set out that Table:

"Year:	*1994*	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*
Amount:	*F$*	*F$*	*F$*	*F$*	*F$*	*F$*	*F$*
Sydney telephone	*40,465.46*	*88,095.58*	*121,516.30*	*121,516.00*	*148,185.00*	*154,437.00*	*154,437.00*
Teletext	*21,428.57*	*44,065.23*	*71,779.96*	*89,357.00*	*113,186.00*	*119,234.00*	*119,234.00*
Sydney office Expenses	*32,315.27*	*74,392.48*	*44,007.16*	*23,688.18*	*23,615.00*	*24,948.00*	*24,948.00*
Technical Assistance	*328,626.73*	*294,948.20*	*254,909.79*	*230,445.00*	*241,560.00*	*241,560.00*	*241,560.00*
Accrued Sydney telephone expenses					*28,771.00*	*28,771.00*	*28,771.00*
TOTAL	*422,836.03*	*501,501.49*	*492,213.21*	*465,006.18*	*555,317.00*	*568,950.00*	*568,950.00*

"

In another letter from KPMG the accountants confirmed that the standard charges "were in existence" when KPMG was appointed as auditors in 1995.

The respondents adduced evidence that the tax liabilities identified by KPMG in its report (and to which we have referred earlier) were paid by the receiver in July 1998 and that there were no outstanding tax liabilities or contingent liabilities.

The appellants did not adduce any independent evidence in support of the allegation that respondents' charges or any of them were excessive.

The judgment under appeal

The application to strike out the counterclaim and the application for summary judgment were heard together by Scott J. In his judgment the Judge isolated the two

principal arguments of the appellants. First the assertion that Waterhouse Snr had not approved the payment of the charges and that that being so he was entitled to have the charges accounted for and justified. And secondly a reliance on the qualifications contained in the KPMG report.

Scott J then stated:-

> ***"Mr. Kapadia's submission in answer was simple and straightforward. Referring to Sections 6 and 7 of the Partnership Act (Cap 248) he suggested that the charges incurred by the Fiji Partnership not only bound the partnership but were also binding on the partners. Whether or not John Knight Waterhouse (Senior) actually approved the charges was irrelevant since the fact that a partner is a sleeping partner does not affect the binding nature of contracts made on behalf of the partnership in the normal course of its business (Beckham v. Drake (1841) 9 M&W 79).***
>
> ***In my opinion these submissions are unanswerable. As I see it, while a partner can certainly disagree with a pending partnership decision and, if his argument prevails, prevent that decision being taken, a partner cannot avoid being bound by decisions already taken. In the present case the First Defendants appear to want to undo decisions already reached and contracts already entered into and completed. In my opinion that course is not open to them."***

The Judge noted that there was no affirmative evidence to support the contention that the charges were excessive.

Scott J concluded by saying that notwithstanding the reservations expressed by KPMG, the charges:

> ***"... were charges incurred in the normal course of partnership business by the Fiji Partnership. They are not now open to review".***

As the result the Judge found that the appellants did not have a reasonably arguable defence to the respondents' claim and thereupon entered Summary Judgment in favour of the respondents for the amount claimed. The Judge declined to strike out the counterclaim.

The appeal

In their notice of appeal the appellants advanced four grounds of appeal. They were that the Judge erred:

1. in allowing the application for summary judgment and in not finding that there was an issue or question in dispute that ought to be tried;

2. in not requiring the respondents to produce an account justifying the sum being claimed;

3. in not finding that there were possible tax liabilities of the partnership which would take priority over unsecured creditors of the partnership;

4. in not ordering a stay of execution of the judgment in favour of the respondents pending the trial of the counterclaim.

The first three grounds of appeal were put forward collectively in support of the overall contention that the Judge erred in not finding there was an issue or question in dispute which ought to be tried.

Mr Knight for the appellants submitted that the essence of the defence which ought to have been submitted to trial was that while the appellants acknowledged that the

respondents had provided certain services to the Fiji partnership they denied that it owed the sum claimed because:

(a) at least part of the sum claimed had already been paid;

(b) some of the charges had been improperly charged;

(c) a reconciliation or statement of account establishing the sum claimed had not been produced by the respondents;

(d) likewise invoices supporting the claim had not been produced by the respondents.

Mr Knight submitted that as the result of the above matters the appellants did not know how the claim was made up. Mr Knight drew our attention to some apparent discrepancies in the audited accounts.

Mr Knight pointed to the KPMG report. He submitted that the report raised:

"... serious questions ... as to the actual payments made to the Respondents and as to non payment of Value Added Tax".

Mr Knight contended that while there had been no other investigations carried out for previous years "it is reasonable to assume that similar problems will exist for other years".

At least initially Mr Knight continued to maintain the two arguments advanced in the High Court (which were rejected by Scott J) namely (a) that the charges were excessive; and (b) that Waterhouse Snr had not seen the accounts.

We now deal with these submissions.

(a) **The absence of a proper account**

We are unable to accept that there was an absence of a proper account. There is no substance in this complaint. The KPMG investigation of the 1997 accounts (which was in the nature of an audit) found that the charges were properly invoiced and accounted for. The respondents produced the audited accounts of the Fiji partnership for the years 1995 through to 2000. KPMG separately set out the make up of the expenses owned by the Fiji partnership to the Australian partnership in each of those years. We have already set out KPMG's table.

Mr Kapadia pointed out that all the relevant invoices were available in Suva and that they could have been inspected at any time by the appellants or their advisors. In our view it was not necessary in this case, given the production of the audited accounts and the certification of KPMG, for the respondents to have been required to bring the invoices into Court.

And as to the assertions that at least part of the sum claimed had already been paid and that some of the charges had been improperly charged we do not consider that there

was any evidence to support either of these contentions. It is not sufficient for a defendant to make an allegation of an impropriety or a deficiency without any evidence and then seek a taking of accounts in the hope that something favourable to the defendant might turn up. In this regard the words of Megarry V.-.C in The Lady Anne Tennant v Associated Newspapers Group Ltd. [1979] FSR 298 – which were cited to us by Mr Kapadia in his argument – are most apt.

> ***" A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism".***

And finally under this head we make one further point. We find it significant that KPMG reported that there had been no complaints over many years in relation to the expenses charged by the respondents.

(b) **Discrepancies in audited accounts**

Mr Knight specifically pointed to two apparent discrepancies in the audited accounts for the years ending 31 December 1997 and 2000 as to the amount owing by the Fiji partnership to the respondents. He submitted that these discrepancies showed the need for a taking of an account. Mr Kapadia in his submissions noted that these apparent discrepancies were raised and clarified before the Judge. He carefully took us through the relevant accounts. We are satisfied that there were no actual discrepancies as contended for by the appellants. Certain items were simply classified differently in the accounts. The amounts could ultimately be reconciled. We therefore find no substance in this complaint.

(c) **VAT/Tax liabilities**

Earlier in this judgment we summarised KPMG's findings in relation to the outstanding tax and VAT liabilities of the Fiji partnership arising from its operations in 1997. We also noted the evidence that those liabilities have since been discharged.

We put to Mr Knight that even if it could be established that further tax was payable to the Inland Revenue Department in the future – and there was no evidence upon the point – that was a matter which affected the Fiji partnership and not one of its creditors and was not a defence to the respondents' claim. Correctly in our view when this proposition was put to Mr Knight he conceded its correctness.

(d) **Excessive charges**

Mr Knight conceded that this allegation was unsupported by any independent evidence. The appellants' primary obligation is to "satisfy" the Court that there is a triable issue or question. Ultimately Mr Knight accepted that the appellants had not satisfied the Court on this complaint.

(e) **Waterhouse Snr not seeing the accounts**

Both counsel took us through the relevant evidence concerning the question of whether Waterhouse Snr saw the accounts of the Fiji partnership. In our view even if he did not see the accounts that is of no assistance to the appellants in establishing an

arguable defence to the respondents' claim. Ultimately Mr Knight in his reply accepted that this was so.

The Judge found that Waterhouse Snr was bound by the contracts of the partnership entered into in the usual way of business of that firm. In our view the Judge was correct in making that finding.

Our conclusion

Having examined each of the complaints raised by Mr Knight on behalf of the appellants we conclude that the appeal must fail. The appellants have not demonstrated that the Judge erred. In our view he was correct in holding that the appellants had not established a reasonably arguable defence to the respondents' claim. We therefore propose to dismiss the appeal. Before doing so however we deal with the fourth ground of appeal.

Stay of execution

The Judge declined to strike out the counterclaim. There was no cross-appeal on this point. The appellants now complain that the Judge erred in not ordering a stay of execution at least for the amount of the counterclaim until the disposal of the counterclaim.

As we have indicated earlier, the counterclaim consists two claims. First a claim for $47,421which is an amount owing to the estate of Waterhouse Snr by the Fiji partnership

as per the firm's partnership capital account and secondly a claim for $87,793 which is an amount owing by the respondent William Waterhouse to the Fiji partnership as per the same account.

Mr Knight argued that a stay was justified on the basis that part of the counterclaim was against the respondent William Waterhouse. He contended that in the absence of a stay the summary judgment would be satisfied and then at some future time after the counterclaim had been determined the receiver might need to enforce a judgment in Australia and incur considerable expense in so doing.

Mr Kapadia resisted a stay. He contended that the claim which was the subject of the summary judgment application was a claim by a creditor of the partnership and that that claim was quite separate from the counterclaim which concerned monies payable to and by the Fiji partnership. He pointed out that the amounts which were the subject of a counterclaim could change and more importantly he relied on s45(b) of the Partnership Act Cap 248 Ed 1978 which prescribes the order of payment from the assets of a partnership on a dissolution. Creditors of the firm are paid in priority to partners.

We are unable to accept Mr Knight's submissions on this point. There is no basis for a stay. The respondents claim as a creditor of the Fiji partnership. They are entitled to be paid ahead of any claims involving the partners in relation to the partnership capital account. It is irrelevant that the receiver may in the future have to enforce a judgment for monies owing by William Waterhouse as per the firm's capital account. We agree that this is a separate and unrelated matter. A stay is not justified.

We have noted the order of Singh J in relation to the proceeds of sale. On an application by the appellants, that Judge made an order for a stay in the sum of $150,000 pending the present appeal. Those monies were retained by Mr McDonald. The balance of the proceeds of sale were paid to the respondents on 12 December 2002. That order will lapse on the disposal of this appeal.

Result

For the reasons given the appeal is dismissed. There will be costs in favour of the respondents which we fix in the sum of $1,500.

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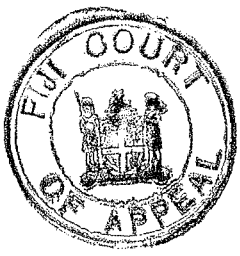
Tompkins, JA



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Henry, JA

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Penlington, JA

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