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

CIVIL APPEAL NO. ABU0028 OF 2003S
(High Court Civil Action No. HBC 245 of 2002L)

BETWEEN:

OCEAN HOLDINGS LIMITED

Appellant

AND:

OLYMPIC FIJI LIMTED

First Respondent

RICK VETAIA SADRANU AND OTHERS

Second Respondent

Coram: Ward, P
Sheppard, JA
Gallen, JA

Hearing: Tuesday, 6 July 2004, Suva

Counsel: Mr C. B. Young for the Appellant
Mr S. K. Ram for the Respondents

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

The Court: This is an appeal brought against a ruling made by the High Court (Byrne J.) on 6 June 2003. The ruling was made in response to a summons taken out by the appellant ("Ocean") against the respondents ("Olympic") in proceedings pending in the High Court in which Ocean is the plaintiff and Olympic Fiji Limited ("Olympic") and the personal respondents are the defendants. All defendants have the same interest. The proceedings in the High Court brought by Ocean have been consolidated with proceedings brought by Olympic against Ocean and one, Garry Pervan, who has the same interest as

Ocean. Both actions were commenced in July 2002. Although statements of claim have been filed in each matter, no defence has been filed for the reason that the parties take the view that the issues are so straightforward that defences are not required. We have some reservations about this which we shall mention later on.

By its summons dated 7 November 2002 Ocean sought a declaration that an agreement for the charter of a ship, "Tamasua Explorer", between Ocean and Olympic would terminate on 28 November 2002 pursuant to a letter dated 30 October 2002 written on behalf of Ocean. Additionally the summons sought an order that Olympic and the other defendants in the action brought by Ocean be restrained from repossessing the vessel on or after 28 November 2002.

That summons was heard on 20 February 2003. Judgment was given on 6 June 2003. In the course of that judgment Byrne J. referred to an earlier ruling he had given on 28 October 2002. There he had dissolved an injunction previously granted to Ocean on the ground of non-disclosure of material facts. He then referred to the agreement. It is described as a demise charter. It was made in 2002 on a date not specified on our copies. It was made between Ocean, said to be the owner, and Olympic as "Charterers by way of demise. " The period of the charter was 60 months from the time when the vessel was delivered and placed at the disposal of Olympic at Lautoka "subject to the earlier determination as hereinafter provided." Hire was to be paid at the rate of $F6,000 per month. The agreement contains 33 clauses. It is unnecessary to refer to these further except to mention clause 31 which provides:-

> ***"31. During the currency of this demise charter either of the parties hereto may terminate this demise charter by giving 30 days prior written notice to the other party."***

On 10 September 2002, Ocean's now solicitors wrote to the solicitors for Olympic. The letter appears to have been written after a change of solicitors by Ocean. It said:-

> ***"We now act for Ocean Holdings Ltd. and Garry Pervan.***

> ***On behalf of Ocean Holdings Ltd without prejudice to S.B. Patel & Co.'s letter of 18 July 2002., we hereby give your client Olympic (Fiji) Ltd. 30 days written notice pursuant to clause 31 that our client hereby terminates the Charter Agreement entered into between Ocean Holdings Ltd, and Olympic (Fiji) Ltd regarding the vessel "'Tamasua Explorer.'"***

On 29 October 2002 Ocean's solicitors wrote a further letter to Olympic's solicitors which said:-

> ***"On behalf of Ocean Holdings Ltd. and without prejudice to our client's right to appeal against the decision of His Lordship Justice Byrne delivered on 28th instant, we hereby give your client, Olympic (Fiji) Ltd 30 days written notice pursuant to clause 31 of the Charter Agreement between Ocean Holdings Ltd and Olympic (Fiji) Ltd. that our client hereby terminates the said Charter Agreement regarding the vessel "Tamasua Explorer."***
>
> ***In the meantime, please request your client to provide adequate proof of Insurance Cover in respect to the hull, passenger and public liability from a recognized double-rated Insurance Company."***

In a sense it seems strange to include in a letter purporting to terminate a contract a request to provide proof of adequate insurance cover. But on any view the contract still had one month to run. The matter was not mentioned in argument. We do not therefore take the view that there is any inconsistency between the two paragraphs of the letter.

This is an appeal from an interlocutory order made by the High Court in proceedings pending before it. There is a question whether the appeal will lie without the Court's leave. Ocean relies on s.12(2)(f)(ii) of the Court of Appeal Act Cap. 12. That provision makes leave to appeal unnecessary where, although the appeal is from an interlocutory order or judgment made or given by a judge of the High Court, an injunction or the appointment of a receiver is granted or refused. Here one of the two orders sought was for an interlocutory injunction but the other order was not. It was for a declaration that the charter agreement would terminate on 28 November 2002 pursuant to the letter of 29 October 2002 above set out.

The provisions of s.12(2)(f)(ii) of the Court of Appeal Act will not overcome the need for leave to appeal against that order providing of course that the order is interlocutory. That creates a difficulty for Ocean but rather than deal with the matter solely on the basis of the absence of necessary leave, we would prefer to deal with it on a broader basis. The reasons for this will emerge as we proceed.

Before we do, we should mention that Counsel for Ocean made a belated application for leave to appeal now. Counsel for Olympic objected to this because of its lateness. He said that if it were to proceed, he would wish to put on evidence showing the prejudice his client would suffer if leave were now granted. We see the force of this and refuse the application for leave which was made to us.

The writ and statement of claim in Ocean's action were filed on 24 July 2002. The summons of 7 November 2002 purports to be an interlocutory summons issued in those proceedings. It bears the same number. But insofar as it seeks a declaration, it is not interlocutory. It seeks a declaration of right and is an application for final relief. It would be most unlikely that the Court would ever grant declaratory relief by way of an interlocutory order.

There are a number of issues to be determined in the principal proceedings filed on 24 July 2002 and in the proceedings brought by Olympic which have been consolidated with the proceedings brought by Ocean. Olympic's proceedings were commenced by writ of summons dated 25 July 2002. One of those issues will be whether the charter agreement was effectively terminated by either of the letters earlier quoted or by a later letter dated 12 March 2003 purporting to terminate the agreement for non-payment of hire. That is, of course, if it is permissible to raise matters of substance which have arisen after the commencement of the proceedings. That is not a matter on which we express any view. No submission was made to us in relation to it.

Whatever the answer to that question may be, the fact is that It is quite inappropriate to seek to have an application for a declaration of right dealt with in an interlocutory application. The High Court has jurisdiction to order the separate trial of an issue or question which arises for determination in principal proceeding; see Order 33, Rule 4 of the High Court Rules. But that is the only means by which such a question may be dealt with. Before a court makes an order for the separate trial of a question it will need to be satisfied that it is appropriate to make such an order. If the determination of the question to be tried separately may be affected by the determination of other issues in the case an order for a separate trial of it will be inappropriate.

Having read the ruling made by Byrne J. the subject of this appeal and an earlier ruling made by him on 28 October 2002 and having listened to the submission made to us by counsel for Olympic we are of opinion that there may well be reasons why it would not be appropriate to make an order for the separate trial of the question whether Ocean has effectively determined the agreement. We do not express any concluded view about the matter because it is not before us and there may be many factors to be taken into account of which we are unaware.

For the moment it is enough to say that the application for declaratory relief was not a matter to be brought as it was here.

That leaves the application for an interlocutory injunction. Plainly its success or failure must depend on the outcome of the application for declaratory relief. Since this must fail, so must the application for an injunction. Ocean's summons was rightly dismissed by Byrne J. The appeal must also be dismissed.

Before we conclude there are some matters, irrelevant to our conclusion, which we mention. These are:-

1. Byrne J. has made two orders. Neither has been taken out. In a moment we shall refer to later orders made by Connors J. We are uncertain whether these orders have been sealed. The formal order of a court is the method it adopts to make clear what is required of the parties. If the order is not taken out it is unlikely that the Court will enforce it. This becomes very important in cases where an injunction has been granted. It is also important in appeals. Time for appeal will not run until the order of the Court appealed from is signed, entered or otherwise perfected; see Rule 16 of the Court of Appeal Rules.

2. In the course of his ruling Byrne J. appears to have relied, at least to an extent, on res judicata. Res judicata rarely has any application in relation to interlocutory judgments; see Spencer Bower, Turner and Handley, The Doctrine of Res Judicata (3rd edition 1996 by the Honourable Mr Justice H. R. Handley) para. 172.

3. We were informed that the vessel, the subject of this dispute continued to be used by Olympic until late last year. It then suffered a major breakdown of its machinery and has not been used since. This has apparently given rise to further issues between the parties. On 3 June 2004 the matter came before Connors J. He delivered a judgment on 11 June last. He made a number of orders in relation to the preservation of the vessel. In the course of his reasons, Connors J. said, "The matter is one that should in the interest of the parties, be resolved at an early date, as any delayed litigated outcome would appear to me to result in a loss for both parties." We strongly agree with this comment. Earlier Connors J. had said;

"Whilst it is extremely difficult to ensure that any matter receives a speedy trial at this court, I propose that orders be made for this matter to be placed before the Deputy Registrar to obtain an early trial date, immediately following the determination by the Court of Appeal."

We also agree with the sentiment underlying these remarks. This case badly needs judicial management. It requires a comprehensive directions hearing to elicit the issues that are really in dispute, to ascertain how ready the case is for hearing and what else needs to be done to make it ready, and the making of clear and concise directions in relation to the amendment of pleadings, the filing of further pleadings, the provision of particulars, discovery and inspection of documents, the pros and cons of the furnishing of statements of evidence, particularly the evidence of any experts, and other matters that may need attention. The difficulties about hearing dates in the High Court mentioned by Connors J. are well known. But this case cries out for expedition. It should be given as early a date as possible consistent with the case being ready and the many other demands on the High Court's time.

4. As indicated, we have misgivings about the parties' agreement that formal defences are not necessary. The cases seem complex enough to make it desirable that pleadings should take the usual course. This may be the only way in which the issues will become clear.

5. Finally, this case, in the interests of the parties should desirably be settled. In the course of discussions during the hearing, the suggestion was made that settlement might be assisted by the appointment of a suitable mediator. We urge the parties to think seriously about this. It may well save them an enormous amount of money.

In the result, however, this appeal must fail. The orders we make are:-

1. The summons dated 7 November 2002 taken out by Ocean Holdings Limited be dismissed.

2. Ocean Holdings Limited pay the respondents' costs of the summons which we fix at $1,000.

Additionally we direct the solicitors for the parties to provide the principals of their respective clients with a copy of these reasons for judgment. Their attention should be drawn particularly to what we have said on pages 5, 6, 7 and 8. Each solicitor is directed to file an affidavit stating that this direction has been complied with on or before 30 July 2004.

Ward, P

Sheppard, JA

Gallen, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. C. B. Young and Associates, Suva for the Appellant
S. K. Ram Esq., Suva for the Respondents

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