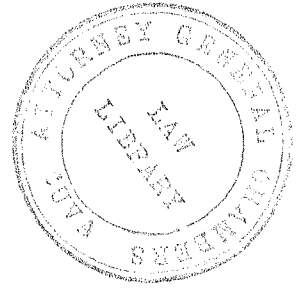


IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI



CIVIL APPEAL NO.ABU0005/2004S

(High Court Civil Action No.HBC414 of 2003)

BETWEEN:

EXPORT FREIGHT SERVICES (FIJI) LIMITED

Appellant

AND:

JOHN BEATER ENTERPRISES PTY LIMITED

Respondent

In Chambers: Sheppard, JA

Hearing: Thursday 11th March 2004, Suva

Counsel: Mr. J. Savou for the Appellant
Mr. A. Seru for the Respondent

Date of Judgment: Friday 19th March 2004, Suva

J U D G M E N T

This is an application for leave to appeal against an order made by the High Court (Connors J) on November 2003. The order was made in proceedings brought by the applicant against the respondent for its winding up. The applicant claims to be one of the respondent's

creditors. The respondent denies that it is. His Lordship ordered that the winding up petition be stayed. He reached that conclusion because he found that there was evidence of a genuine dispute between the parties over the existence of the debt.

His Lordship said that the respondent ("Beater") was an importer of alcohol and that the applicant ("Export Freight") was at one time its customs agent. The debt is said to have been incurred by Beater during the course of that relationship. Export Freight claims to have paid to the Customs the total amount due pursuant to a number of short payment advices (S.P.A. s) received from the Customs. It claims that the total of these constitutes its debt.

In June 2002 the parties had attempted to reach a settlement of the matter but no agreement was reached. Since then the amount claimed by Export Freight has increased from \$13,700 to \$17,374.59 which is the amount of the debt relied upon in the petition.

His Lordship concluded that there was a substantial dispute as to the alleged debt. His Lordship reached his conclusion after reading affidavits filed in proceedings brought by Beater against Export Control claiming damages for negligence; see Civil Action NO.414 of 2003 pending in the High Court.

In the course of the argument before me counsel for Export Freight said that on the face of the Lordship's judgment there had been found to be a debt owing of the difference between \$17,374.59 and \$13,700. If that were so Export Freight would be on firm ground because it is clear law that the respondent to a winding-up petition cannot escape its consequences where there is genuine dispute only as to part of the petitioning creditor's debt. But the submission by counsel for Export Freight is based on a misapprehension. His Lordship did not find that there was a

dispute only as to part of the debt. He found that the dispute was in respect of the whole of the debt.

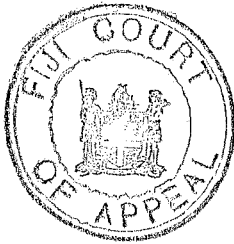
I was referred to the same affidavits as was his Lordship. They bear out what he said. Both counsel went into a good deal of detail about the significance of the affidavits, counsel for Export Freight contending that the amounts referred to in the Beater affidavits were not amounts making up the total of the SPAs upon which his client relied. That may eventually be proved to be correct. But the question I have to determine is whether upon the material before me Export Freight should be given leave to appeal. In my opinion its chances of persuading an appellate court that his Lordship's finding of a genuine dispute was wrong are remote. In those circumstances I have reached the conclusion that this application should be dismissed.

Before I conclude, there is another matter to which I should briefly refer. This application is brought pursuant to S.12 (2) (f) (iii) of the Court of Appeal Act (Cap.12). It provides, so far as relevant, that no appeal shall lie from any interlocutory judgment made or given by a judge of the High Court except in the case of a decision determining the claim of any creditor. It was submitted by counsel for Beater that the order sought to be appealed from did not determine Export Freight's claim; nor for that matter would a winding-up order, if one were to be made, because in that event, Export Freight would need to prove its debt in the liquidation. The claim would only be established if its proof were admitted by the liquidator.

It is very difficult to see why the submission is not connect but the matter was not the subject of full argument and I do not think I should express a final view on it unless it is necessary to do so which it is not; I therefore leave the matter open. In passing I should mention that one of the matters that has occurred to me is whether the judgment is final or interlocutory. This matter was not raised in argument. If,

however, it proved to be final, Beater would have had an appeal as of right. It would, however, be out of time if it were minded to file a notice of appeal now. If it were to make application for leave to file a notice of appeal out of time, it would raise very much the same considerations as are dealt with in the first part of this judgment.

In the result the application is dismissed with costs which I fix at \$500.



A handwritten signature in black ink, appearing to read "I. F. Sheppard", is written over a horizontal dotted line.

I.F. Sheppard J.A.

Solicitors:

J. Savou Esq., Suva for the Appellant

A. Seru Esq., Suva for the Respondent