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

CIVIL APPEAL NO. ABU0037 OF 2003S
(High Court Civil Action No. HBC 507 of 1999S)

BETWEEN: FILIMONE RAIBOSA

Appellant

AND: AIR PACIFIC LIMITED

Respondent

Coram: Tompkins, JA
Smellie, JA
Scott, JA

Hearing: Thursday, 10 March 2005, Suva

Counsel: Ms V. Patel for the Appellant
Mr J. Apted for the Respondent

Date of Judgment: Friday, 18 March 2005

JUDGMENT OF THE COURT

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[1] The appellant's application for leave to appeal out of time and for stay of a execution was reserved pending the outcome of the substantive appeal.

[2] The application is for leave to appeal to the Supreme Court and is governed by article 122 (2) of the 1997 Constitution: "an appeal may not be brought from a final judgment of the Court of Appeal unless:

(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance."

[3] The opening paragraph of the judgment of the Court of Appeal in respect of which this application is made (***Filimone Raibosa v. Air Pacific Limited*** Civil Appeal No.ABU0037/04 of 2003S judgment delivered 19 December 2004) reads as follows:

> ***"The appellant consigned a container of fresh taro to the respondent for carriage by air from Nadi to Sydney on 2 May 1999. The consignment was 4300 kgs of taro packed in 20 kg bags and loaded into the container. The sale price of the taro was A$2.70 per kg so the total value was $A11,610. After taking delivery of the consignment in Sydney on 4 May 1999 the consignee found this (sic) 700 kgs of taro were damaged beyond saleability and the balance so damaged, that after 3 days of cleaning it was sold for only $A6,745. For present purposes the damage to the taro was caused by the respondents failure to store the container in a cool store."***

[4] Although the record in the High Court was not before us, it appears that the sale price of $A6,745 was a gross figure and that by the time the cost of sorting and cleaning the damaged portion of the consignment had been undertaken and the cost of quarantine, fumigation and cartage from the airport to the consignees shop were deducted a significantly lesser net figure was recovered.

[5] In the appellant's notice for leave to appeal to Supreme Court the questions said to be of significant public importance are recorded as follows:

> ***"(i) whether there has been consistency within the interpretation of international conventions shown by the High Court and the Fiji Court of Appeal;***
>
> ***(ii) The questions involve international carriage by air of cargo which affects all cargo movements into and out of Fiji and elsewhere. It further has direct implications in terms of carrier liability on the carriage of persons and baggages"***

[6] Counsel for the Appellant (Applicant) was unable to demonstrate any inconsistency but as Ms Patel developed her submission it emerged that the questions of

significant public importance, as seen by the appellant, related more to, at what point total loss or damage should to be ascertained. In particular whether the decision must be made before the goods leave the airport of destination – that is before the carriage by air can be said to have terminated. It appears from Counsel's submissions (we accept they are based on the record in the High Court) that initially the consignee on viewing the goods at the airport rejected them. It also appears, however, that they were nonetheless transported to his premises where they were examined carefully and, as the introductory paragraph of the Court of Appeals judgment shows, 700 kgs were found to be damaged beyond saleability, (destroyed in effect) but the balance were cleaned up and sold. On that basis 1/6th approximately of the total consignment was lost 5/6th were damaged. The gross recovery also suggests that something over 50% of the original value of the undamaged consignment was recovered, although it can be accepted that the net recovery was rather less.

[7] While submitting that the evidence of refusal of the consignment at the airport should be accepted as proof of total loss Ms Patel also, as we understood her, submitted at that point the burden of proof shifted to the airline to show that it had done everything that it could to prevent the loss. It became clear as a result of questions from the bench that the appellant's contention was that the evidence of what happened to the consignment after it left the airport ought not to have been taken into account. The two cases, (***Applied Implants v. Lufthansa***) [2000] 2 Lloyd's Law Reports 46 and ***Siemens v. Schenkers International*** [2004] HCA 11 cited in support do not help. Both are concerned with provisions dealing with limitation of liability, not the point at which liability per se is to be ascertained.

[8] We have no hesitation in rejecting Ms Patel's submission. It is self evident that in many instances damage sustained during carriage by air will not be discovered until the goods reach the consignee's premises and are unpacked. The right to make a timely claim for damage would be emasculated if the damage had to be ascertained

before the goods left the airport of destination. In the present case what happened was that the appellant failed to give notice within 14 days of receipt of the cargo and as a consequence its claim was barred.

[9] As was noted by the Court of Appeal in this case ***"....the interpretation of the Convention should be uniform throughout the world or at least in the jurisdiction of the parties."*** The Court cited leading authorities in both the United Kingdom and the United States in support of that proposition and also relied upon the leading text Shawcross and Beaumont Air Law 4th edition.

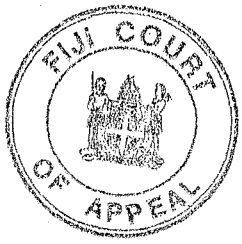
[10] It is apparent that if leave were granted to appeal to the Supreme Court, the appeal could only succeed if the findings of fact by Singh J. in the High Court and the acceptance of those findings by this Court, were overturned.

[11] We are unable to see that we could properly certify such an issue as ***"a question... of significant public importance"***

[12] It follows that even if leave were granted to appeal out of time the substantive application pursuant to Article 122 (2) (a) of the Constitution would evidently fail. Leave to appeal out of time is therefore declined and the substantive application is dismissed.

[13] The costs ordered in the High Court were modest. This application, with due respect to the submissions of Counsel for the appellant, had but a remote prospect of success. In this Court costs are ordered in favour of the respondent in the sum of $750 with any disbursements incurred by the respondent to be fixed by the Registrar.

Tompkins, JA



Smellie, JA

Scott, JA

Solicitors:

Messrs. O'Driscoll & Shivam and Company, Suva for the Appellant
Munro Leys, Suva for the Respondent

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