

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

CIVIL APPEAL NO. ABU0008 OF 2007S
(High Court Civil Action No. 210 of 1999L)

BETWEEN:

CARPENTERS FIJI LIMITED MBF

Appellant

AND:

WESTERN WRECKERS LIMITED

Respondent

Coram:

John Byrne, JA
Devendra Pathik, JA
Randall Powell, JA

Hearing:

Thursday, 10th July 2008, Suva

Counsel:

S. Maharaj for the Appellant
I. Khan for the Respondent

Date of Judgment: Friday, 11th July 2008, Suva

JUDGMENT OF THE COURT

1. On 26 and 30 October 1995 the respondent imported from Japan into Fiji twenty (20) and thirty (30) car body shells ("the Goods") via the cargo ships M.V. Kyowa Cattleleya Voyage and M.V. Reefer Fresh Voyage respectively. The shipper on both occasions was Aamir Traders Limited of Japan ("the Shipper").

2. The appellant was the respondent's shipping agent, who cleared the respondent's shipments from Lautoka Wharf.
3. The appellant claimed that, in the absence of the original Bills of Lading, the respondent executed Letters of Indemnity dated 27 October 1995 and 30 October 1995 respectively ("the Guarantees"), that the respondent instructed the appellant to deliver the Goods to it and that the appellant did so on the instructions of the Shipper and on the strength of the Guarantees.
4. A claim was made against the appellant in the sum of \$62,923 by Greater Bali Hai Service in respect of forwarding charges in respect of the Goods ("the Forwarding Charges"). The appellant commenced proceedings against the respondent seeking to recover the Forwarding Charges.
5. The respondent declined to reimburse the appellant for the Forwarding Charges and in early 1999 the appellant commenced proceedings against the respondent for orders that it forthwith deliver up the original Bills of Lading and alternatively for judgment on the Guarantees.
6. The respondent's defence was that it paid for the Goods in full, including customs duty and VAT, before the Goods were released to it by the appellant. The respondent denied that the Guarantees were executed by it. The respondent also denied that the High Court had jurisdiction to determine the cause of action, on the ground that any cause of action arose in Japan.
7. The Guarantees were purportedly executed by a Mr Rahimat Ali ("Mr Ali") on behalf of the respondent. Connors J held that *"On the evidence that has been placed before the Court I cannot be satisfied on the balance of probabilities that the guarantee documents were in fact executed by Mr Ali on behalf of the (respondent). That being so I am unable to find in favour of the (appellant) on the statement of claim."*

8. There was a verdict for the respondent with costs.
9. The appellant appeals on the grounds that the finding by the trial judge that the Guarantees were not executed by the respondent was against the weight of the evidence. The appellant says that the trial judge should have accepted that the Goods would not have been released without the original Bills of Lading unless the respondent had provided the Guarantees.
10. An appellant cannot appeal against findings of fact unless the evidence is preponderant that the trial judge's finding of fact is unreasonable, so that no person acting judicially could have reasonably made such findings.
11. The trial judge, in coming to his finding that the Guarantees were not executed by the Mr Ali, relied on the following matters:
 1. That Mr Ali denied ever having executed the Guarantees;
 2. Mr Ali's evidence that it was not uncommon for goods to be released without the original Bill of Lading being produced due to the long standing relationship between the appellant and the respondent;
 3. That none of the witnesses called by the appellant witnessed Mr Ali executing the Guarantees and only one of those witnesses maintained that the signatures were in fact Mr Ali's;
 4. That the signature on each of the Guarantees appeared from a casual perusal to be different from the other.
12. An examination of the Guarantees reveals that they are standard form documents and they suggest that it was a standard practice of the appellant to release goods without a

Bill of Lading in return for guarantees to pay in due course. The purported signatures of Mr Ali on the Guarantees do appear somewhat unlike each other and also unlike a signature of Mr Ali on a later letter, being a letter of 15 April 1999, which letter was annexed to an affidavit read at the hearing. This letter, addressed to John Swire & Sons Pty Ltd, contains the sentence:

"I have now paid Carpenters Shipping the Forwarding charges of F\$62,923.33 which they demanded."

This is clearly a lie but it doesn't appear that Mr Ali was cross-examined on this passage and it doesn't appear that the trial judge's attention was drawn to this passage.

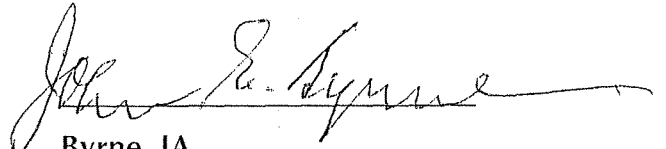
13. The trial judge, as it can be seen, made his finding based in significant part on the credibility of the crucial witness, Mr Ali. As was held in **Benmax v Austin Motor Co Ltd** (1955) AC 370, where a trial judge has seen and heard the witnesses, *"it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness"*. (per Lord Reid at 328)

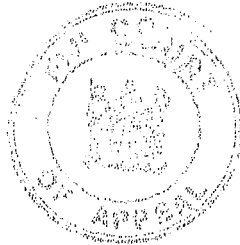
14. This is not that rare case. There was sufficient evidence before the trial judge to support the principal finding of fact that he made. If Mr Ali had been cross-examined on the letter of 15 April 1999, or if the trial judge's attention had been drawn to the obvious lie in that letter, the trial judge would have been obliged to address the matter in coming to a finding on the credibility of Mr Ali. The passage in the letter, and Mr Ali's evidence in relation to that passage, may have caused the trial judge to come to a different finding as to the credibility of Mr Ali but that is a matter of speculation. It cannot however be held that the trial judge was in error in failing to find this passage himself.


15. The appeal must be dismissed with costs.


16. The orders of the Court are:

1. Appeal dismissed;
2. The appellant to pay the respondent's costs as taxed or agreed.


Byrne, JA




Pathik, JA


Powell, JA

Solicitors:

Suresh Maharaj and Associates, Lautoka for the Appellant
Iqbal Khan, Lautoka for the Respondent