IN THE COURT OF APPEAL, FIJI ISLANDS

Miscellaneous Application No. 12/06
(High Court Civil Action No. HBC 415'2005S)

BETWEEN:

YAUKUVE ISLAND RESORT LIMITED

Applicant

AND

CA'BELLA PACIFIC CONSTRUCTION (FIJI) LIMITED

Respondent

D. Sharma for the Applicant
I. Roche for the Respondent

DECISION

[1] This is an application for leave to appeal out of time against a judgment of the High Court dated 10 May 2006. As the judgment was interlocutory, application was first made for leave to appeal in the High Court. That application was refused on 23 June 2006.

[2] Counsel were in agreement that the 21 day period specified by Rule 16 (a) of the Court of Appeal Rules must, where further application is made to the Court of Appeal under the provisions

of Rule 26 (3), begin running on the date that the first application is refused by the High Court. The present application for leave is therefore out of time by the period running from 14 July to 23 August.

[3] The manner in which this litigation has been pursued is, with all respèct to the parties' legal advisers, somewhat strange.

[4] The parties entered into an agreement for the construction of a tourist resort on Yaukuve Island in about December 2003. On 8 March 2005 the Applicant terminated the contract and excluded the Respondent from the work site on the island.

[5] The contract between the parties contained an arbitration clause, clause 33. On 18 April 2005, solicitors for the Respondent wrote to the Applicant advising them that pursuant to clause 33 it was proposed to refer the dispute between the parties to arbitration.

[6] On 7 June 2005 the Applicant's then solicitors wrote to the Respondent's solicitors as follows:

> "With regard to the question of arbitration, clause 33, our client takes the view that the pre-conditions to trigger an arbitration as required by the agreement do not exist at present and consequently any arbitration on contractual issues, the contract not having been terminated, would properly be dealt with upon the completion of the works. Should you disagree with this please advise us within seven days of the date of this letter, failing which our instructions are to seek

the direction of the High Court by way of declaratory judgment".

[7] On 10 August 2005 the Respondent commenced proceedings for breach of contract in the High Court. They sought special damages of just over $2.5million together with general damages at just over $2m. No mention was made in the statement of claim of the arbitration clause.

[8] On 18 October 2005 the Applicant filed a Statement of Defence. Paragraph 1 (c) is as follows:

> "the Defendant files this Statement of Defence under protest and under threat of default judgment being entered against it. The Defendant reserves its rights to the following:
>
> (c) to invoke the arbitration clause under Article 33 of the Building Contract entered into in December 2003."

[9] As at October 2005 the general position of the parties as revealed by the pleadings filed in the High Court and the correspondence which had preceded them was that the Plaintiff/Respondent which had earlier sought arbitration but which had been rejected by the Defendant/Applicant then commenced proceedings in the High Court in contract. The Defendant/Applicant on the other hand, having previously refused to agree have the dispute referred to arbitration, then filed a defence to the proceedings commenced by the Plaintiff/Respondent invoking, in part, the arbitration clause.

[10] On 7 December 2005 the Plaintiff/Respondent apparently reverted to its original position. It applied to the High Court for an order for the appointment of a qualified person:

> " ... as arbitrator or as special referee to hear and determine the whole of the dispute between the parties."

[11] The application was made under the provision of RHC O 36. This provision applies to the appointment of a special referee. It has no relevance at all to the appointment of an arbitrator whose functions are quite different from those of a special referee. Applications relating to the appointment or removal of an arbitrator are dealt with under the provisions of the Arbitration Act (Cap. 38) and RHC O 73.

[12] Notwithstanding the clear distinction between a referee and an arbitrator, paragraphs 11 and 12 of the supporting affidavit filed by the Plaintiff/Respondent read as follows:

> "[11] In discussions I have had with the lawyers representing the Defendant I have been advised that the Defendant will not agree to the appointment of an arbitrator under clause 33 of the contract ... the Defendant asserts that there is no power under clause 33 to appoint an arbitrator, nor does there appear to be power under the provisions of the Arbitration Act to apply to have an arbitrator appointed to determine the matter.

> [12] The nature of the proceedings, the costs and the interests of justice indicate that the matter is one which is aptly suited for determination by an arbitrator appointed for the purpose pursuant to rule 1 of Order 36 of the Rules of Court."

[13] On 9 March 2006 solicitors for the Defendant/Applicant filed an affidavit in answer. In paragraph 3 (d) it was averred that:

> "Order 36, Rule 4 of the high Court Rules has nothing to do with the appointment of an arbitrator, it only deals with a special referee."

In paragraph 6 of the affidavit it was deposed that:

> "I am advised and verily believe that the Plaintiff's application is misconceived and made contrary to the provisions of Section 5 of the Arbitration Act, Cap. 38".

[14] Section 5 of the Arbitration Act reads as follows:

> "*Power to Stay Proceedings where there is a submission*

> 5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the

proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings."

As will be evident from the section, it was clearly drafted in anticipation not that, as here, the Plaintiff in proceedings commenced by it in contract would subsequently seek an order staying the proceedings which it had itself commenced but to enable a defendant to proceedings commenced in contract by the other party to the submission to make application to the court for those proceedings to be stayed.

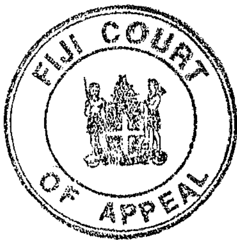
[15] On 10 May 2006, the High Court allowed the Plaintiff/Respondent's application. It took the view that "the Court has a discretion to allow proceedings to be referred to an arbitrator". It was of the opinion that the subject matter of the dispute between the parties was such that it could best be resolved by arbitration. When, on 23 June, the High Court refused leave to appeal it stated that in granting the application for the appointment of an arbitrator all it had done was to give effect to the agreement contained in clause 33 of the building contract. No mention was made by the Court either of the distinction between Orders 36 and 73 or of the effect or otherwise of Section 5 of the Arbitration Act.

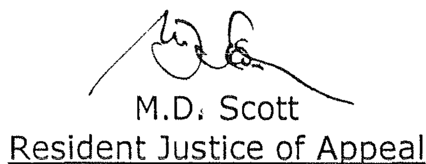
[16] Mr. Sharma's submission was that the High Court erred in law by overlooking and/or misconstruing Section 5 of the Arbitration Act. He submitted that this was a fundamental error of law which affected the rights of the parties. In these circumstances he invited this court to waive the delay (for which he apologized) in filing this application and grant leave to appeal out of time.

[17] Mr. Roche maintained that the building dispute was eminently suitable for disposal by way of arbitration. He however conceded that the Plaintiff/Respondent would only be able to avoid the effect of Section 5 "with difficulty".

[18] In my opinion it is at least arguable that the High Court may have erred in law when it apparently took the view that notwithstanding Section 5 it still had a discretion to stay the proceedings commenced by the Plaintiff on the grounds of convenience. This is a fundamental question of arbitration law. The delay in applying for leave to this court is not serious.

[19] The application succeeds. There will be orders in terms of paragraphs (a) and (b) of the Notice of Motion dated 18 August 2006. There will be no order as to costs.





M.D. Scott
<u>Resident Justice of Appeal</u>

15 September 2006