

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 67 OF 1990

BETWEEN

REDDY'S ENTERPRISES LIMITED

Appellant/Applicant

and

THE GOVERNOR OF THE RESERVE  
BANK OF FIJI

Respondent

Mr B.C. Patel for the Applicant/Appellant  
Mr M.J. Scott for the Respondent

DECISION

(Application in Chambers for a Stay Order)

By its Summons dated 11 March 1991 the Appellant/Applicant (hereafter referred to as the Applicant) seeks an Order "that the proceedings to which the application relates be stayed pending the determination of the appeal or until the Court otherwise

orders". The Summons states that the application is taken out pursuant to Rules 25 and 26 of the Court of the Appeal Rules and Order 53 rule 3(8) of the High Court Rules. In the course of arguments before me the Applicant also relied on Section 20(f) of the Court of Appeal Act.

By the terms of a Consent Order made by me on 3 April 1991 it is clear that the application to stay is in respect of the decision of the Governor of the Reserve Bank of Fiji dated 8 June 1989 whereby he declined the Applicant's request to invest in New Zealand and to all his consequential directives requiring the Applicant to bring into Fiji all insurance proceeds and interest received and held in London. For the purpose of convenience, clarity and consistency I shall hereafter wherever possible refer to the Governor's decision together with all subsequent directions, collectively, as the "Governor's Order".

#### Chronology of events

The following chronology of events provide the background to the application now before me:

- "20 November 1987 - Reddy's Enterprises Limited obtains insurance for Tanoa Hotel with London underwriters after obtaining permission from the Commissioner of Insurance and the Reserve Bank of Fiji.
- 17 December 1988 - Tanoa Hotel destroyed by fire.
- May 1989 - Loss claim agreed at \$F5.1 million.
- 22 May 1989 - Application made by Reddy's Enterprises Limited to invest insurance proceeds offshore on term deposit of 24 months.

- 8 June 1989 - Governor declines application and gives direction to Applicant to repatriate to Fiji funds totalling \$F5.1 million held in London.
- 15 June 1989 - Governor requested to reconsider.
- 20 June 1989 - Application again declined after reconsideration.
- 7 June - 26 July 1989 - Payment to Sedgwick London as agent of Reddy's Enterprises Limited of \$F4.59 million (Sterling 1.865 million). 10% of the agreed sum was paid to the Applicant Company in Fiji by Pan Pacific Insurance Co. Ltd.
- 22 August 1989 - Appeal filed to Minister. (Temporary consent given pending determination of appeal).
- 13 October 1989 - Minister dismisses appeal.
- 16 November 1989 - Judicial Review Application filed in the High Court seeking certiorari to quash the Governor's Order of 8 June 1989.
- 24 November 1989 - Leave for Judicial Review granted and interim stay of Governor's order made by Mr Justice Palmer.
- 30 November 1989 - Further stay granted by Mr Justice Palmer pending hearing of Judicial Review Application.
- 17 - 19 September 1990 - Case heard in High Court by Mr Justice Byrne. Judgment reserved and further stay granted pending judgment.
- 29 November 1990 - Judicial Review Application dismissed by High Court. Further stay sought orally but not granted. Advised to apply to the Court of Appeal without hearing submissions.
- 3 December 1990 - Reddy's Enterprises Limited required to repatriate principal and interest forthwith.

- 20 December 1990 - Notice of Appeal to Fiji Court of Appeal filed.
- 11 February 1991 - Reddy's Enterprises Limited reminded of criminal implications of continuing non compliance with Governor's directions.
- 11 March 1991 - Reddy's Enterprises Limited apply to Fiji Court of Appeal of a stay pending Appeal.
- 3 April 1991 - Stay granted by consent by order of the Resident Justice of Appeal, Sir Moti Tikaram, to expire 29 July 1991.
- 12 June 1991 - Further application for stay filed.
- 22 July 1991 - Hearing of further application for stay takes place. Decision reserved, stay order to continue until decision given."

The Consent Order made by me on 3 April 1991 and referred to above reads as follows:-

- "1. That a stay of proceedings to which the application for Judicial Review relates ("the stay") is hereby granted upto and including 29th July 1991.
2. That the stay shall also relate to and include the decision or direction of the Respondent dated 8th June 1989 and all subsequent directions requiring the Appellant to bring into Fiji the insurance proceeds and interest received and held in London.
3. That the Appellant will retain the insurance proceeds and interest in a bank account in London until 29th July 1991.
4. That the Appellant shall be at liberty to apply to extend the stay, and the Respondent shall be at liberty to oppose any such application for stay, and subject to any order made extending the stay beyond 29th July 1991, this Order of stay shall lapse on 30th July 1991.
5. Upon the expiry of this Order of stay or any extension thereof each party shall be at liberty to take such action or proceeding as he may deem necessary according to law.
6. That the costs of this application be costs in the cause."

Applicant's case

The Applicant contends that the application should be granted because -

- (1) A refusal will render its right of appeal nugatory.
- (2) Substantial interest loss will be suffered if required to repatriate the funds before a decision of the Court of Appeal is given.
- (3) The Applicant will be greatly prejudiced in its application to take out funds from Fiji if the application for a stay is refused and as a consequence funds are brought into Fiji. This is so because approval of the Governor of the Reserve Bank will be required and all indications are that it will not be given.
- (4) The Respondent is not likely to suffer any irreparable loss if the application is granted.
- (5) The points of law involved in the appeal are not only novel but are also of great general public importance especially to the commercial community. Furthermore the appeal is clearly arguable and is neither wholly unmeritorious nor wholly unlikely to succeed.
- (6) A great harm is likely to be caused to the Applicant by criminal prosecution pending appeal.

In short, it is the Applicant's contention that there are special circumstances of the case which require a Stay Order and it is just equitable that such an Order be granted.

Respondent's opposition

The Respondent's opposition to the application can be summarized as follows:-

- (1) Prejudice to the public interest if the application is granted, and thus the Respondent will be denied the fruits of its success;
- (2) The fact that the Applicant has already obtained the full advantage sought by it which was the subject of relevant litigation;
- (3) The fact that the Applicant has already received a high degree of indulgence in the relevant matter;
- (4) The undesirability of conferring immunity from prosecution upon the Applicant pending appeal because criminal prosecution is the only sanction against refusal to comply with the Governor's Order. (See Section 36 of the Exchange Control Act and the Fifth Schedule);
- (5) The impossibility of securing public interest against prejudice in the event of the Applicant's application being granted;



- (6) There is no novelty on the points of law raised by the Applicant and that in any case the grounds of appeal are tenuous and the appeal is wholly unlikely to succeed.

#### Preliminary issues

A preliminary issue raised by Mr M.J. Scott on behalf of the Respondent is that the true nature of the application is really a request for our injunctive relief against criminal prosecution rather than a stay of the Governor's Order.

In support he cites paragraph 12 of Mr Y.P. Reddy's affidavit of 11 March 1991 wherein he states that any criminal prosecution "*would cause irreparable damage to the commercial integrity of the Company and its directors*". However, since the Applicant has made it clear that it is not asking for an Order restraining the Respondent from taking criminal prosecution and having regard to the decision in Re Attorney-General of Manitoba 1987 38 DLR (4th Ed) 321 that the distinction between a stay and an injunction is essentially procedural and they are governed by the same rules, Mr Scott is not pursuing the point that the application be dealt with on the footing that the Applicant is seeking an injunction to restrain the Respondent from resorting to criminal prosecution. However, he argues that the effect of granting a stay as sought could be the same.

Mr Scott also concedes that an application under the English equivalent to Order 53 rule 3(8) is capable of being used to obtain *"a stay of the process by which the decision is challenged has been reached, including the decision itself"* - see R. v. Secretary of State for Education (1991) 1 All ER 282.

Order 53 r.3(10) of the Rules of the English Supreme Court provides that a Court granting prohibition or certiorari may order that the grant shall operate as a *"stay of the proceedings to which the application relates"*. In the case of R. v. Secretary of State for Education initially cited by Mr B.C. Patel, Counsel for the Applicant, it was also held that the word *"proceedings"* is not limited to the proceedings of a Court but is to be construed widely in order to include any decision-making process which is susceptible to judicial review. Since we have similar legislation in Fiji (Order 53 r.3(8)) it is my view that the application before me relates to a *"proceedings"* and that by virtue of Section 20(f) of the Court of Appeal Act read in conjunction with Rule 25(1) of the Court of Appeal Rules it is within the competence of a single Judge of Appeal to deal with a stay application.

Section 26(f) which prescribes the powers of a single Justice of Appeal reads as follows -

*"to stay execution, or make any interim order to prevent prejudice to the claims of any party pending an appeal".*



Rule 25(1) provides:

"(1) Except so far as the Court below or the Court of Appeal may otherwise direct -

- (a) an appeal shall not operate as a Stay of Execution or of proceedings under the decision of the Court below;
- (b) no intermediate act or proceeding shall be invalidated by an Appeal".

Rule 26 is now not relevant for the purpose of my decision as the Respondent agrees that an oral application unsupported by an affidavit made soon after judgment in the Court below constitutes an application in that Court - See Tuck v. Southern Counties Deposit Bank (1889) 42 ChD 471, CA. The Respondent originally contended that application before me should have first been made in the lower Court as required by Rule 26.

I have found it necessary to refer albeit briefly to the competence of this Court to deal with this application because when the matter first came before me in April 1991 Mr Scott raised the question of jurisdiction. With regard to Rule 25 he had submitted, inter alia:

- "(a) The rule only enables a Stay of Actions and proceedings under a Judgment and it is not applicable to a simple case of dismissal by the High Court of an application for judicial review;
- (b) The rule applies only to Stay "execution" and "proceedings under" the judgment of the High Court and does not apply, if no such measures are extant."

### Factors to be taken into account

Consequently I shall deal with the application as worded and in accordance with the principles applicable to a stay application. In doing so I propose to take into account the following factors - the nature and purpose of appeal, prejudice to the parties if the application is granted or refused and balance of convenience.

First of all it is necessary to make some reference to the Judicial Review proceedings as well as the Grounds of Appeal lodged.

### Judicial Review proceedings

Mr Justice John Byrne's reserved decision delivered on 29 November 1990 covered 45 pages. It dealt with a number of legal issues raised by Counsel on both sides. As to the nature of the application and the importance of the issues raised he had this to say at page 2:

" The relief sought is for an Order of Certiorari, to remove into this court and quash a decision dated the 8th of June 1989 of the Governor of Reserve Bank of Fiji ("The Governor"). The Applicant also seeks an Order of Mandamus directing the Reserve Bank (hereinafter called "The Bank"), in the event that the decision of the Governor is quashed, to determine the matter according to law, and within the limits which may be indicated by this Court. I have been told by counsel that the proceedings are in the nature of a test case and thus may be described as friendly in the sense that both sides are anxious to have the important matters raised in the application decided in the hope that the Court's decision will be of assistance and guidance not only to the parties but to the commercial community of Fiji also.

I said the proceedings are important because they raise questions about the right of the Reserve Bank of Fiji to

control the investment abroad of funds owned by residents of Fiji. As stated by senior counsel for the Applicant at the beginning of the hearing before me, the Applicant wants the Court to hold that a Fiji resident is entitled to retain Fijian dollars abroad without breaching the Exchange Control Act, Cap 211.

The other reason why the case may be regarded as important is that it involves the application of well-known principles of statutory interpretation, particularly the so-called "purposive" rule, in relation to legislation such as the Exchange Control Act."

In refusing the application for Judicial Review

Mr Justice Byrne held, inter alia, that Section 26 of the Exchange Control Act applied to funds held by the Applicant in London and that the Governor acted within his jurisdiction in requiring the Applicant to repatriate the funds held there. However, he conceded that a proper construction of Section 26 of the Exchange Control Act required him to read certain words into the Section. Furthermore, he concluded that the Applicant was not denied natural justice.

#### Grounds of Appeal

In appealing against Mr Justice Byrne's decision the Applicant filed the following grounds of appeal -

##### "Section 26

1. The learned Judge erred in law in holding that section 26 of the Exchange Control Act ("the Act") was applicable to the appellant.
2. The learned judge erred in law by implying words in section 26 of the Act when the section was unambiguous as to its meaning and effect.

3. Section 26, including the implied words, did not bear the meaning and effect attributed to it by the learned judge.

#### Section 9

4. The learned judge misconstrued section 9 by interpreting the word "compensation" too narrowly and by failing to appreciate that the section deals with "payment".
5. The learned judge erred in law in not holding that the appellant had complied with section 9 of the Act.

#### Delegation

6. The learned judge failed to consider section 39(4) of the Act in holding that the Minister had delegated his powers, under the Act, to the Governor, when the delegation was to the Reserve Bank.
7. By holding that the Minister had delegated his powers to the Governor, the learned judge failed to consider the distinction created by the words "to delegate or authorise the delegation of any of his [the Minister's] powers" contained in section 39(4) of the Act.

#### Section 4

8. The learned judge erred in law in holding that section 26 of the Act was applicable to the appellant even though the appellant had complied with section 4.

#### Section 4 and 9

9. The learned judge erred in law in not holding that only sections 4 and 9 of the Act were applicable to the appellant and that these sections had been duly complied with by the appellant.

#### The Wednesbury principle

10. The learned judge misconstrued the Wednesbury principle by taking the view that the appellant was inviting the Court to substitute its decision for that of the Governor.

11. *The learned judge failed to properly evaluate the evidence and determine whether the respondent had exercised his discretion, under section 33, according to law, and in particular whether the respondent had been influenced by extraneous considerations, which he ought not to have taken into account, or had failed to take into account relevant considerations in reaching his decision."*

#### The nature and purpose of appeal

The Respondent says that the appeal raises points of law of general public importance regarding interpretation of the Exchange Control Act. And further that it is the first litigation of its kind in Fiji and is expected to affect the business community. Mr Patel accepts the general proposition of law that an important point of law raised on appeal is but one factor for consideration on an application for stay. He cites Thomas v. Commissioner of Inquiry (1983) N.Z.L.R. 98 at 115 in support of this proposition.

Mr Scott concedes that important issues are raised on the appeal but argues that the grounds as formulated merely create an appearance of complexity whereas in fact the issues are not complex and the solutions are simple because very basic rules of statutory construction and application of well-known and well-tested concepts of administrative law are involved. He further submits that the Grounds of Appeal are so tenuous as to make the appeal wholly unmeritorious. He submits that the Court should proceed on the basis that Judge Byrne's decision is correct.

It is not my function to assess the actual merits of the

appeal but if prima facie it is obvious that the appeal is wholly unmeritorious or wholly unlikely to succeed then it would be appropriate for me to say so. As to the contention that the points raised are not novel all I can say is that the issue of novelty itself is not crucial. The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious.

As to the contention that the real purpose of the appeal is to delay repatriation of funds I am not persuaded that this is so. The appeal was filed in time by the Applicant in exercise of its unrestricted right of appeal conferred by law.

It is clear from what the parties said in the Court below, from the observations of the trial Judge Byrne (already quoted) and from the Grounds of Appeal lodged that the appeal is on points of law of general public importance particularly to the business community.

I accept the Applicant's submission that the appeal is clearly not one that is *"obviously destined to fail or obviously merely for purposes of delay"* - See Sewing Machines Rentals v. Wilson (1975) 3 All ER 553, 555B.

In my view a definitive resolution of issues raised by an authoritative judgment of the Fiji Court of Appeal will be of value not only to the Applicant but also to the Respondent and indeed to the business community at large. The points raised by the Applicant call for further detailed argument.



Prejudice to Applicant if stay refused

The Applicant argues that if the appeal is successful it will be rendered nugatory because the Applicant cannot be put back to its previous position as a fresh permission will be required to take the money out of the country and that it is not likely that permission will be granted. In this regard the Applicant has referred to the stance taken by the Governor since his refusal in June 1989, and reference is made in particular to paragraph 13 of the Governor's first affidavit filed in this Court. Mr Scott takes issue on this point and says that an application to take money out of Fiji will be dealt with on merits bearing in mind the circumstances prevailing at the relevant time.

The Applicant also argues that there will be substantial loss of income which cannot be recovered from the Respondent. There is no dispute that the income by way of interest earned in London is substantially higher than that can be earned in Fiji. Mr Scott points out that the Applicant has achieved its original purpose in that it has already reaped the full benefit of earning interest for 24 months, i.e. the period for which application was made. Mr Patel counters this by saying that the challenge to the Governor's Order has wider implications in that the very applicability of Section 26 of the Exchange Control Act to the Applicant's funds is in issue and therefore a definitive resolution is warranted. I am satisfied that a refusal to grant a stay will render a successful appeal substantially if not wholly nugatory.

Prejudice to Respondent if Stay is granted

It is the Respondent's contention that repatriation of funds and their investment in Fiji will help generate employment and industrial activity which in turn will benefit Fiji's foreign exchange reserves. A grant of the stay sought will be prejudicial to the public interest, it is argued.

The Respondent's position on prejudice to public interest issue is, in my view, adequately reflected in the following quotations taken from pages 8-11 from the written submission presented by Mr Scott on 22 July 1991 -

" The Reserve Bank, of which the Respondent is Governor, is entrusted with the administration of the Exchange Control Act, the prime purpose of which legislation, which was enacted for the public good, was to conserve the foreign exchange resources of Fiji. So far as any delay occurs in the instant case affecting such matter, prejudice in the relevant sense may be said to exist. The manner in which such prejudice has already occurred with consequent irreparable harm to the public interest is clearly set out in the Respondent's Affidavits; also, the manner in which further harm will enure from further delays in the present case.

It is submitted that the essential principles applicable here are set out in the judgment of the Supreme Court of Canada in RE ATTORNEY-GENERAL OF MANITOBA, already cited. That case concerned an application for a stay of proceedings pending determination of constitutional validity of a disputed law and in that respect differed from the present case, but much of what was stated therein is of general application. The Court at page 338 said this: "... the granting of a stay requested by the private litigant .... is usually aimed at the public authority ... public official or Minister responsible for the implementation or administration of the impugned legislation ...." So it is in the present case, where the Exchange Control Act is impugned in the sense that the inefficacy of section 26 to achieve the Respondent's objective is asserted by the Appellant. The Court went on to say: "... the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, the providing .... of public services ....., the controlling of economic activity such as the containing of inflation ..." In this connection, it is noted that the

High Court in the instant case analogised the functions of the Reserve Bank with those of the Prices and Incomes Board (Judgment pages 21-23) and cited the speech of Lord Keith in the Privy Council in ROWLING v. TAKARO PROPERTIES LTD 1988 1 AER 163, 173 as authority for the proposition that the official administering exchange control regulations "is acting essentially as a guardian of the public interest" acting under legislation enacted "for the protection of the community as a whole."

To continue with the Canadian citation, at page 339 same states thus: "It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases ... is susceptible temporarily to frustrate the pursuit of the common good." The Court continued by stressing the significance of taking into account the public interest in assessing the balance of convenience in such cases.

The Court continued by stating: "In looking at the balance of convenience, they (the courts) have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving statutory authorities, they have correctly held it is erroneous to deal with those authorities as if they have an interest distinct from that of the public to which they owe the duties imposed upon them by statute." So it is here. The private interests of Reddys must be subordinated to the public interest which the Respondent represents. The prejudice to be evaluated is prejudice to that public interest. The continuing failure of Reddys to repatriate funds is prejudicial to that public interest as explained in the Respondent's Affidavits. The prejudice lies in the Fiji economy being deprived of the investment which those funds would represent.

Further on this point, the Canadian Court at page 342 said this: "... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. (a statutory authority). This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said ... that the public interest, of which that authority is the guardian, suffers irreparable harm". No citation could more aptly fit the present case.

The above Canadian judgment is compatible with the decision of the High Court of Australia in CASTLEMAINE TOOHEYS v. STATE OF SOUTH AUSTRALIA, 1986 161 CLR 148, in which relief was sought by private litigants from enforcement of certain Acts. The Court stressed that the assessment of the balance of convenience in such cases required the Court to be "astute to ensure that any detriment to the public interest is avoided or diminished."

The validity of principles set out in the above judgments is in no way conditional upon such being given in context of constitutional challenges, since both deal with the principles involved in suspending operation of statutory obligations by way of application for injunction. Further, the Canadian Court in the judgment at page 352 invoked the judgment of Browne LJ in SMITH v. INNER LONDON EDUCATION AUTHORITY 1978 1 AER 411, at page 422, thus: "where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom those duties are owed."

*To sum up on the matter of prejudice to the Respondent likely to arise from a further stay, the prejudice is not personal but is a prejudice to the public interest; such prejudice is clearly shown; and such must be accorded special significance over and above private prejudice to Reddys.*

*Further from the point of view of the public interest, there is the important matter of the taxation loss to Fiji arising from funds being retained in London to earn interest. This arises since under the relevant Double Tax Agreement the fact that interest is souped in the United Kingdom entitles the United Kingdom authorities to exact ten per cent withholding tax in respect thereof, for which Fiji must give a tax credit.*

Mr Scott also cited the judgment of the N.S.W. Court of Appeal in SIBUSE v. SHAW 1988 NSWLR 125 in support of his argument that no stay should be granted if it would have the effect of prolonging any illegal state of affairs.

I accept Mr Scott's submission that the Governor of the Reserve Bank should be looked upon as the guardian of the public interest in so far as the operation of the Exchange Control Act is concerned.

#### Respondent's response

Mr Patel submits that there will be no real prejudice to the Respondent if the stay is granted because -

- (a) There is full disclosure of the amount, bank account and interest income to the respondent. (This fact is not in dispute.)

- (b) The Applicant is subject to Fiji taxation on interest income earned and that return in respect of all income earned in London is being made to the Commissioner of Inland Revenue in Fiji. (This latter fact is now not in dispute.)
- (c) More funds are likely to come into Fiji in due course if the appeal is unsuccessful.
- (d) There is no risk to the funds since the Applicant undertakes that they are, and will be, retained at Westpac London, pending determination of the appeal.
- (e) If funds are repatriated now there is no guarantee that they will generate employment because the Applicant may find it necessary to deposit them in a Bank.
- (f) With regard to the alleged criminality the Applicant is not seeking to restrain the Respondent from acting under any other legislation, other than on the order challenged.

Need to show special circumstances and need to take public interest into account

Each Counsel has made further written submissions on the relevance and applicability of the decisions in Re Attorney-



General of Manibota and other Canadian, Australian and New Zealand cases. I do not find it necessary to review them here because I intend to take into account the public interest element when determining the balance of convenience of the parties involved in this application. Furthermore bearing in mind the particular facts and circumstances of this case including the indulgence already granted I am satisfied that the Applicant carries the burden of establishing special circumstances to warrant granting of a stay. In doing so I have not overlooked Mr Patel's citation of the decision of the New South Wales Court of Appeal in Alexander & Ors v. Cambridge Credit Corporation Ltd (Receivers Appointed) and Anor 1985 2 NSWLR 685. This case held that the Court may grant a stay of proceedings where the Applicant demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour; it is not necessary that special or exceptional circumstances should be made out. However, I accept the Respondent's submission that Rule 25 of the Fiji Court of Appeal Rules is identical to Order 59, rule 13 of the United Kingdom Rules whereunder special circumstances to justify a stay are required. (See United Kingdom Supreme Court Practice 1991, Vol 1, page 958, and cases cited thereat.)

In requiring the Applicant to establish special circumstances in this case I am not to be taken to hold that in all applications for a stay it shall be incumbent on the Applicant to show special circumstances in the traditional sense. I subscribe to the view that adherence to an inflexible



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rigid test to all types of stay or injunction cases without considering their nature is not to be favoured. The strict test rule can negate the wide discretion vested in Courts and could even lead to denial of justice in particular cases.

#### Balance of convenience

The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits. A balancing of conflicting considerations is required, between the underlying principle that a litigant is entitled to the fruits of his judgment forthwith and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory. I have already outlined the harm, loss or prejudice that each party alleges it is likely to suffer. I have no hesitation in concluding that were I to refuse the application and the appeal is successful the Respondent will suffer considerable irreparable financial loss if funds were repatriated in the meantime. Furthermore if the Applicant decides not to repatriate the funds and awaits the decision in the Court of Appeal then he would face the prospect of criminal prosecution. Such a prosecution could have serious implications on the integrity of the company as well as the directors even if they were acquitted ultimately. In addition, there is considerable merit in the Applicant's argument that once funds are brought into Fiji they will thereafter clearly

come under the Reserve Bank's jurisdiction even if the Court of Appeal subsequently holds in favour of the Respondent that these funds whilst in London did not come under the control of the Foreign Exchange Act. This could mean an appreciable reversal of fortunes for the Respondent from the point of view of a meaningful investment. If the Applicant loses its appeal there is no doubt that a much larger sum will ultimately be brought into Fiji and this will benefit both the Applicant and the country as a whole. As to the claim that there is likely to be some tax loss to Fiji by reason of U.K.'s entitlement to exact 10% withholding tax (for which Fiji has to give credit) it must be borne in mind that a Double Tax Agreement is, by its very nature, a two way traffic so that, to use a colloquial expression, what a country loses in the swings it could make up in the roundabouts. In short, U.K. residents earning income in Fiji will also be paying withholding tax in Fiji. In any case any tax loss in Fiji by reason of the 10% withholding tax in U.K. will, to some extent, be offset by the Applicant paying a larger tax in Fiji because it is earning substantially larger interest in U.K. than it could in Fiji. Furthermore there is no risk to the funds since the Applicant has given an undertaking that it will retain the funds at the Westpac in London.

As regards prejudice to public interest by prolonging the alleged illegal state of affairs I am clearly of the view that the present litigation has not been undertaken to avoid criminal prosecution. If the Applicant fails in its appeal the Respondent will not be deprived of any right of prosecution.

direct or indirect that he may have under the Exchange Control Act. Furthermore the Applicant is not challenging the validity of the Exchange Control Act. What is in issue basically is its applicability to the Applicant's funds in London. So any stay granted to the Applicant will be personal to it so to speak and will not affect the operation of the Exchange Control Act vis-a-vis the public at large. To this extent public interest cannot be said to be harmed.

### Conclusions

Having considered all arguments presented and having regard to the contents of all the affidavits filed and bearing in mind the public interest I have come to the clear conclusion that the Applicant will suffer greater prejudice (if the application is refused) than the Respondent (if it is granted). The balance of convenience demands that the status quo be maintained and this can be achieved by granting a limited conditional stay. I am satisfied that the Applicant's appeal will be rendered nugatory or substantially so if a stay is not granted. In my view the Applicant has shown special circumstances warranting a grant of stay. In coming to my conclusions I have borne in mind what was said in Wilson v. Church (1879) 11 ChD 576 CA:

*"Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such orders for staying proceedings under a judgment appealed from, as would prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances."*

I have also borne in mind the general rule that the Court does not "make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which *prima facie* he is entitled" pending appeal. (The Arnot Lyle (1886) 11 PD, 114, 116, CA; Monk v. Bertram (1891) 1QB, 346).

I have also taken account of the fact that neither party is in any way responsible for the delay in obtaining a decision of the Court of Appeal. For reasons I need not discuss here there is as yet still some uncertainty as to when the Fiji Court of Appeal's first session will take place this year. However, the appeal in this matter will be placed in the priority list for hearing as soon as the date for the first session is fixed. Consequently I feel that a conditional stay for a limited period is called for at this stage.

Grant of Stay Order on conditions

This application for a stay of proceedings is granted upto and including 16 December 1991 on the following terms and conditions:

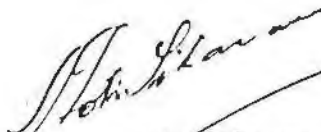
1. The stay is in respect of proceedings to which the application for Judicial Review relates.
2. The stay shall also relate to and include the decision or direction of the Respondent dated 8 June 1989 and

all subsequent directions requiring the Applicant to bring into Fiji the insurance proceeds and interest received and held in London.

3. The Applicant shall retain the insurance proceeds and interest in a Bank in London until the 16 of December 1991 but this requirement shall not bar the Applicant from voluntarily repatriating to Fiji all or any part of its funds in the meantime.
4. The Respondent shall continue to disclose to the Commissioner of Inland Revenue of Fiji all interest earned in London as and when required by him in accordance with the law.
5. The Applicant shall be at liberty to apply to extend the stay, and the Respondent shall be at liberty to oppose any such application and subject to any order made extending the stay beyond 16 December 1991 this Order shall lapse at the end of the 16th day of December 1991.
6. Upon the expiry of this order of stay or any extension thereof each party shall be at liberty to take such action or proceeding as it may deem necessary according to law.
7. The costs of this application be costs in the cause.

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8. In the event of the Fiji Court of Appeal delivering a decision in Civil Appeal No. 67 of 1990 on or before 16 December 1991 this order of stay shall lapse in its entirety on the day on which such decision is delivered.



Sir Motti Tikaram  
Resident Justice of Appeal

Suva, 9 August, 1991.