IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 60 OF 1992
(Civil Action No. 283 of 1992)

BETWEEN

SUN ENTERPRISES LTD
KENNETH JOSEPH SEETO — Appellants

and

THAI BRICKWORKS (FIJI) LTD
PATTAMIKA DAMPRAPHA — Respondents

Mr Vijaya Parmanandam for the Appellants
Mr J. Howard for the Respondents

Chamber Ruling on Stay Application

On 25th August, 1991 Fatiaki J. granted a mandatory injunction in favour of the Respondents (Original Plaintiffs) ordering the Appellants (Original Defendants) to forthwith deliver up to the Respondents a certain brick-making machine in their possession. This Order was made conditional on payment of $6,880 into Court by the Respondents to cover storage charges. The sum as ordered was duly paid into Court but the Appellants

neither uplifted the monies nor obeyed the mandatory Court Order despite the 2nd Respondent's attempts to obtain the release of the brick-making machine.

In the meantime the Appellants changed their Solicitors and filed an inter parte summons to seeking various injunctions and a stay of execution of the mandatory injunction.

On 18/9/92 the Appellants filed a notice seeking leave to file an amended Statement of Defence, set-off, and counterclaim which leave was granted by Fatiaki J. during the hearing of the stay application.

On 25th November, 1992 Fatiaki J. gave his reserved ruling in writing dismissing the application for a stay order.

In the course of his ruling he stated, inter alia, as follows:

> "In doing so I make the observation that the defendants *amended* Statement of Defence and *'grounds of appeal'* raised in the defendants *proposed* Notice includes *"a claim by way of lien and/or bailment for award (sic) in repect of the storage and installation of the said machine ..."*. With all due respect to the defendants' present counsel neither issue was raised in the defendants' *original* Statement of Defence or in the defendant's previous counsel's submissions to the Court. Indeed the defendant's *amended* Statement of Defence appears to confirm this fact.
>
> ... The defendants in their affidavit filed in support of the application for a *'stay of execution'* seek to raise *'new grounds'* and *'fresh evidence'* for opposing the grant of the order in the first instance.
>
> More relevantly the defendants depose to their fear that the removal of the machine would result in the loss of any prospect of recovering any damages from the plaintiffs of whom the second-named is a foreign national and who are alleged to *"... have insufficient security and/or asset backing to meet a claim for damages"*. There is no evidence

however from which it might be inferred that the first plaintiff company is insolvent or that the second plaintiff is preparing to leave Fiji.

In opposing the application the plaintiffs have filed an affidavit in reply denying the various matters raised in the defendants affidavit. In particular the plaintiffs depose that the brick-making machine the subject matter of the Court's order *"... will remain in Fiji" and further "that the defendant was not owed anything apart from the reasonable costs and expenses of storage and that in furtherance there has been a payment into Court".*

In my view the principle to be applied in the exercise of the Court's unfettered discretion on an application for a *'stay of execution'* pending appeal is one of fairness to all parties bearing in mind the well known observations concerning *"the fruits of litigation"* on the one hand and *"rendering rights of appeal nugatory"* on the other.

In this regard if the question were simply one of allowing the defendants to continue to use the machine productively pending an appeal then I would be inclined to rule in their favour.

Several factors however weigh heavily against the defendants in this particular case in which the very basis of their possession and continued retention of the machine is strenuously disputed and denied. Additionally the defendants themselves are not using the machine and as this Court has already observed damages would be an adequate remedy in the event they should succeed in establishing the existence of an enforceable agreement. ..."

On 8th December, 1992 the Sheriff of the High Court duly executed the High Court's Order handing back the brick-making machine to the Respondents.

On the same day, i.e. 8/12/92 the Appellants filed an inter partes motion in this Court for a stay order pending appeal supported by an affidavit which contained a copy of the proposed Notice of Appeal. The notice of motion was made returnable on 11/12/92.

On 11/12/92 this motion could not be heard because of hurricane conditions. It was adjourned to 10/1/93 on which date

Counsel for the Respondents informed me that the High Court's Order had already been executed. However, he wished to file an affidavit in reply and as there was no objection, the matter was adjourned to 21/1/93 to enable the Respondents to file an affidavit in reply.

On 7/1/93 the Appellants filed the actual Notice of Appeal against the Order made by Fatiaki J. on 27th August, 1992, there being no need for prior leave to appeal.

On 21/1/93 the Counsel for the Appellants informed me that he was unwell and the matter was therefore adjourned by consent to 26/2/93 for hearing. In the meantime the Appellants were to file Skeleton Arguments within 10 days and the Respondents were to file theirs within 10 days thereafter. The Appellants were given leave to amend their Notice of Appeal.

On 28/1/93 the Appellants filed an Amended Notice of Appeal and at the same time lodged their Skeleton Arguments. By 26/2/93 all affidavits and written submissions as ordered were on hand and both counsel agreed that a ruling be given on the basis of written material before the Court.

A stay application before a single Judge of the Court of Appeal is entertained by virtue of concurrent jurisdiction enjoyed by this Court. The Appellants having complied with the provisions of Rule 26(3) of the Court of Appeal Rules, i.e. by applying for a stay in the Court below in the first instance, are entitled to apply afresh to this Court in the event of being unsuccessful in the High Court. In short, the application before me is not an appeal.

The jurisdiction of a single Judge to deal with a stay application pending appeal derives from Section 20(f) of the Court of Appeal Act viz *"To stay execution or make any interim Order to prevent prejudice to the claims of any party pending appeal".*

In the matter before me the very basis of the application has disappeared in that the Order sought to be stayed has already been executed.

The relevant part of the application filed in this Court on 8th December, 1992 reads as follows:

> *"(b) that execution and all further proceedings to enforce the decision of the Honourable Mr. Justice D.V. Fatiaki given on the 25th day of November, 1992 in Civil Action No. 283 of 1992 BE STAYED pending the determination of the Appeal to this Honourable Court".*

But on 25th November, 1992 Fatiaki J. refused to make a stay order. On that day he did not make a stay order. On this score alone the application before me is misconceived. In any case taking a very broad and liberal view of the application, i.e. that it is really an application to stay the mandatory injunction made on 27th August, 1992, there is indeed nothing to stay as the Order has already been executed.

In this case it has never been disputed that the Respondents are the owners of the brick-making machine.

The Appellants' proper remedy is to seek damages if they are successful. Indeed this is what they have endeavoured to secure in their Skeleton Arguments, i.e. a deposit in Court as a

security for damages but the motion before me at all relevant times was and remains an application for a stay order. It was never amended. The Respondents are entitled to oppose the application as it stands and this is what they have, inter alia, done.

It could be argued that although the mandatory injunction has already been carried out it was nevertheless still open to this Court in the interest of justice to (a) make an order for an appropriate sum to be deposited in Court by way of security and (b) to order that the machine be not taken out of the country. I have considered these possibilities and have come to the conclusion that no such orders are warranted. An undertaking as to damages is on record and so is an undertaking that the machine will remain in Fiji. As to the undertaking relating to damages there is no credible evidence to show that the Respondents will not be able to pay such damages, if any, as might be ordered against them. If the Respondents make any attempt to take the machine out of the country the Appellants will be at liberty to apply for a restraining order.

The Appellants have failed to satisfy me that there is any need for me to make any orders against the Respondents to prevent any possible prejudice to their claims pending appeal.

In the circumstances this application is dismissed with costs to the Respondents.

Sir Moti Tikaram
Resident Justice of Appeal

Suva,
11th March, 1993.