

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0040 OF 1994

(High Court Civil Action No. HBC0389 of 1993)

BETWEEN:TEVITA FA

t/a Tevita Fa &amp; Associates

APPELLANT

-and-

TRADEWINDS MARINE LTDOCEANIC DEVELOPERS (FIJI) LTDRESPONDENTS

Mr. H. M. Patel for the Appellant

Mr. W. Morgan for the Respondents

Date & Place of Hearing

: 16th November, 1994, Suva

Date of Delivery

: 18th November, 1994

D E C I S I O N

This is an application first for an extension of time within which to appeal against an order for possession made by Pathik J. and then for a stay of enforcement of that order.

The order was made on 15 July 1994. It was sealed on 18 July 1994. On 8 August 1994 it was resealed with a notice to the applicant endorsed on it. On 2 September 1994 the applicant applied for an extension of time in which to appeal and for a stay of execution. He applied to Pathik J. for a stay; on 20 October 1994 His Lordship rejected the application. On 31 October 1994 the applicant again applied to this Court for a stay.

When the matter first came on for hearing in chambers I pointed out to Mr Patel that, as the appeal was out of time, the granting of a stay must depend on the extension having been granted. I pointed out also that, although the applicant had sworn an affidavit in support of the application he made on 2 September 1994, it contained no evidence of any reason for failure to appeal within time. At Mr Patel's request the hearing was adjourned for one day; during the interval an affidavit sworn by the applicant was filed. It did not contain evidence of any reason for failure to appeal within time but the deponent essentially asserted that the time for lodging the appeal should run from 8 August when the order was resealed, so that the appeal had been commenced within time. When the hearing resumed Mr Patel made a submission to the same effect but said also that, if time ran from 18 July, the reason for the delay was confusion in the applicant's mind.

Rule 16 of the Court of Appeal Rules requires a notice of appeal to be filed and served, except in the case of appeal from an interlocutory order, within a period of six weeks from the date on which the order under appeal was signed, entered or otherwise perfected. As the order was sealed on 18 July 1994, that was when it was perfected; so the period of six weeks began from then and ended on 29 August 1994; the appeal was, therefore, out of time. It is immaterial that the order was sealed again later with the notice endorsed on it.

The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr Patel has asked me to draw from his statement of a present belief that time began to run only from 8 August 1994. As Mr Fa is in practice as a barrister and solicitor, that explanation, even if it is true, is certainly not satisfactory.

However, as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds. There is a similar need for that to be shown if a stay of execution to be granted.

The premises in respect of which Pathik J. made the order for possession are rooms in a building adjacent to Government Buildings in Suva. The applicant has carried on his practice as a barrister and solicitor in those rooms for some years. The building was held on a protected Crown lease by five persons as trustees for the Alliance, a political party. They sub-let to the applicant the rooms which he occupied. Because the head-

lease was a protected lease, written consent of Director of Lands was required to the sub-lease, (Crown Lands Act (Cap.132) section 13(1)). According to the applicant, the trustees agreed to obtain the consent but failed to do so. The effect of that is that the sub-lease was null and void. If the trustees breached a legal obligation to the applicant by failing to obtain the Director's consent, he may well have a cause of action against them.

However, they are not the respondents. The respondents purchased the protected lease from the trustees early in 1989. The applicant says that they were aware of his tenancy and that an officer of one of them told him that they would allow his tenancy to continue. But, in the absence of the Director's consent to the sub-lease, he had no enforceable right to continue to occupy the rooms. The respondents, having come onto the scene three years after the sub-lease was granted, cannot be fixed with any obligation towards the applicant arising out of the trustees' failure to obtain the Director's consent to the sub-lease. For that reason the applicant does not, in my view, have any reasonable prospect of success if he proceeds with his appeal.

There are other reasons also why, I believe, he would not have a reasonable chance of success. The applicant exhibited to one of his affidavits a copy of the memorandum of agreement for the sub-lease granted to him by the trustees. The sub-lease was for a term of three years from 13 March 1989, with an option to

renew it for a further three years. It contained a clause entitling the applicant to be "given an opportunity to purchase the property" if the trustees ever decided to sell the premises. It also provided that, if the trustees sold or redeveloped the premises, the lease was to terminate and the applicant vacate them before the end of ninety days after being given written notice to do so. The applicant did not renew the lease. The Crown lease was transferred by the trustees to the respondents on 13 May 1992, two months after the term of the sub-lease had expired.

Further, the applicant exhibited to one of his affidavits copies of correspondence between a Malcolm Brain, writing on behalf of the Alliance, and the applicant. In a letter dated 22 May 1992 Mr Brain informed the applicant that the building had been sold and that he was required to give vacant possession of the rooms occupied by him at the end of a further three months. It was suggested that he might negotiate a lease with the new owners, if he wished.

In the correspondence the applicant and Mr Brain disputed whether the applicant had been given an opportunity to buy the property for the price which the respondents were willing to, and did, pay for it. In an action commenced in the High Court after the issue of the summons for possession by the respondents the applicant alleged in his Statement of Claim that a director of one of the respondents had pleaded with him not to contest the

sale of the premises to the respondent; however, he said that that had occurred after the sale. He did not assert that the respondents or anyone on their behalf knew before the sale that he had not been given an opportunity to purchase the building (if indeed that was the case). So again, while he may have a claim against the trustees for damages, he cannot, in my view, succeed in showing either that the Crown lease did not pass to the respondents or that they had any obligation in law or equity to permit him to continue to occupy the rooms such that he could show cause why they should not have obtained the order for possession made by Pathik J.

As I have stated, there are several reasons why, in my view, the applicant has not been able to show that, if his appeal proceeded, he would have a reasonable prospect of success. That lack of a reasonable prospect of success is a major reason why an extension of time to appeal should not be granted. Moreover, if an extension were granted, it would be a reason not to grant a stay of execution of the order.

Accordingly I refuse to grant an extension of time to appeal and I record that, if I had done so, I should have refused to grant the stay of execution of Pathik J's order.

Decision

Application for extension of time in which to appeal  
refused.

*I. R. Thompson*

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Mr. Justice Ian R. Thompson  
Judge of Appeal