

**IN THE COURT OF APPEAL, FIJI**

**IN CHAMBERS**

**CIVIL JURISDICTION**

**CIVIL APPEAL NO : ABU0032/99S**

**BEFORE THE HONOURABLE JUDGE OF APPEAL - JUSTICE SIR MAURICE CASEY**

**ON MONDAY THE 14<sup>TH</sup> DAY OF FEBRUARY, 2000 AT 9:30 A.M.**

**BETWEEN:**

**S. B. HOLDING LIMITED**

**APPELLANT**

**- v -**

**CREDIT CORPORATION (FIJI) LIMITED**

**RESPONDENT**

**Counsels: Ms. P. Narayan for the Appellant  
Mr. N. Arjun for the Respondent**

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**DECISION IN CHAMBERS**

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On 9 July 1999 Pathik J made an order that an opposed petition by the respondent to wind up the appellant company could proceed. There is an appeal to this Court against it and on 14 September 1999 Shameem J ordered a stay of the winding up proceedings on condition that the appellant paid \$157,310 into Court, to be held until determination of the appeal. The appellant now applies to this Court for an unconditional stay order. The application is made to a Judge alone pursuant to s.20 (1)(e) of the Court of Appeal Act (Cap 12) as amended in 1998, which authorises the making of an interim order to prevent prejudice to the claims of any party pending an appeal. There is a concurrent jurisdiction with the High Court to grant such a stay, so that this is an independent application, and not an appeal from or review of Her Ladyship's decision.

Counsel agreed that the application could proceed on written submissions which I have considered and am able to give my decision without the need of their further assistance.

The petition was based on a debt of \$225,630.13 alleged to have been owed by the appellant for hire of machinery under an asset purchase agreement. A statutory notice requiring payment was served on 14 October 1998 and not complied with. The petition was opposed, the main ground being that the amount of the debt was wrongly stated, and that the appellant had a larger counterclaim for \$385,000. It did acknowledge, however, that \$157,310 was owing to the respondent for hire charges.

There were discussions following the notice in November 1998 when the appellant was given further time to pay but without result, and the petition was advertised on 12 February 1999. The counterclaim was referred to in the affidavit of the appellant's managing director opposing the petition, who said it arose as a result of the respondent's wrongful seizure of the machinery in January 1998. The latter denied any liability and said that no demand for such a claim was received by it, nor have any proceedings been commenced and that the matter of a counterclaim was never raised in the discussions giving rise to the further time for the payment.

The principle applicable to an application for stay pending appeal are well-settled, the fundamental question being whether a successful outcome would be rendered nugatory if a stay were not granted. A winding-up would have this effect, and in his submissions respondent's counsel appears to acknowledge this by his support of Her Ladyship's decision to grant a conditional stay.

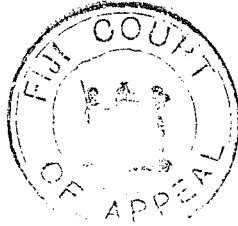
The issue is whether the stay should be unconditional as now sought by the appellant. It does not claim to be unable to pay the acknowledged debt of \$157,310 into Court. The respondent submits that it is merely playing for time, reinforcing its attempt with a late and dubious counterclaim, and that there is a real risk of its assets being dissipated.

I am satisfied that the respondent's interests pending appeal deserve protection to the extent of securing the admitted amount of the debt it claims by payment into Court as a condition of stay.

#### Orders

- (1) Subject to para (2) hereof, the Order of the High Court allowing the respondent to proceed to wind up the appellant is stayed until the hearing and determination of the appeal, or until the further order of this Court.
- (2) The order for stay will lapse and be of no further effect after 24 February 2000 unless the appellant on or before that date pays into the High Court at Suva the sum of \$157,310 to be held until determination or other disposal of the appeal and to be paid out as directed by that Court.
- (3) The Order made in the High Court for stay (except the order for costs) is set aside.

- (4) The respondent to have \$100 for costs including disbursements on this application.



*M. Casey*  
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**Sir Maurice Casey**  
**Justice of Appeal**

**Solicitors:**

**Sherani & Co., Suva for the Appellant**  
**Wm. Scott Grahame & Co., Suva for the Respondent**