IN THE FIJI COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF FIJI
AT SUVA

CIVIL APPEAL NO. ABU0001/97S & ABU0003/97S
(High Court Civil Action No. HBC0011/96)

BETWEEN : JULIE DOYLE

Appellant

AND : PHYLLIS DOYLE
TRUSTEE CORPORATION LIMITED

Respondents

In Chambers: The Hon. Madam Justice Shameem

Hearing: 1st November 2000

Counsel: Mr V. Kapadia for Appellant
Mr M.B. Patel for 1st Respondent
Mr P. Knight for 2nd Respondent

Judgment: 7th November 2000

DECISION IN CHAMBERS

This is an application by the 2nd Respondent to stay execution of a judgment delivered by the Fiji Court of Appeal on 12th November 1999, pending appeal to the Supreme Court, or the full court of the Fiji Court of Appeal.

On 14th July 2000, the Fiji Court of Appeal certified the appeal as being one which raised issues of significant public importance, and which raised far reaching questions of law, under section 122(2)(a) of the Constitution (Amendment) Act 1998.

The Facts

The facts, which are not in dispute, are that the 1st Respondent was the former wife of Patrick Joyce Doyle of Sigatoka. He died in 1990, and probate of his will, was granted to Anthony William Cooper the Manager of Burns Philip Trustee Company Ltd. (the 2nd Respondent). The sole beneficiary of the estate was Julie Doyle, the widow of the deceased, and the Appellant in the appeal before the Supreme Court. The value of the estate, when probate was granted, was $236,000, and it appears that the Appellant paid out this sum (save for $1,000) to the beneficiary before the appeal in the Court of Appeal was heard.

The Appellant (Julie Doyle) and the deceased were separated by 1975, and on 4th June 1975, they executed a Deed of Settlement agreeing inter alia, to a transfer of half-share of the deceased's property in New Zealand to the 1st Respondent, and to the payment of $70,000 to her from the disposition of a company. The deceased also agreed, in the Deed, to pay the sum of $F360 per month to the 1st Respondent "for the rest of her life or until re-marriage."

Fresh divorce proceedings commenced in Fiji, and the decree nisi included an order for maintenance to be paid to the 1st Respondent at $360 per month with effect from 22nd January 1976. The decree absolute, on 21st May 1976, made no mention of the Deed of Settlement of 4th June 1975.

After the death of the deceased, the maintenance payments stopped. The 1st Respondent then claimed that the maintenance payments continued to be payable after the death of the deceased

and that she was also owed $70,000 as a lump sum in settlement of her future maintenance entitlement.

In the High Court, Byrne J granted leave to enforce the maintenance order made in the decree nisi, under section 101(2) of the Matrimonial Causes Act, and awarded the 1st Respondent a sum of $60,000 for future maintenance.

The Appellant appealed to the Court of Appeal, claiming that the 1st Respondent had no right to maintenance because the Deed of Settlement, was extinguished on the death of the deceased. She argued that the decree nisi which superseded the Deed of Settlement, did not authorise maintenance to be paid to the 1st Respondent after the death of the deceased.

At the appeal, the only real issue was whether the Deed of Settlement was superseded by the decree nisi. Counsel conceded that the lump sum payment for future maintenance could not be justified.

The appeal, on the remaining issue, was dismissed, the court holding (at page 15 of the judgment) that "the decree nisi maintenance order could, with leave of the court, bind the estate of the deceased."

The Appellant now appeals to the Supreme Court on two questions. They are:

(i) Whether the provisions of the Deed of Settlement dated 4th June 1975 relating to the payment of maintenance contained in Clause 1 of the Deed are valid and enforceable against Trustee Corporation Limited.

(ii) Whether the maintenance order contained in a Decree Nisi survived the death of the husband.

The Appeal

Under section 122(1) of the Constitution (Amendment) Act 1998, the Supreme Court has exclusive jurisdiction, to hear and determine appeals from all final judgments of the Court of Appeal. Section 122(2) provides that an appeal may not be brought from a final judgment of the Court of Appeal unless leave to appeal on a question certified by it to be of significant public importance is granted or, the Supreme Court gives special leave to appeal.

Section 8 of the Supreme Court Act No. 14 of 1998 provides:

> "A single judge of the Court of Appeal may, in respect of any appeal pending before the Supreme Court, make such orders and give such directions as he or she considers the interests of justice or the circumstances of the case require."

The Supreme Court Act was purportedly repealed by the Administration of Justice Decree, which was then repealed and replaced by the Judicature Decree No. 5 of 2000. The Judicature Decree purports to abolish the Supreme Court, and instead under Section 16 purports to provide that the final court of appeal in Fiji, is the Court of Appeal. Section 17(2) provides:

> "Any judgment or decision of the Court of Appeal that was pending in the former Supreme Court shall be heard and determined by a Court of Appeal consisting of 5 Justices of the Court of Appeal none of whom was a member of the Court of Appeal which delivered the judgment or decision which is under appeal and only if the pending judgment or decision raises a matter of great public importance."

Unfortunately the Decree does not replicate section 8 of the Supreme Court Act in relation to the power of a single judge of the Court of Appeal in relation to appeals to the full court of the Court of Appeal under section 17(2).

However section 20 of the Court of Appeal Act Cap. 12, as amended by the Court of Appeal (Amendment) Act 1998 gives to the single judge of the Court of Appeal power "to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal."

Before the amendment of section 20 of the Court of Appeal Act, a person aggrieved by the decision of the single judge, could have the matter determined afresh by the full court. That right is now no longer available in civil appeals. (See **Suresh Charan -v- Bansraj** Civ. App. ABU0042/99 per Tikaram P).

Counsel for the Appellant submitted that, with the purported repeal of the Supreme Court Act, and the amendment of the Court of Appeal Act, this application was the only opportunity he had to apply for stay. This submission is of course only valid, if it is accepted that the repeal of the Supreme Court Act, and the abolition of the Supreme Court, are valid. That is a question that only the courts can determine.

I understand that the question of the purported abrogation of the Constitution is currently pending in the Lautoka High Court, and that the determination of that question will effectively determine the course that this appeal will run. I am not told whether any application has been made in the High Court to uphold the validity of any of the Decrees passed since May 29th 2000, on the basis that they were necessary for the

maintenance of law and order. However, if the Constitution is valid, and the Supreme Court Act has not been effectively repealed, then the party aggrieved by the decision of a single judge of the Court of Appeal, may apply afresh to the single judge of the Supreme Court under section 11, and section 14 of the Supreme Court Act.

That is of course a matter for a party aggrieved by this judgment to pursue. However for the purposes of this decision, I consider that the power to grant a stay of execution of judgment is given to a single judge of the Court of Appeal under section 8 of the Supreme Court Act, and that the right of appeal to the Supreme Court, as provided for under section 122 of the Constitutional (Amendment) Act 1998, remains intact under the presumption of constitutional validity. It follows that the section under which I exercise jurisdiction in this application, is section 8 of the Supreme Court Act.

The rationale behind this approach is an orthodox and well-settled principle of constitutional law. It was the principle applied in the case of **Mitchell -v- DPP** (1986) LRC (Const) 35, and subsequently in cases such as **Bhutto -v- Chief of Staff Pakistan Army** PLD (1977) SC 670. It was this principle that was applied by Madraiwiwi J in **Ved Prakash -v- NLTB** Civil Action HBC 0409D/96L.

For these reasons, on the question of the jurisdiction and powers of the court, the section under which this application is deemed to have been made is section 8 of the Supreme Court Act. In practical terms, of course the nature of the discretion under section 20 of the Court of Appeal Act, and under section 8 of the Supreme Court Act, is the same. In considering a stay pending

appeal in any court, the court has a wide discretion to act in the interests of justice. Matters to be considered are whether there are reasonable prospects for the success of the appeal, any prejudice to the party who would be deprived of the fruit of the success of his/her litigation, and whether if the stay were not granted, the applicant's appeal would be rendered nugatory and/or that the applicant might be ruined as a result. There is no dispute that these are the principles relevant to an application for stay.

Submissions

In support of this application counsel for the 2nd Respondent, and counsel for the Appellant say that the appeal clearly has merits particularly because the decision of the Court of Appeal is not consistent with the decision of the High Court of Australia in **Johnston -v- Krakowski** (1965) 113 CLR 552 on the same point. Counsel further say that the estate has now been disbursed to the Appellant, and that the 2nd Respondent (against whom the judgment is to be executed) now only has $1000 on the account of the estate. Counsel for the 2nd Respondent says that the Trustee Corporation would be forced to pay the 1st Respondent from its own funds if the stay were refused.

Counsel further submits that the 1st Respondent was said, at the trial, to be financially badly off, and that therefore she would be in no position to reimburse the judgment sum if the appeal succeeds. He says that the 1st Respondent is now 77 years old, and if she dies while the appeal is pending, the Respondent would be forced to take the difficult steps of reimbursement from her estate.

Counsel for the 1st Respondent submits that his client has sufficient assets to cover the amount of money owed to her, that the litigation in the case has continued since 1994, and that she was still being deprived of the fruits of the judgment both in the High Court and the Court of Appeal. He said that at 77 years of age, she might die before she receives the money she says is owing to her, and that due to the current confusion about the existence or otherwise of the Supreme Court, considerable delay was likely before this appeal was heard.

All counsel agreed that a hearing before the Supreme Court on this matter, would be preferable to a hearing by a full court of the Court of Appeal. It appears that the original application for stay pending appeal to the Supreme Court, was withdrawn on the instructions of the court registry and replaced with an application for stay pending appeal to the Court of Appeal.

Stay

For the purposes of this application, I accept that there are merits in the appeal. The Court of Appeal, which certified the appeal as being one of public importance, would not have done so, if it thought that the appeal lacked merit. There is no doubt that the issue of whether a Deed of Settlement survives a Decree Nisi, and binds the estate of a deceased spouse after his/her death, is a matter which requires guidance from the highest appeal court in Fiji.

The next question is whether a refusal of a stay order would render the appeal nugatory. If the Appellant succeeds in this appeal, the 1st Respondent must pay the Appellant all sums paid to her, in execution of the judgments in the High Court, and Court of Appeal. If she does not, or is unable to do so, the

Appellant's appeal will be rendered nugatory. The affidavit material in the court record, which was referred to by all counsel, suggests that the 1st Respondent was in dire financial straits at the time of her trial. However, it appears that she has since inherited a substantial sum of money and that she possesses assets in New Zealand which are valued at a much larger sum than the $32,000 owed to her in July of this year (excluding costs). She will clearly be in a position to pay this sum back to the Appellant, if she survives the appeal process. She is now 77 years old. It is possible that she may not survive the process, and that therefore the Appellant may have to pursue her claim with the 1st Respondent's estate.

Such a step, whilst being inconvenient, and time-consuming, is not however, impossible to achieve. Indeed, extra-jurisdictional claims are now common place and fairly efficiently effected.

The prejudice on the other hand, to the 1st Respondent, is far more serious. She may not survive the appeal process, and may never enjoy the fruits of a long and expensively-conducted litigation. The judgment sum, at her age and in her circumstances may fundamentally affect the quality of her last years.

Furthermore, with the current uncertainty about the existence or otherwise of the Supreme Court, counsels' obvious preference for the Supreme Court, and the inevitable delay while the challenges to the purported abrogation of the Constitution are pursued through the court system, this appeal is unlikely to be heard in the near future. The Registry is unable to give any

indication of when the Court of Appeal is likely to agree to sit as a full court under the Judicature Decree.

I see no reason why the 1st Respondent should be deprived of the fruits of litigation for an indefinite period of time, while our legal and judicial system clarifies the position of the Supreme Court. It is of course, no fault of any of the parties that this situation had arisen. However, in the circumstances I consider that a stay of execution of judgment would not be in the interests of justice.

Of course, the judgment is against the 2nd Respondent, who has now disbursed the funds from the estate. It may seem unfair that the 2nd Respondent must now pay the 1st Respondent from its own funds. However there is a pending indemnity action in the High Court by the 2nd Respondent, against the Appellant, and a resolution of this appeal, can then lead to the hearing of that action as soon as the parties are able to expedite the same.

For these reasons, this application is dismissed. Costs are in the cause.

FIJI COURT OF APPEAL

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Nazhat Shameem
JUDGE

At Suva
7th November 2000

Solicitors:
Messrs. Sherani & Co. for the Appellant
Messrs. M.B. Patel & Co. for the 1st Respondent
Messrs. Cromptons for the 2nd Respondent

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