

IN THE COURT OF APPEAL, FIJI ISLANDS

AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU 0041 of 2001S.  
(High Court Civil Action No. HBC 0306 of 1992)

BETWEEN:                    REGISTRAR OF TITLES

Appellant

AND:                            SHARDA PRASAD  
(s/o Ram Asre)

First Respondent

NARENDRA NARAYAN SINGH  
(s/o Rup Narayan Singh) AND  
MALA LAKSMI SINGH  
(d/o Narayan Nair)

Second Respondent

In Chambers:            The Hon. Justice Devendra Pathik,  
Justice of Appeal

Counsel:                    Mr. J. Udit for the Appellant  
Mr. A. K. Singh for the first Respondent

Date of Hearing:        30<sup>th</sup> August 2001

Date of Decision:      19<sup>th</sup> September 2001

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DECISION

(Chamber application for Stay of Execution)

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By Summons dated 14 August 2001 the appellant (the Original 4<sup>th</sup> defendant) has applied to this Court under **section 20 (1)(e)** of the **Court of Appeal (Amendment) Act 1998** (No. 13 of 1998) for an order:

*For a stay of execution of the interim order for payment of \$30,000.00 granted by the High Court on 3<sup>rd</sup> August 2001 pending the determination of this Appeal and/or Civil Appeal No. ABU0031/2001.*

### **Background facts**

Briefly, the First Respondent (the Original Plaintiff) negotiated and entered into with the Second Respondent (the Original First-named Defendants), (hereinafter referred to as the “Vendors”) a Sale and Purchase Agreement to purchase the vendors’ share of a piece of land, being a residential property. Whilst he was making arrangement for finance, he lodged a Caveat with the Titles Office to register his interest. There were certain errors in the Caveat form, which was presumably returned for corrections. In the meantime, the Vendors sold the land to another person. As a result of this the 1<sup>st</sup> Respondent was not able to purchase the land, hence, he sued all the respective parties including the Registrar of Titles (the appellant). On behalf of the Registrar of Titles, the then Counsel appearing, admitted liability, accordingly the Court proceeded to assess damages.

On 26 January 2000 Byrne J. awarded damages in the sum of \$225,000.00 and interest at 6% which amounted to \$326,250.00 in Civil Action No. HBC 0306 of 1992. It is this decision which the Appellant has already appealed and which is pending before this court being Civil appeal No. ABU0031/2001; but because of non-compliance with the new Court of Appeal Rules the appeal was deemed to have been abandoned. However, on 8 June 2001 appeal out of time was granted by

Shameem J.A. sitting as a single Judge of Court of Appeal. An order for stay was refused by Her Ladyship stating that it must first be heard by the High Court.

An interim payment of **\$125,000.00** was granted by Byrne J and this amount has been paid to the first Respondent's solicitors.

Then on 20 July 2001 the first Respondent applied for a further interim payment; on 3 August 2001, His Lordship granted an additional '*further and final interim payment*' of **\$30,000.00** to be paid by the Appellant by 17 August 2001 and '*in default of such payment the whole amount of judgment falls due*'; the appellant was further '*granted leave to appeal the present interlocutory order for an interim payment of a sum of \$30,000.00*', but application for stay of the execution was refused.

On 9 August 2001 the appellant filed Notice of Appeal against the order for payment of the \$30,000.00 on the ground that '*the learned judge erred in law and in fact in awarding an interim payment of a sum of \$30,000.00 pending the final determination of Civil Appeal No. ABU0031 of 2001.*'

#### **Appellant's submission**

The learned Counsel for the appellant has submitted that, as Shameem JA has agreed, he has an arguable substantive appeal pending before the Court of Appeal. Mr. Udit submits that the Respondent will not suffer any prejudice if a stay is granted, but the Appellant will, as the whole appeal will be rendered nugatory as a substantial sum would have been paid to the Respondent who is retired now and probably of no means. He does not have a house or any real property to enable the appellant to register a charge to recover any overpaid monies in the event the appeal succeeds partly or wholly.

Mr. Udit has made written and oral legal submission on stay in the interlocutory appeal and stated with due respect that the learned judge erred in applying the proper test for the interim payment. He referred the Court to a number of authorities and the principles involved in making an order for interim payment. The learned judge said, inter alia, that the '*Court considers it fair to order a further interim payment because delay in appeal being heard is no fault of Plaintiff*'. Mr. Udit submitted that wrong principles of law were applied in ordering the payment particularly when an order had already been made for the sum of \$125,000.00. The learned judge did not take into account what Shameem J.A. stated in the matter before her in this action. Mr. Udit submits that the appellant has an excellent prospect of success on appeal based upon the grounds of appeal filed. If a stay is not granted the appeals will be rendered nugatory. Not only that, since the appeal is against quantum of damage, and if paid as ordered it would destroy the subject matter of both the appeals.

There is no delay on the part of the appellant in prosecuting the Appeal. He has exhausted all the means to expedite the appeal which is ready for directions by the Court.

Finally, he submits that the balance of convenience favours a grant of stay pending appeal.

**First Respondent's submission:**

Leave to appeal out of time was granted on 8 June 2001 by Shameem JA, sitting as a single Judge of Appeal. An Order for interim payment of \$125,000.00 was made on 7 June 2001 by Byrne J because the Appeal Court would not have heard the appeal in October 2001. Then again on 3 August 2001 a further interim payment of \$30,000.00 was made and payable by 17 August 2001.

Mr. A.K. Singh for the Respondent submits that since the appellant has not paid the said sum as ordered the whole amount becomes due and the stay application cannot be entertained. He says that the appellant should now go back to the High Court and apply for the stay of the default order.

The learned counsel then referred the Court to the principles involved in granting a stay. He said that under **Order 29 of the High Court Rules** an order for interim payment could be made. He says that there is no merit in the application and that there are no special circumstances for granting a stay.

#### **Consideration of the issue**

The issue for the Court's determination is whether a stay should be granted or not.

It is not necessary for me to go into the circumstances leading to the assessment of damages in the sum of \$225,000.00 together with interest thereon at 6% from the date the writ was issued, with additional interest at 3% from the date of payment suffice it to say that after admitting liability the appellant was not of much assistance to the trial Judge as I gather from the file in assessing damages. This judgment is the subject of an appeal to Court of Appeal being Civil Appeal No. ABU0031 of 2001. It is pertinent to note at this juncture the statement of Shameem J.A. when considering application for leave to appeal out of time and stay of the judgment herein in the assessment of damages. She said:

*'However, I accept the submissions of counsel for the Appellant that the appeal is not necessarily doomed to failure and that he has at least an arguable case that the commercial loss to the Respondent, calculated on the basis of the improved value of the land, should not have been awarded to him. Furthermore, I am*

*satisfied that the part-payment of \$125,000.00 to the Respondent alleviates to some extent, the prejudice that he might have suffered if the appeal proceeded after a delay of 12 months'.*

Her Ladyship refused stay stating that it must first be made to the High Court. It appears that the amount of damages and interest comes to \$326,250.00 (vide paragraph 11 of appellants' affidavit sworn 14 August 2001). The total amount of interim payment ordered to be paid is \$125,000.00 plus \$30,000.00 making a total of \$155,000.00 which still leaves a substantial balance of \$171,250.00.

Because the appellant was not moving with due diligence subsequent to the judgment in the matter of appeal, the respondent made an application for interim payment which he was entitled to do. The trial judge made the said two orders by way of interim payment.

The first order for payment of \$125,000.00 has already been complied with. It is on the second order that a stay is sought.

On the facts and circumstances of this case it was well within Byrne J's powers to make the said orders. He applied the correct test and principles in doing so. In this regard **Or.29 r.11**, inter alia, provides:

*11. - (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied -*

- (a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or*
- (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or*

(c) *that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,*

*the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.*

(2) .....

It is clear from the order that it is a ‘**further and final interim payment**’. That still leaves a substantial balance of the judgment amount which the appellant will be required to pay should he not succeed on appeal. Leaving aside the likely delay in the hearing of the appeal herein, the trial Judge would still have been acting *intra vires* in making Order for interim payment.

I am grateful to both counsel for their useful legal submissions and I found them to be very helpful. In law, I find that there is no merit in the application for stay.

Applying the principles pertaining to stay I do not agree that on the facts of this case, although the appellant maintains that he has an ‘excellent prospect of success on appeal’, that the appeals will be rendered nugatory [**Wilson v Church** (1879) 12 Ch D. 458-459]. As already stated only about half of what is awarded has been ordered to be paid. This would not, when paid by the appellant destroy the subject matter of both the appeals. The fact that there is likelihood of delay in getting

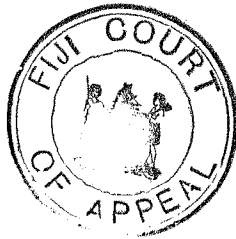
a hearing date in Court of Appeal could not be said to be the main ground for the said orders.

Having held that the second order was justified and that payment under the first order has been made, there will be no prejudice to the appellant if there was no stay. The only proper course is to let the appeal or appeals herein take their normal course.

To conclude, I am not satisfied that a stay ought to be granted pending the hearing and determination of the Appeal. I do not see why the Respondent should be deprived of the 'fruits of his litigation' wholly pending an appeal (**The Annot Lyle** (1886) 11 P.D. 114 at 116 **Monk v Bartram** [1891] 1 Q.B. 346). Hence the trial judge's interim orders for payment are perfectly in order on the facts of this case. The discretion to order a stay should only be exercised where special circumstances exist, but none exist here (**Timbers (Fiji) Limited & Anor v. Native Land Trust Board & Others** Action No. HBC0344 of 1997, **Peter Gervaise Joseph Eyre v Estate Management Services Limited & Anor.** Civil Action No. 407 of 1992). Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory (**Wilson v Church**) (supra). But, generally that will occur when because of respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment. In view of the sum of money that has been ordered to be paid this difficulty is not likely to arise. This is not a case where if stay is refused the appellant will be '*ruined*' (**Linotype-Hell Finance Ltd. v. Baker** (1992 4 All ER 887 C.A.), although the appellant has some prospect of success.



For these reasons the application for stay of execution of the interim order for payment of \$30,000.00 made on 3 August 2001 pending the determination of this appeal and/or Civil Appeal No. ABU 0031/2001 is dismissed with costs to the Respondent's solicitors in the sum of \$250.00.



*D. Pathik*

D. Pathik

Justice of Appeal