

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0018 OF 2007S
(High Court Civil Action No.HBC 94/2006]

BETWEEN:

ALI'S CIVIL ENGINEERING LIMITED

First Appellant

AND:

VITIANA TIMBERS (FIJI) LIMITED

Second Appellant

AND:

HABIB BANK LIMITED

First Respondent

AND:

CHALLENGE ENGINEERING LINTIED

Second Respondent

AND:

NATIONAL BANK OF FIJI

Third Respondent

AND:

DIRECTOR OF LANDS AND SURVEYOR GENERAL

Fourth Respondent

AND:

ATTORNEY GENERAL OF FIJI

Fifth Respondent

Counsel:

S Sahu Khan for applicants/appellants
B Narayan for first respondent
D Sharma for second and third respondents
Z Sahu Khan for fourth and fifth respondents

Hearing: Thursday, 5 April 2007, Suva

Ruling: Tuesday, 17 April 2007, Suva

RULING

- [1] This is an application for a stay of execution of part only of an interlocutory order. The principal action in the High Court relates to leases of land in Laucala Beach

Estate and the validity of a mortgage over some or all of it. The leased land comprised two separate but adjacent plots and the applicants challenge the validity of the mortgage, the land to which it applies and raise very serious allegations of fraud in respect of the alteration of the original lease over the first plot.

[2] It is not necessary to set out the details of those matters. It appears it first came before the High Court as an application by the applicants for an injunction restraining the first respondent from completing a mortgagee sale to the second respondent and the fourth respondent from consenting to any further dealings over the whole of the land covered by both leases.

[3] The court granted an interim injunction and the hearing of the application for the interlocutory injunction was before Pathik J. The learned judge considered the various competing claims, the balance of convenience and the importance of preserving the status quo. In a ruling delivered on 16 March 2007, he concluded:

“In the light of the facts herein I am satisfied that there is a serious question to be tried. In this regard the plaintiffs do not have to show by establishing a prima facie case that they will get a permanent injunction after trial. There is sufficient affidavit evident before me to show that the claim is not frivolous, vexatious or hopeless (re Lord Cable (dec'd), Garrat v Waters [1976] 3 All ER 417). Without going into details I find that there is merit in Dr Sahu Khan’s argument about how other writings appear on the mortgage in relation to the property in question without the mortgagor’s knowledge. These doubts can only be resolved at the trial of the action.

By refusing the injunction I find the plaintiffs will suffer greater loss than the defendants. Damages will not be an adequate remedy.

The balance of convenience in this case rest with the plaintiffs. For the above reasons, it is ordered that the interim injunction continue until the determination of this action subject to the plaintiffs paying into Court the full amount owed by them under the mortgage within 14 days from the date of this decision and failure to do so will result in the injunction being dissolved without the need to come to court. I further order costs against the defendants to be taxed if not agreed.”

- [4] The applicants applied for a stay and it was heard by Pathik J on 27 March 2007. In a decision delivered on 29 March 2007, the judge found:

“After considering all the arguments, I am of the view that the defendants, particularly D1, 2 and 3, will suffer greater prejudice if stay is granted than the plaintiffs.

The balance of convenience favours maintaining of status quo conditional upon payment into court as I have ordered rather than granting stay as prayed. I am not satisfied that the appeal will be rendered nugatory or substantially so if stay is refused. ...

For the above reasons the application for stay is refused and is dismissed with costs against the plaintiffs payable to the defendants’ solicitors the sum of \$500.00 each within 7 days. Since the application for stay has come so close to the expiry of time for payment into Court as ordered, in the interests of justice, I vary my said decision of 16 March 2007 by extending time for paying into Court by 14 days from today expiring in 13 April 2007 otherwise the rest of the said order stands.”

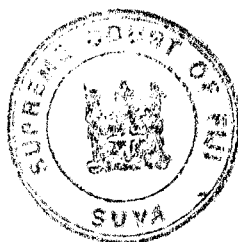
- [5] The motion for stay of execution before this Court was filed on 30 March 2007 by the applicant in the court below and seeks “an Order that the order made on the 29 day of March 2007 be stayed pending the hearing and determination of the appellants appeal”.
- [6] In his oral submission, counsel for the applicants made it clear that he is, in fact, only seeking to stay the condition of payment into court which was a condition of the order of 16 March 2007 granting his application for an injunction. The Notice of Motion is clearly inaccurate at best and meaningless at worst. The order of 29 March refused the application for a stay and extended the time for payment into court by a further 14 days.

- [7] Staying a refusal of a stay will not result in a stay. It would only remove the additional fourteen days for the payment into court. If, as counsel advises the Court, the order sought is to stay the order for payment into court, the notice of motion cannot achieve it. However, counsel for the respondents have not taken the point and are content simply to oppose the application to stay the order for payment into court made on 16 March 2007.
- [8] Dr Sahu Khan's submissions were directed principally at the merits of the appeal – an issue on which Pathik J has already found in his favour when deciding to order the injunction. I do not consider it necessary to revisit that issue for the purposes of this application because the application is not to stay the injunction itself.
- [9] The attaching of a condition to the grant of an injunction is a matter within the discretion of the judge. An appeal court will only interfere with the exercise of such a discretion if it was exercised on a wrong principle or it has led to a miscarriage of justice. It is clear from the judgment of Pathik J and the affidavits that the background to this case is that the first applicant owes a substantial sum to the first respondent and the debt has been outstanding for a long time. The second respondent bought the property from the first respondent under a mortgagee sale and the application for the injunction was only filed in the High Court after the sale had been effected.
- [10] Dr Sahu Khan suggests that the order to pay the sum into court will render a successful appeal nugatory. I do not accept that argument. In the present case, the debt has not been disputed and the sum ordered to be paid into court is the mortgage sum only. If the applicant is successful, the sum will be returned and no doubt the court will consider any question of interest.

[11] On those facts, I do not consider there is sufficient reason to stay the order of 16 March 2007 for payment into court.

[12] The application is refused with costs of \$300.00 each to (a) the first respondent, (b) the second and third respondents and (c) the fourth and fifth respondents. I further order that the time for payment into court is extended for a further 14 days from the date of this ruling.

Gordon Ward



**[Justice Gordon Ward]
President
FIJI COURT OF APPEAL**