IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI
Sitting as the Tax Court

CIVIL APPEAL ABU 106 OF 2018
(High Court HBTC 1 of 2013)

BETWEEN	:	**GENERAL MACHINERY HIRE LIMITED**
		Appellant
AND	:	**CHIEF EXECUTIVE OFFICER OF FIJI REVENUE AND CUSTOMS AUTHORITY**
		Respondent
Coram	:	**Calanchini P**
Counsel	:	**Mr C B Young for the Appellant** **Mr F Haniff with Mr C Yee for the Respondent**
Date of Hearing	:	**22 October 2018**
Date of Ruling	:	**25 October 2018**

RULING

[1] This is a renewed application for a stay of proceedings in the High Court sitting as the Tax Court (the Tax Court) pending the determination of an appeal against an interlocutory order made on 13 September 2018. By summons filed on 13 July 2018 the

appellant as plaintiff (General Machinery) had applied for leave to amend the statement of claim dated 29 November 2013. In his judgment the learned High Court Judge accepted that section 21(2) of the Tax Administration Act 2009 applied to the proceedings before the Court. The Judge also noted that an objector is limited to the grounds stated in the objection unless the Tax Court grants leave to add new grounds. The judge concluded that the application to amend the statement of claim should be refused on the basis that all the matters that the appellant sought to raise in its amended statement of claim could just as well have been raised in the initial statement of claim.

[2] Being dissatisfied with the Ruling the appellant filed and served an application for leave to appeal pursuant to section 12(2) of the Court of Appeal Act 1949 (the Act). The application was made by summons filed in the High Court Registry on 20 September 2018. The appellant also applied for a stay of the proceedings in the Tax Court which had been ordered to continue on 29 and 30 October 2018. The application for leave to appeal and stay of proceedings have been made in compliance with Rules 16, 26(3), and 34 of the Court of Appeal Rules (the Rules).

[3] It should be noted that under Rule 34 of the Rules an appeal does not operate as a stay of any description unless the court below or the Court of Appeal otherwise orders. Pursuant to Rule 26(3) whenever an application, such as an application for a stay of proceedings pending appeal, may be made either to the court below or to the Court of Appeal, it is required to be made in the first instance to the court below. In a judgment delivered on 16 October 2018 the learned High Court Judge refused leave to appeal, refused a stay of proceedings and ordered the appellant to pay costs of $1000.00 to the Respondent. The Judge ordered the hearing of the action to continue on 29 October 2018.

[4] It is as a result of those orders that the appellant has sought to renew both the application for leave to appeal and the application for stay of proceedings before the Court of Appeal. Pursuant to section 20(1) of the Act a single judge of the Court of Appeal has the power to grant leave and to grant a stay. Directions for the renewed hearing of the leave application were given on Monday 22 October 2018. That renewed application will be

listed for hearing before a justice of appeal on a date to be fixed. As the stay of proceedings application was necessarily an urgent application the parties presented oral submissions on Monday 22 October 2018.

[5] At the outset it should be noted that the application before this Court is not an appeal from the decision of the High Court refusing a stay of proceedings pending the hearing of the appeal. This is a fresh application in the form of a renewed application. It is not the function of this Court to review the decision of the learned Judge. The Court is exercising a concurrent original jurisdiction. The issue is not whether leave should be granted but rather whether there should be a stay of proceedings until the appeal has been determined.

[6] The application was supported by an affidavit sworn on 16 October 2018 by Alvin Kumar Singh. The application was opposed. An answering affidavit sworn on 19 October 2018 by Raijeli Gukisuva was filed on behalf of the Respondent. Both parties presented oral submissions on 22 October 2018.

[7] It is convenient to reproduce from the minutes of the pre-trial conference filed on 5 July 2017 those facts that are relevant to the proceedings presently before the Court. On 22 November 2012 the Commissioner issued Notices of Amended Assessments to General Machinery in respect of (i) Value Added Tax for years ended 31 December 2006 to 2010 and (ii) Income Tax for years ended 31 December 2001 to 2010. The Appellant filed its Objections to the Amended Assessments of Value Added Tax and Income Tax on 21 January 2013.

[8] On 31 October 2013 the Commissioner replied to the objections raised by General Machinery and advised that the objection was partially disallowed for VAT and wholly disallowed for Income Tax in line with section 16(6) of the Tax Administration Act 2009. The Commissioner also indicated that during the course of the review cash Books, cheque butts, bank statements and contra listings had been inspected. There are detailed reasons given for the stance adopted by the parties set out in the agreed facts. However it

is quite apparent that the agreed facts relate to the objections taken by the appellant in relation to amended assessments for VAT and income Tax liabilities.

[9] The issue before the High Court Judge was whether leave should be given to amend the statement of claim by adding to the objections initially raised in the notice of objection filed on 21 January 2013 and which formed the basis of the Statement of Claim stated 29 November 2013.

[10] The relief sought by the appellant in the Statement of Claim filed in 2013 was as follows:

> *"(i) An order to wholly set aside the amended assessment of VAT and income tax issued by the defendant and to determine the VAT and Tax liability of the Plaintiff in accordance with the plaintiff's objections dated 21 January 2013.*
>
> *(ii) An order that the Defendant refund to the Plaintiff all monies overpaid by the Plaintiff to the defendant on account of VAT and Income Tax.*
>
> *(iii) Damages for acting in bad faith.*
>
> *(iv) Damages for unlawful issue of the Garnishees*
>
> *(v) Special damages to be quantified at the trial.*
>
> *(vi) Compound interest under common law on all monies to be refunded, alternatively interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act at such rate for such period as this Honourable Court shall deem just.*
>
> *(vii) Such other orders _ _ _*
>
> *(viii) Costs on an indemnity basis."*

[11] In the proposed amended Statement of Claim the only additional relief is for an order:

> *"For a declaration that the Deed of Settlement is lawful and binding on the Defendant."*

[12] Although there are other proposed amendments they constitute what might otherwise be regarded as further particulars of the allegations raised in the Statement of Claim already filed.

[13] The issue is whether it would be appropriate to compel the General Machinery to launch fresh proceedings to pursue the relief sought in relation to the deed of settlement that is alleged to have been entered into by the parties and dated 9 July 2010. It seemed to be accepted by Counsel that the limitation period for such an action to be commenced had not expired. This would necessarily require at least some of the issues traversed in the present proceedings to be re-tried in a separate action.

[14] It is correct for the respondent to submit that the appellant has not offered any compelling explanation for what can only be described as an extremely late application to amend. The trial proceedings had commenced when the application was made almost at the conclusion of the appellant's examination in chief of the first and only witness for the plaintiff. The explanation given by Counsel from the bar table was that it was only when evidence was ruled inadmissible because it was not pleaded in the statement of claim that he realized that it would be necessary to amend the statement of claim to ensure that critical evidence could be admitted.

[15] Given sufficient time to file an amended defence I can think of no basis for the respondent to claim that there would be unfair prejudice in the event that a stay were granted.

[16] However it seems to me that a more compelling reason for granting a stay in this case is that in the event that the appeal against the interlocutory order refusing leave to amend is ultimately successful, then the appeal would be rendered nugatory since the proceedings in the High Court by that time will have been finalized.

[17] Although the merits of the appeal should not be considered in any detail, it is usually necessary for an appellant to demonstrate that the appeal is at least arguable. If the

appeal is obviously without merit and has been filed merely to delay the proceedings then the application should be refused.

[18] The grounds of appeal upon which the appellant seeks to rely in the event that leave to appeal is subsequently granted are set out in annexure *"AKS 11"* of the affidavit filed on 16 October 2018 in support of the renewed application for stay of proceedings. Those grounds of appeal are:

> *"1. The learned judge erred in law in holding that the Appellant was bound by the grounds of objection filed with the Chief Executive Officer of the Respondent pursuant to section 21(2) of the Tax Administration Act when the Appellant had not filed a review before the Tax Tribunal but had invoked the jurisdiction of section 91(1)(b) of the Tax Administration Act.*
>
> *2. The learned judge erred in law when he applied the maxim of public policy, generalia specialibus non derogant when it was not applicable in the interpretation of the Appellant's rights to file an action directly with the Tax High Court pursuant to section 91(1)(b) of the Tax Administration Act.*
>
> *3. The learned judge erred in law and was in breach of the duty of fairness when he applied the maxim of public policy, generalia specialibus non derogant but did not give an opportunity to the Appellant to respond to or make any submissions on the maxim.*
>
> *4. The judge erred in law in following the decision of the South African case of HR Computek (Pty) Ltd and the Commissioner for the South African Revenue Service: Case No. 830/2011 delivered on 29 November 2012 when the legislation in the South African case differed in substance to that of the relevant provisions of the Tax Administration Act.*
>
> *5. The judge erred in law in not considering the Appellant's written Submissions including those set out in paragraphs 2.6 to 2.10.*
>
> *6. The judge erred in law in not considering the case law in Fiji for the amendment of the Statement of Claim pursuant to High Court Rules Order 20 Rule 5."*

[19] For the reasons stated earlier in this Ruling I consider that the appeal is not groundless. The appeal, if successful, will avoid the same or similar issues being adjudicated in a second civil action. The appeal will be rendered nugatory in the sense that it would be too late for the statement of claim to be amended in the event that the appeal was successful.

[20] As a result I am prepared to grant a stay of proceedings in the High Court until the determination of the interlocutory appeal on condition that General Machinery:

1) file and serve a reply affidavit in relation to the leave application by 29 October 2018.

2) file and serve written submissions on the leave application by 13 November 2018.

3) pay to the Commissioner the sum of $2000.00 costs in this application within 14 days from the date of this Ruling.

[21] In default of any of these orders, the order granting the stay of proceedings is lifted forthwith and the learned Judge is at liberty to list the matter for continuation on a date that is convenient to the Court.

[22] The time for the respondent to file submissions on the leave application is extended to 20 November 2018.

W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL