

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC Civil Action No. 86 of 2007

Between: Kaneta Foods Limited

Plaintiff

And: Tosa Bussan Fiji Limited

First Defendant

And: Tosa Bussan Inc

Second Defendant

And: Hiroshi Tokuhisha

Third Defendant

Appearances: Mr Shelvin Singh for the plaintiff

Mr H. Nagin for the defendants

Date of hearing: 19<sup>th</sup> February, 2015

### **Judgment**

#### *1. The Background*

- (a) In these proceedings, the defendants moved to strike out the plaintiff's action for want of jurisdiction, on the ground that the claim should have been filed in Japan. The Master held that a foreign plaintiff has a right to obtain a decision of a Fiji Court considering that the first and the third defendants are both based in Fiji.
- (b) I declined the application of the defendants for leave to appeal the judgment of the Master. I held the Master had correctly reasoned that the action may be tried in Fiji. I also held that leave is granted to appeal from an interlocutory order only in the most exceptional circumstances.

2. By notice of motion, the defendants move that the substantive action and proceedings in this case be stayed, until the hearing and determination of the pending Civil Appeal No. ABU 0013 of 2014.
  
3. The third defendant, in his affidavit in support states that :
  - a. The defendants have good grounds of appeal and a good chance of succeeding in the appeal.
  - b. He is advised that the Master and I misapplied the law relating to the forum and have not properly taken into consideration the submissions of the defendants that the proper forum should have been in Japan.
  - c. The defendants have filed notice of appeal in the Court of Appeal. On 2<sup>nd</sup> May, 2014, the defendants paid security for costs in a sum of \$2,500.00.
  - d. The defendants will be seriously prejudiced, if the action proceeds to trial.
  - e. The issue of jurisdiction should be determined before the substantive action is entered for trial.
  - f. The defendant's appeal will be rendered nugatory, if a stay is not granted.

4. ***The grounds of appeal***

The grounds of appeal to the Court of Appeal from my decision are as follows:

- i) *The Learned Judge erred in law in not granting the Appellant's application for leave to Appeal the Master's decision when the application was properly made and the grounds of Appeal demonstrated the Master did not apply the proper law of doctrine of forum conveniens. The Learned Trial Judge failed to give any proper weight to the Appellants' arguments and failed to properly consider the grounds of appeal.*
- ii) *The Learned Judge erred in law in holding that the Fiji Court is an appropriate forum, when the transaction took place in Japan and dealings were done in Japanese yen.*

- iii) *The Learned Judge erred in law in not taking into consideration that the First Appellant had no arrangement nor had taken any orders to supply fish to the Respondent and all transactions were between the Respondent and the Second Appellant and this is why the Second Appellant was made a party.*
- iv) *The Learned Judge erred in law whereby stating at paragraph 3.8 of his Judgment wherein he said "that payments were made to the First Defendant's account.....makes Fiji Courts an appropriate form." He failed to consider that the First Appellant did not authorize or request the Respondent to payments to its account and all transactions were done by Second Appellant with the Respondent and the Respondent acted on instructions of the Second Appellant as to where payments were to be remitted.*
- v) *The Learned Judge erred in law by arriving in his conclusion that there was an authority given to the Respondent to make a deposit in the First Appellant's account. The First Appellant had denied this in its Statement of Defence. Even if authority was there, that still did not make Fiji the proper jurisdiction for this case.*
- vi) *The Learned Judge erred in law in not properly considering the legal authorities in this area of law.*
- vii) *The Learned Judge erred in law in ruling that the Appellant had submitted to jurisdiction by filing Statement of Defence and could not raise the issue of jurisdiction.*
- viii) T  
*he Learned Judge erred in law in not holding that the issue of submitting to jurisdiction was a new matter raised and had not been raised before the Master.*
- ix) *The Learned Judge erred in law in not granting leave to appeal by holding that there were no exceptional circumstance based on which leave to appeal could be granted when the issue of jurisdiction and forum conveniens was a very important matter not properly considering the legal authorities in this area of law.*

5. *The determination*

- a. At the hearing, Mr Nagin counsel for the defendants pointed out that the plaintiff has not filed an affidavit in reply. The riposte of Mr Singh, counsel for the plaintiff was that the matters raised were all questions of law. There were no new facts to respond to.
- b. The law on stay pending appeal was stated by His Lordship Chief Justice Gates in *Native Land Trust Board v Shanti Lal*, [CBV0009.11, January, 2012] as follows:

*The court considering a stay should take into account the following questions. They were the principles set out by the Court of Appeal and approved subsequently and applied frequently in this court. They were summarised in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd, Civil Appeal ABU0011.04S 18<sup>th</sup> March 2005. They are:*

- 1) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
  - 2) *Whether the successful party will be injuriously affected by the stay.*
  - 3) *The bona fides of the applicants as to the prosecution of the appeal.*
  - 4) *The effect on third parties.*
  - 5) *The novelty and importance of questions involved.*
  - 6) *The public interest in the proceeding.*
  - 7) *The overall balance of convenience and the status quo. (emphasis added)*
- c. The first test requires the court to consider whether the applicant's appeal will be rendered nugatory, if no stay is granted. This factor "is not determinative".
  - d. The next factor to be considered is whether the successful party will be injuriously affected by the stay. Both counsel agreed that this principle is inapplicable in the present case, since there has been no final judgment.

- e. I am not satisfied as to the bona fides of the defendants as to the prosecution of the appeal, albeit security for costs have been paid. No steps have to be taken to move the appeal.
- f. The fourth, fifth and sixth tests laid down in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*, (*supra*) do not apply to the present matter. In my view, there are no novel or important questions of law involved in the application before me.
- g. The FCA in *AG and Minister of Health v Loraine Die*, (Misc. No 13 of 2010) stated:
- The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal.. That hurdle is higher than that of chances of success.* (emphasis added)
- h. The first ground of appeal argues that I erred in not granting leave to appeal the Master's decision, since the Master did not apply the proper law of the doctrine of forum conveniens.
- i. The second, that I made a misjudgment in holding that the Fiji Court is an appropriate forum, when the transaction took place in Japan and dealings were done in Japanese yen.
- j. The other grounds of appeal take issue that I was wrong as follows:
- *in not taking into consideration the following matters that the First Appellant (first defendant) had no arrangement nor had taken any orders to supply fish to the Respondent (the plaintiff) and all transactions were between the Respondent and the Second Appellant (second defendant) and this is why the Second Appellant was made a party.*
  - *wherein (I) said "that payments were made to the First Defendant's account.....makes Fiji Courts an appropriate form." (I) failed to consider that the First Appellant did not authorize or request the Respondent to payments to its account and all transactions were done by Second Appellant with the Respondent and the Respondent acted on instructions of the Second Appellant as to where payments were to be remitted.*
  - *by arriving in (my) conclusion that there was an authority given to the Respondent to make a deposit in the First Appellant's account.*

- k. The principal contention of the defendants is that the Fiji Court is not the appropriate forum.
- l. The mainstay of the appeal as stated in the first to the fifth grounds of appeal urge questions of fact. It is not contended that there was a written contract between the parties. The parties would have to adduce evidence before an original court, in order that a conclusive finding can be made on the issue of the forum conveniens.
- m. The proceedings before the Master was to strike out this action. It is settled law that the power to strike out an action is exercised sparingly and rarely.
- n. The seventh and eighth grounds contend that I erred in holding that the defendants had submitted to jurisdiction by filing a statement of defence. Or 12, r 7 requires a defendant to dispute the jurisdiction of the Court, "*within the time limited for defence*"
- o. The ultimate ground of appeal is that I held there were no exceptional circumstance based on which leave to appeal could be granted. I relied on the oft quoted authority in *Niemann v Electronic Industries Ltd* ,(1978) VR 431 that leave is granted to appeal from an interlocutory order only in the most exceptional circumstances.
- p. I am of the view, that the overall circumstances and the balance of convenience favours the refusal of the stay. In the exercise of my discretion, I decline the application to stay the hearing of this action until the hearing and determination of the appeal.

6. **Orders**

I make order as follows:

- a) I decline the application of the defendants to stay the substantive action and proceedings until the hearing and determination of the appeal.
- b) The defendants shall pay the plaintiff costs summarily assessed in a sum of \$ 1000.

23<sup>rd</sup> October, 2015



*A.L.B. Brito-Mutunayagam*

**A.L.B. Brito-Mutunayagam**  
**Judge**