

**IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
[CIVIL JURISDICTION]**

**Civil Action HBC: 154 of 2015**

**BETWEEN** : **PETER ALLAN LOWING** of Unit 6.2, Fairfax Apartments,  
Hunter Street, Port Moresby, Papua New Guinea, Legal  
Practitioner.

**PLAINTIFF/APPLICANT**

**A N D** : **PETER HOWELL** of 30A Lynwood Avenue, Killara, New  
South Wales, Australia.

**DEFENDANT/RESPONDENT**

**Counsel** : Ms Salote Tabuadua-Seru for plaintiff  
: Ms Barbra Dorton for defendant

**Date of Hearing** : 19.07.2016  
**Date of Ruling** : 21.07.2016

## **R U L I N G**

### **INTRODUCTION**

[01] This ruling concerns with an application for Leave to Appeal coupled with application for stay of execution and for extension of time for appeal.

[02] By an *inter partes* summons dated 7 July 2016 and filed 6 July 2016 ('the **Application**') the plaintiff seeks the following orders:

- “1) *The plaintiff be granted leave forthwith to appeal to the Court of Appeal of Fiji from the interlocutory ruling including all orders arising therefrom of the Honourable Mr. Justice Ajmeer in these proceedings pronounced on the 28 June 2016;*
- 2) *In the event that leave is granted to appeal the within interlocutory ruling and all orders arising therefrom, the within interlocutory ruling and all orders arising therefrom be wholly stayed forthwith pending the determination and delivery of the judgment of the Court of Appeal on any appeal brought pursuant to such leave;*
- 3) *Time for bringing the appeal from the within interlocutory ruling and all orders arising therefrom to the Court of Appeal be extended until such times as this Court determines the plaintiff’s application for leave to appeal if necessary;*
- 4) *Alternatively, the within interlocutory ruling and all orders arising therefrom be wholly stayed forthwith pending determination of the entire appeal proceedings numbered ABU0025 of 2016 currently before the Court of Appeal;*
- 5) *Time of service of this application be abridged to 1 day due to the urgency of this application;*
- 6) *Costs of this application be borne by the defendant or alternatively costs in the cause.*
- 7) *Any other or further order that the court deems just and appropriate.”*

[03] In support of the Application, the plaintiff reads and relies on the following affidavits:

- a. affidavit sworn by Peter Lowing on 5 July 2016 and filed and served (in original) on 11 July 2016 (the **Supporting Affidavit**).
- b. the affidavit sworn by Peter Lowing on 22 June 2016 annexed to the affidavit of Suzie Cheer sworn on 22 June 2016 and filed 23 June 2016 (the **22 June Affidavit**). The 22 June Affidavit has been read, confirmed, verified and adopted into the Supporting Affidavit (it has also been responded to by the defendant by affidavit of Peter Howell dated and filed 18 July 2016).

- c. affidavit in reply sworn by Peter Lowing on 18 July 2016 annexed to the affidavit of Suzie Cheer sworn on 19 July 2016 (**PAL Reply Affidavit**).

[04] The defendant opposing the application has sworn an affidavit in response and filed 18 July 2016.

[05] At the hearing both counsel made oral submissions. In addition to their oral submissions they also tendered written submissions, which were of great use in drawing up this ruling. I am grateful for both counsel for their efforts.

[06] The Application is made under to section 12(2)(f) of the *Court of Appeal Act* [Cap 12], Rule 26(3), Rule 27, Rule 34(1) of the *Court of Appeal Rules* and Order 3 rule 4 of the *High Court Rules* and the Inherent Jurisdiction of the High Court.

### **BACKGROUND TO THE APPLICATION**

[07] The plaintiff, Peter Lowing and the defendant, Peter Powel entered into an employment agreement in March 2014 for the defendant to work for the plaintiff at Lowing & Associates in Nadi (the **Employment Agreement**).

[08] Dispute arose in relation to the Employment Agreement and the defendant resigned.

[09] The defendant sued the plaintiff in New South Wales (the **NSW Proceedings**). The plaintiff alleges that this was in contravention of clause 14 of the Employment Agreement, which specifically states that any disputes in relation to the Employment Agreement must be decided by Fiji Courts. The plaintiff agreed to settle the NSW Proceedings and a judgment by consent was entered accordingly.

[10] The plaintiff instituted proceedings in the High Court of Fiji at Lautoka seeking certain remedies against the defendant for breach of Clause 14 of the Employment Agreement being HBC 154 of 2015 (the **High Court Action**).

[11] In March 2016, the plaintiff having settled the NSW proceedings, filed an interim injunction application seeking to restrain the defendant from executing the Judgment in the NSW Proceedings until the court has determined the High Court Action (the **HC Injunction Application**). This Court refused the HC Injunction Application by a ruling pronounced on 21 March 2016. The plaintiff appealed this ruling and it is currently before the Court of Appeal in ABU25 of 2016. The plaintiff also filed an interim injunction application in the Court of Appeal which is awaiting ruling (the **CA Injunction Application**).

[12] In June 2016, the defendant made an application to set aside the Writ of Summons in the High Court Action. The court considering that application set aside the Writ of Summons by its ruling delivered on 28 June 2016 (the **28 June Ruling**). It is the 28 June Ruling that the plaintiff seeks leave to appeal to the Court of Appeal and is the subject of the Application.

## **ISSUES**

[13] The issues before the Court are: whether

- a. *the plaintiff ought to be granted leave to appeal the 28 June Ruling;*
- b. *there ought to be a stay pending the appeal of the 28 June Ruling;*
- c. *alternatively, there ought to be a stay pending the current appeal before the Court of Appeal (ABU0025 of 2016);*
- d. *the Court has the power to grant an enlargement of time to appeal (if the need arises).*

**RELEVANT LEGAL PRINCIPLES:**

**(a) Leave to Appeal**

[14] Section 12(2) (f) of the *Court of Appeal Act* [Cap 12] (as amended) (**CAA**) reads, as far as material:

*“12 (2) No appeal shall lie –*

*...*

*(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases, namely:-*

*...”*

[15] Rule 26(3) of the *Court of Appeal Rules* (**CAR**) reads:

*“Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”*

**(b) Stay Pending Appeal**

[16] Rule 34(1) of the CAR reads:

*“34.- (1) Except so far as the court below or the Court of Appeal may otherwise direct-*

*(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;*

*(b) no intermediate act or proceeding shall be invalidated by an appeal.”*

[17] In *New world Ltd v Vanualevu Hardware (Fiji) Ltd* [2015] FJCA 172; ABU76.2015 (17 December 2015), Fiji Court of Appeal observed:

*“[14] The factors that should be exercised by this Court in an application such as is presently before the Court were identified in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** (ABU 11 of 2004 delivered on 18 March 2005). Generally a successfully party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1)*

*whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.”*

[18] *The Supreme Court of Fiji in Ward v Chandra [2011] FJSC 8, CBV0010 (20 April 2011)* set out the principles governing a stay application as follows:

**“Principles governing a stay application**

[17] *In arriving at a decision as to whether the Petitioner’s circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU0011.04S, 18<sup>th</sup> March 2005.*

*They were:*

- “(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (b) Whether the successful party will be injuriously affected by the stay.*
- (c) The bona fides of the applicants as to the prosecution of the appeal.*
- (d) The effect on third parties.*
- (e) The novelty and importance of questions involved.*
- (f) The public interest in the proceeding.*
- (g) The overall balance of convenience and the status quo.”*

**(c) Enlargement of Time for Appeal**

[19] Rule 16 of the CAR reads:

*“Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was pronounced) that is to say-*

- (a) in the case of an appeal from an interlocutory order, 21 days;*
- (b) in any case, 6 weeks.”*

[20] Rule 27 of the CAR reads:

*“Without prejudice to the power of the Court of Appeal, under the High Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period.”*

## **DISCUSSION**

### **(a) Leave to Appeal**

[21] The primary issue raised in this application is that whether the plaintiff ought to be given leave to appeal the 28 June order delivered by me.

[22] By the 28 June order the court struck off the writ of summons filed by the plaintiff on the grounds of irregularity and *res judicata* (the plaintiff agreed to enter a judgment by consent in the foreign proceedings brought by the defendant in respect of the same matter).

[23] An order made striking out a writ of summons on an application to strike out on any preliminary issue is an interlocutory order.

[24] The plaintiff commenced proceedings in the High Court in its original jurisdiction and matter did not proceed to hearing and judgment on the merits of the case. The writ of summon filed by the plaintiff was struck off before the hearing and judgment on the preliminary ground. Therefore, the 28 June order is an interlocutory order. In this regards I have adopted the interpretation given in *Goundar v Ministry of Health* (above). Also see, *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015):

[25] Since the order of 28 June is an interlocutory one, the plaintiff will need leave to appeal the same.

- [26] Leave to appeal an interlocutory order may be given by the judge or by the Court of Appeal (see CAA, 12 (2) (f)). Furthermore, an application may be made either to this court (the court that made the order) or to the Court of Appeal. The application must be made in the first instance to the Court below (see CAR, 26 (3)).
- [27] Counsel for the plaintiff advances argument that the proposed appeal raises questions of importance that seek to clarify the extent to which the Courts of Fiji will/should recognize a claim for breach of contract and anti-suit injunction where consent judgment has been entered in the Foreign Proceedings; She also contends that jurisdiction of the Court extends to restraining the enforcement of a foreign judgment in breach of contract.
- [28] Defendant's counsel, Ms Barbra on the other hand argues that it is clear from all proceedings and admitted facts that the NSW proceedings and the proceedings herein are based on the same employment agreement between the parties. As such, she submits that the proposed grounds of appeal have no merits or prospect of success therefore the application herein ought to be dismissed with costs to the defendant.
- [29] It will be noted that the Court struck off and dismissed the writ of summons by its 28 June order. The plaintiff seeks leave to appeal that order to the Court of Appeal. The writ of summons has been struck off on the ground of irregularity and res judicata. The Court did not consider merits of the plaintiff's claim when making the order striking off. It only considered the preliminary points raised at that stage of the proceedings.
- [30] In ***Hussain v National Bank of Fiji*** [1995] FJHC 188; [1995] 41 FLR 130 (1 June 1995) the High Court held that as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or



judgments which do not either directly or by their practical effect finally determine any substantive rights of either party.

[31] Fiji Court of Appeal in ***Habib Bank Ltd v Ali's Civil Engineering Ltd*** [2015] FJCA 47; ABU7.2014 (20 March 2015) granted leave to appeal having satisfied with the summary of grounds that raises appealable issues that should be considered by the Court of Appeal.

[32] The plaintiff submits that the grounds of appeal raises some question of general importance to be determined by the Court of Appeal. I have considered the summary of the proposed grounds of appeal. The question of general importance is that whether Fiji Courts have jurisdiction over the breach of contract entered in Fiji between the parties with exclusive jurisdiction clause that any dispute arising out of that contract must be determined by the Fiji Courts, despite the fact that the foreign court had already decided the issues arose out of the same contract in proceedings initiated by the defendant where the plaintiff had agreed to a consent judgment.

[33] Lord Woolf MR said in ***Swain v Hillman*** [2001] 1 All ER 91 that a 'real' prospect of success means that prospect of success must be realistic rather than fanciful.

[34] In ***Beedell v West Ferry Printers Ltd*** [2001] EWCA Civ 400; [2001] ICR 962, it was said that even hopeless appeal may allowed to proceed where the area of law in question is the subject of considerable controversy.

[35] The 28 June interlocutory order was made without considering the merits of the plaintiff's claim. The ruling has finally determined the substantive rights of the parties. The presumption against granting leave to appeal from an interlocutory order is applicable where such an order or

judgment does not determine any substantive right of either party. In this case, the order delivered on 28 June has the effect of finally determining the substantive right of the plaintiff, for the plaintiff's claim was truck off and dismissed. Therefore, the presumption against granting leave to appeal an interlocutory order has no application herein.

[36] Where the interlocutory order or judgment decides the substantive rights, as in this case, the test for granting leave should not be strictly applied.

[37] I am satisfied that the summary of grounds of appeal raises question of general importance and the area of law in question is the subject of considerable controversy and obtaining clarification on the law is needed. As stated in *Beedell's* case, even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy. I therefore grant leave to the plaintiff to appeal the 28 June Ruling. It follows that leave to appeal is granted under section 12 (2) (f) of the CAA.

**(b) Stay pending appeal**

[38] Let me now decide the second issue that whether there ought to be a stay pending the appeal of the 28 June Ruling.

[39] The basic rule is that a litigant is entitled to enjoy the fruits of its success (see *BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028 and *Chand v Lata* [2008] FJHC 162)).

[40] Unless the court below or the Court of Appeal otherwise directs, an appeal will not operate as a stay of execution or of proceedings under the decision of the court below (see CAR, 34-(1)).

[41] The court has an unfettered discretion to impose a stay of execution if the justice of the case so demands (see BMW AG (above)). In so doing, the court will take into consideration the principles governing a stay application as set out in *Ward v Chandra* [2011] FJSC 8; CBV0010 (20 April 2011) and *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU 0011.2004S (18 March 2005).

[42] In order to obtain a stay the plaintiff must establish that he has sufficiently exceptional circumstances as stated in Ward's case (above).

[43] The plaintiff submits that a stay ought to be granted on the following grounds:

- a. The plaintiff would be gravely prejudiced if stay is refused and is vital for the protection of the status quo;
- b. The plaintiff's right of appeal (ABU 00 25 of 2016) would be rendered nugatory;
- c. The prejudice to the plaintiff is greater than to the defendant: whereas the defendant could be compensated by interest and/or costs for any delay;
- d. The plaintiff has acted diligently in prosecuting the proposed appeal;
- e. The questions raised by the plaintiff in the proposed appeal is of general importance and also novel.
- f. The balance of convenience and the protection of the status quo is in favour of the plaintiff.

[44] Opposing the application for stay, the defendant's counsel submits that the plaintiff will not be prejudiced if stay is not granted and that it is the defendant who will continue to be prejudiced if a stay is granted. She further submits that the plaintiff's application have been unsuccessful both in the foreign court as well as in the proceedings herein and the

defendant ought to be allowed to recover the costs awarded against the plaintiff.

[45] In ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 1915, LTL 18/12/2001), the Court identified three questions as relevant to be asked when considering an application for stay of execution, which includes:

*(a) If a stay is refused, what are the risks of the appeal being stifled?*

*(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*

*(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

[46] The plaintiff made an application in this court seeking a stay of execution of the consent judgment entered in the foreign proceedings. This court refused that application. The plaintiff has appealed that order to the Court of Appeal (ABU0025 of 2016) and the Court of Appeal has granted an interim stay. The plaintiff submits that the appeal would be rendered nugatory if a stay is refused.

[47] The appeal arose out of the writ of summons and subsequent orders this court made in interlocutory proceedings. By the June 28 Ruling the court struck off the writ of summons. It follows that there is no substantive action for the plaintiff to rely upon. I am of the view that there are risks of the appeal being stifled if a stay is refused.

[48] I am unable to find any risks the defendant will be unable to enforce the judgment if a stay is granted and the appeal fails. The defendant is a legal practitioner in Australia and Fiji. The plaintiff is also a legal practitioner in

PNG and Fiji. The risk is that the defendant would not be able to enforce the judgment if a stay is granted.

[49] The defendant submits that he will continue to be prejudiced if a stay is granted.

[50] The prejudice that may be caused to the defendant if a stay is granted and appeal fails could be compensated by an order of interest and/or costs. Therefore, in my view, balance of convenience and the protection of status quo favour the plaintiff.

[51] For all these reasons, I grant a stay of execution of the 28 June Ruling pending appeal. It follows the stay is granted under CAR, Rule 34 (1).

### **(c) Enlargement of Time**

[52] The plaintiff seeks enlarge of time given that the time for appeal expired on 19 July 2016.

[53] The proposed appeal is against the 28 June Ruling, which is an interlocutory ruling.

[54] Under **CAR, Rule 16 (a)** a notice of appeal in respect of an interlocutory order must be filed and served within 21 days from the date on which the order was pronounced. However, without prejudice to the Power of the Court of Appeal, the Court below may enlarge the time prescribed for appeal upon application made before the expiration of that period (see **CAR, Rule 27**).

[55] The plaintiff has made the application for leave to appeal and for enlargement of time on 6 July 2016. The court pronounced its ruling on

28 June 2016. So, the plaintiff has made the application for extending the time for appealing well within the time as required in CAR, Rule 27. The granting of leave to appeal will be futile if the time for appeal is not extended. I therefore, acting under CAR, Rule 27, extend the time for appeal by seven (7) days.

[56] As I have granted a stay pending the proposed appeal, there is no need to decide the alternate issue that whether there ought to be a stay pending the current appeal before the Court of Appeal (ABU0025 of 2016).

[57] With regards to costs, I would order costs shall be in the cause.

### **Final outcome**

1. Leave is granted to the plaintiff to appeal the 28<sup>th</sup> June 2016 Ruling.
2. There will be a stay of execution of the 28<sup>th</sup> June 2016 Ruling, pending appeal.
3. The time for appeal is extended by seven (7) days.
4. Costs shall be in the cause.

*M H Mohamed Ajmeer*  
21/7/16

.....  
**M H Mohamed Ajmeer**

**JUDGE**

**21<sup>st</sup> July 2016**

**At Lautoka**

