

In the High Court of Fiji at Suva  
Civil jurisdiction  
Civil Action No. HBC 234 of 2007

Between  
Total Fiji Limited  
Plaintiff  
And  
Auto World Trading (Fiji) Limited  
Defendant

Appearances: Mr N.S. Gedye QC with Mr H. Nagin for the plaintiff  
Mr Shelvin Singh for the defendant  
Date of hearing: 28<sup>th</sup> June, 2016

### **Ruling**

1. The plaintiff moves for stay pending appeal of my judgment delivered on 30<sup>th</sup> March, 2016.
2. The plaintiff claimed that it had exercised its option to renew its lease over CT Nos 3157 and 3357 for a further period of twenty years from 1<sup>st</sup> January, 2000, with the defendant's predecessor in title. The defendant had purchased the two properties on 2<sup>nd</sup> May, 2007, subject to the existing lease.
3. I declined the plaintiff's claim for a declaration that (a) it had a lease over the defendant's properties comprised in CT Nos 3157 and 3357 till 31<sup>st</sup> December, 2019; and (b) the defendant's notice to quit dated 17<sup>th</sup> May, 2007, is invalid.  
I also made order that the plaintiff vacate the properties within a period of three months and pay the defendant mesne profits in a sum of \$ 953,600.
4. Erwin Budoio, President, Finance & Corporate affairs of the plaintiff company in his affidavit in support of the summons, states that the plaintiff has been using the premises to operate the business of a service station. The plaintiff's appeal will be rendered nugatory. The plaintiff will suffer irreparable damage, if a stay is not granted. The balance of convenience requires that a stay be granted.

5. Ravindra Lal, a director of the defendant company in his affidavit in opposition states that this action was commenced in 2007. The defendant does not have its land nor the appropriate market rental, due to the plaintiff's unlawful occupation. The plaintiff is a large multinational corporation which has more than 20 service stations operating in the country. The plaintiff does not operate the service station on the properties. The defendant has a substantial debt on the property. The balance of convenience requires the stay application to be declined. The plaintiff will not suffer any loss or damage.
6. A detailed affidavit in reply was filed by Erwin Budoio stating that the plaintiff derives income from the dealer on the premises. The dealer will lose revenue. The plaintiff sets out in detail the damages it would suffer.
7. At the hearing, Mr Singh, counsel for the defendant quite correctly objected to the detailed in the affidavit in reply containing matters not averred in the affidavit in support.

***The determination***

8. 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:*

- (a) *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).*
- (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.*

9. The first test reiterates the general principle that the court must consider if no stay is granted, namely, whether the applicant's appeal will be rendered nugatory, albeit this factor "*is not determinative*". The second whether the successful party will be injuriously affected by the stay.
10. 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)
11. The main contention of the plaintiff in its proposed grounds of appeal is that I erred in holding that there was no "*effective*" renewal of the lease from 1 January,2000, the defendant as successor in title was not bound by the covenant for renewal embodied in the lease and the indefeasibility provisions in the Land Transfer Act negated the plaintiff's renewal rights.
12. I found on the correspondence between the plaintiff and the defendant's predecessor in title that the plaintiff was in possession of the properties as a monthly tenant and there was no exercise of the right of option to renew the lease. I held that the defendant had a paramount title to the two properties, in terms of sections 39 and 40 of the Land Transfer Act.
13. It is also contented that I assessed mesne profits, an increase in market rentals without adequate evidence, failed to consider the evidence of PW2,(*Rajesh Patel, Director of Supreme Fuel Ltd*), assumed "*without evidence*" an increase and did not direct that the question be determined on the basis of "*further evidence*".
14. In determining the market rental, I relied on the valuations of "*Fairview Valuations*", as produced by the plaintiff and "*Professional Valuers Company Ltd*", as produced by the defendant.
15. In my view, the plaintiff has not presented strong grounds of appeal.
16. I am satisfied on the bona fides of the defendants in prosecuting the appeal.
17. I do not find novel questions of law nor issues of public interest involved.

18. The plaintiff, in its written submissions filed in support of the stay argues that if it is required to vacate the premises, its dealer Tradewinds Marine would be affected. The defendant, in his affidavit in opposition states that the plaintiff has subleased the property to Tradewinds Marine Ltd without his consent.
19. In my view, a stay will not affect third parties as contemplated in the *Natural Waters* case.
20. In *Reddy's Enterprises Ltd v The Governor of the Reserve Bank of Fiji*, (1991) 37 FLR 73 Tikaram RJA at pg 87 said :
- In requiring the Applicant to establish special circumstances in this case I am not to be taken to hold that in all applications for a Stay it shall be incumbent on the Applicant to show special circumstances in the traditional sense. I subscribe to the view that adherence to an inflexible rigid test to all types of stay on injunction cases without considering their nature is not to be favoured. The strict test rule can negate the wide discretion vested in Courts and could even lead to denial of justice in particular cases.*
21. In any event, I do not find any special or exceptional circumstances in this case.
22. Finally, I consider the balance of convenience test.
23. The plaintiff contends that the appeal will be rendered nugatory, if the stay is not granted. It will suffer irreparable harm.
24. The defendant argues that he has been denied the enjoyment of his properties since 2007.
25. In *Reddy's Enterprises Ltd v The Governor of the Reserve Bank of Fiji*, (*supra*) Tikaram RJA at pg 88 said :

*The rule is that the court "does not make a practice of depriving a successful litigant of the fruits of litigation and locking up funds to which prima face he is entitled" pending appeal. (The Annot Lyle (1886) 11 PD 114, 116, CA; Monk v. Bertram, (1891) 1 QB 346)*

26. Mr Gedye, QC argues that the defendant does not have the capacity to repay damages, if the appeal is successful. The answer to that argument is that the defendant is the owner of the subject matter of this litigation: two prime properties in Suva.

27. On a consideration of the overall balance of convenience and in the exercise of my discretion, I decline the stay.

28. *Orders*

(a) The application to stay execution of my judgment is declined.

(b) The plaintiff shall pay the defendant costs of this application summarily assessed in a sum of \$1000.

  
**A.L.B. Brito-Mutunayagam**  
**JUDGE**  
18<sup>th</sup> October, 2016

