IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC No. 09 of 2017.

BETWEEN : **TAGRA SPARE PARTS & CARWASH (FIJI) LIMITED** a limited liability having its registered office at Lautoka in the Republic of Fiji Islands.

PLAINTIFF

AND : **IFTIKAR IQBAL AHMED KHAN** of Lautoka, Barrister & Solicitor, operating as **IQBAL KHAN AND ASSOCIATES** Barristers and Solicitors, Lautoka.

1ST DEFENDANT

AND : **SAROJINI NARAYAN & VICKY HARISH NARAYAN** both of 34 Ravouvou Street, Lautoka, Property Owners.

2ND DEFENDANTS

RULING

Introduction

1. The background to this case is set out in my earlier rulings (see **Tagra Spare Parts & Carwash (Fiji) Ltd v Khan** [2017] FJHC 51; HBC09.2017 (1 February 2017); **Tagra Spare Parts & Carwash (Fiji) Ltd v Narayan** [2017] FJHC 165; HBC221.2016 (3 March 2017)).
2. The intended appellant was a tenant of the respondent over some commercial premises situated within the township of Lautoka. At some point last year, the defendants had filed an application pursuant to section 169 of the Land Transfer Act seeking an eviction Order against the plaintiff on the ground of non-payment of rent.
3. At some point after the defendants' section 169 application, the plaintiff would file separate proceedings seeking certain Orders to undermine the section 169 application.
4. At some point after the plaintiff filed their proceedings, both counsel appeared in Court before me and reached a compromise. Pursuant to that, a consent order was entered in Court on 21 October 2016. The related sealed Order is reproduced in full below:

    1. By consent, Defendants agree by their counsel that they will allow the Plaintiff further three (3 months from today to vacate the premises and remove all their possession by 21st of January 2017;

2. The Plaintiff agrees that it will discontinue this action and forfeit any right of first refusal under contract;
3. The Defendants will withdraw their section 169 application pending before the Master of the High Court
4. The parties agree to work out between themselves on exit of the premises so that Plaintiff does not damage the belongings of the Defendants;
5. Parties to bear their own costs.

5. On 20 January 2017, the plaintiff filed a fresh Writ of Summons seeking to set aside the said consent order after having instructed a new solicitor, Mr. Mohammed of Fazilat Shah Legal. The plaintiff also filed an *ex-parte* Notice of Motion on 20 January 2017 seeking an order that the Consent Order be stayed pending determination of the action or that it be wholly set aside.
6. Notably, at the time the plaintiff filed these applications, the defendant had already withdrawn its section 169 application as per the Consent Order.
7. The intended appellant had filed before me an application to set aside a consent order entered in this court earlier this year. The application was based solely on an allegation that the intended appellant's former solicitor had agreed to certain terms of the above Consent Order without specific instruction or authority.
8. In my ruling dated 03 March 2017 (see **Tagra Spare Parts & Carwash (Fiji) Ltd v Narayan** [2017] FJHC 165; HBC221.2016 (3 March 2017), I had refused the application.
9. I reproduce below an extract from the above ruling which captures the essence of my reasoning:

EARLIER RULING

5. In my Ruling dated 01 February 2017, I refused and dismissed the plaintiff's said application with costs in the sum of eight hundred dollars only in favour of the defendant.
6. I noted at the outset that a consent order can only be set aside on the same grounds as the court would normally set aside any contract or agreement.
7. I then observed that the only ground upon which the plaintiff was relying to set aside the consent order was in its allegation that the said order was entered into by its former solicitor without his instruction and knowledge. As I had noted:

10. The director of the plaintiff company, Mr. Amal Dip Singh, has now filed a fresh action in HBC 09 of 2017 through his new solicitors seeking to set aside the said Consent Order.
11. The gist of his argument is that the said Consent Order was entered into by his former solicitors without his instruction and knowledge.
12. The thrust of Mr. Mohammed's argument is that not only did his client not authorise his former counsel to consent to settlement of the matter on the terms set out above, but also, that his client would never ever have consented to those terms because his

client was interested in purchasing the property and was relying on the right of first refusal therein the Tenancy Agreement.

8. I also observed that the plaintiff is aggrieved because the consent order meant the end of the Tenancy Agreement. The plaintiff had submitted through its solicitor that it (plaintiff company) would never have consented to ending the Tenancy Agreement as it would mean that it (plaintiff) would have to forfeit its right of first refusal.
9. I then cited some case law which establish that a right of first refusal - unlike an option to purchase which is a proprietary interest - only confers a mere personal right. As such, a right of first refusal is not sufficient to sustain a caveat on the property, and probably will not be sufficient also to support an injunction against the defendants from selling the property.
10. In any event, the plaintiff could not rely on the said right of first refusal (or for that matter, on any term of the Tenancy Agreement) because the Tenancy Agreement which conferred that right, was no more. I came to this conclusion on the view that the consent order was, in effect, a mutual termination by both counsel of the said Agreement.
11. In order to succeed, the plaintiff had to revive the Agreement. To do so, he would have to succeed in setting aside the consent order which more or less terminated that Agreement.
12. The plaintiff's immediate hurdle is getting around the grain of case law authority which establish the position that a counsel who settles a claim on behalf of his client has the apparent general authority to do so and accordingly any consent judgment entered upon the compromise was binding on the client as against the other party.
13. The law of agency recognizes that an agent will have apparent authority, although the principal may not have consented to the agent having such authority, where the principal, by his words or by his conduct, makes a third party to believe that the agent has authority to contract for and on behalf of the principal.

Current Applications

10. I am now dealing with two applications. The first is the application seeking leave to appeal and the second is the application seeking stay of execution.
11. The plaintiff, meanwhile, has taken steps and succeeded in having a writ of possession re-issued. I say "re-issued" because a first writ of possession issued earlier this year was later set aside because it was not properly served (see **Tagra Spare Parts & Carwash (Fiji) Ltd v Narayan** [2017] FJHC 165; HBC221.2016 (3 March 2017).

Stay Pending Appeal

12. Without any specific stay order of the court below, an appeal *per se* does not automatically act as a stay of execution.
13. The questions to ask when considering an application for stay of execution are:

    (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?

14. The Fiji Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** (FAC Civil Appeal No. ABU 0011 of 2004S (18 March 2005 at page 3) outlined the relevant principle on applications for stay pending appeal as follows:

> The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):
>
> > "On a stay application the Court's task is "carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful". **Duncan v Osborne Building Ltd** (1992) 6 PRNZ 85 (CA), at p 87.
>
> The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13** PRNC 48, at p 50 and **Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission** (1993) 7 PRNZ 200:
>
> (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"

15. As a starting point, a successful litigant is entitled to enjoy the fruits of its successful litigation. The court has an unfettered discretion to impose a stay of execution if the justice of the case so demands.

16. Hence, an enforcement should normally be allowed to proceed unless the circumstances of the case and the interests of justice dictate otherwise.

17. The defendant argues that if the plaintiff is to be allowed to proceed with writ of possession, and if it is to turn out later that the defendant succeeds in his appeal to the Fiji Court of Appeal, the Court of Appeal's decision shall be rendered nugatory.

18. Would the intended appellant be able to recover from the intended respondent later, if in the event the appeal were to be successful later? This has to be balanced against any prejudice to the successful litigant.
19. The prejudice to the respondent is that it is being denied the opportunity to sell the land in question to prospective buyers because of the intended appellant staying on the land. The respondent is not accepting any rent from the intended appellant. The other important point to consider is that the judgement in question was a consent judgement. Normally, as I have said in my earlier rulings, the only way by which a consent judgement may be set aside is upon any of the grounds that a contract would normally be set aside. In this case, no such ground has been disclosed in the affidavit. The intended appellant has even argued, over and above the point about his lawyer having entered into the consent order without authority, that the consent order was vague and ambiguous in its terms. I do not agree. There is no ambiguity in its terms. On top of that, the respondent has performed its part of the bargain under the consent order by having withdrawn a section 169 application that it had filed before the Master.

Leave To Appeal

20. For the same reasons above, I would refuse leave to appeal. I do not think the appeal has any real prospect of success.
21. As I have said over and over again, the intended appellant would be better advised to sue his former solicitors rather than seek to unsettle the Consent Order that it had entered into with the respoudent.

Conclusion

22. Costs to the respondent (original defendant) which I summarily assess at $1,500 (one thousand and five hundred dollars only).

HIGH COURT OF FIJI LAUTOKA

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Anare Tuilevuka
JUDGE
03 May 2017