


**IN THE COURT OF APPEAL OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**

CA: 1371 <sup>7/11</sup> 

**BETWEEN**            **OCEAN FISHERY COOK ISLANDS NO.1**  
                             **LIMITED**  
                             First Appellant

**AND**                    **HANNOVER COOK ISLANDS LIMITED**  
                             Second Appellant

**AND**                    **SUNNUBERG COOK ISLANDS LIMITED**  
                             Third Appellant

**AND**                    **JONC OVERSEAS CORPORATION**  
                             Fourth Appellant

**AND**                    **HILL COSMOS INTERNATIONAL LIMITED**  
                             Respondent

**Coram:**                    Barker, P  
                                 Fisher, JA  
                                 Hugh Williams, J

**Written Submissions:**    Appellants: 1 November 2011  
                                 Respondent: 7 November 2011

**Judgment:**                <sup>24th</sup> November 2011 

**Counsel:**                    G.M. Hall for Appellants  
                                 W Akel & B.J. Upton for Respondent

**Solicitors:**                Buddle Findlay, Auckland for Appellants  
                                 Simpson Grierson, Auckland for Respondent

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**JUDGMENT OF THE COURT DELIVERED BY BARKER, P.**

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## Introduction

[1] This is an application to the Court of Appeal for a stay of orders made by Paterson J in the High Court on 15 August 2011 and 3 October 2011 that funds held in the trust account of Buddle Findlay be paid to the Respondent. The payment is to comprise so much of the judgments of the High Court of 22 April 2010 and 15 June 2010 as have not been satisfied, together with interest thereon.

[2] The application for stay is made under the provisions of s 58 of the Judicature Act 1980-81 which confers concurrent jurisdiction on the High Court and the Court of Appeal to order a stay of execution pending the hearing of an appeal. The Appellants have obtained leave to appeal against Paterson J's judgment of 15 August 2011. They have satisfied the terms set by Paterson J as to payment of security for costs. It is anticipated that this appeal will be heard at the sessions of the Court in Rarotonga commencing 11 June 2012.

[3] It has been necessary to assemble a panel of three Judges to consider this application which, if the Judicature Bill presently before Parliament had been passed, could have been dealt with by a single Judge of the Court of Appeal. Constitutional amendments made in 2009 allowed the Court of Appeal to operate through a single Judge in areas to be delineated by statute. It is common in most appellate courts for a single Judge to be empowered to deal with applications such as the present without the necessity of assembling a panel of three Judges. Counsel were content that the application be dealt with by way of written submissions without the necessity for an oral hearing.

[4] Because the jurisdiction of this Court is concurrent with that of the High Court, this is not an appeal from Paterson J's refusal to grant a stay. Rather, the Court must evaluate the application on its merits, although it is unrealistic to suggest other than that the views of Paterson J must have some weight, given his long involvement with this tortuous litigation.

[5] The facts and history of the litigation are set out in Paterson J's judgments and in the submissions of counsel. We do not see it necessary to repeat them. Nor is it necessary to embark on a discussion of the principles relating to stay. They are expressed



in cases such as *Dymoocks Franchise Systems NSW Pty Ltd v. Bilgola Enterprises Ltd* [2006] 18 PRNZ 459. Counsel do not disagree as to the principles which require a balancing exercise between the right of a successful litigant to the fruits of a judgment and the need to preserve the Appellants' position in case the appeal is successful.

[6] Counsel for the Appellants submits that they have a right of set-off which equals or exceeds the amount of the Respondent's judgment. Accordingly, the entire sum presently held on trust should remain on trust pending final determination of the appeal. Counsel further submits it would be unjust to allow the Respondent to execute judgment without bringing the Appellants' set-off claim into account. Put another way, the appeal would be rendered nugatory if no stay were granted.

[7] Paterson J considered the appeal would not be rendered nugatory if a stay were declined because the Appellants' substantive rights would not be affected. He stated:

"The substantive issue on the appeal is whether the court was correct in substantially striking out the counterclaim. If the counterclaim is reinstated, then the defendant's right to bring a claim has been in no way affected."

[8] The Appellants submit that Paterson J erred in focussing on the striking-out of the counterclaim which was only one element of the case and that he should have concentrated on the alleged set-off claim. The balance currently held on trust is US\$427,144.74. The amount of US\$405,556.68 is owing to the Appellants pursuant to earlier judgments of Paterson J. This is the amount which he ordered be paid out to the Respondent.

[9] Counsel for the Respondent submits that the Respondent has been out-of-pocket for a substantial sum since mid-2010 and that the quantum has not been in doubt since the Court of Appeal decision of 22 June 2011. The purpose of holding money in trust was only to secure the Appellants' position pending determination of the appeals concerning quantum. Counsel further points out that any counterclaim the Appellants may have is covered by a guarantee from the Respondent's parent company which remains in place. Concerns that this guarantee had not been properly executed were put to rest by an affidavit from an authorised director of that company.

[10] The Respondent submits that the trust money was to protect the Appellants' position pending resolution of the appeals and that the guarantee was to protect the Appellants' position on the counterclaim. This Court notes that it is unusual for a counterclaim defendant to be given security. Paterson J made the same point by describing the application as "*a back door application to obtain a Mareva injunction. That is what the set-off argument comes down to.*"

[11] Counsel also refer to criticisms made by Paterson J of the Appellants' principal witness and of delays attributed to the Appellants. Paterson J ended his judgment on this point by saying: "*Even if the set-off were available I see no reason in the circumstances of this case not to accede to the respondents' application.*" Counsel for the Respondent spoke of currency fluctuations and noted that the money in trust, in a US dollar account, earns only .25% interest. In any event, the Appellants have substantial security in the form of the guarantee.

[12] Counsel for the Respondent invited the Court to consider that the chances of a substantive appeal were not seriously arguable. No stay, in their submission, should be granted where the chances of success of the substantive appeal are low and not seriously arguable. The Court is not prepared to enter into that inquiry.

[13] Paterson J noted that this case was one where the Appellants had not expeditiously brought their counterclaim, although they had, through previous counsel indicated for some time that they would be bringing a counterclaim. The Respondent has obtained judgments in the High Court, has largely survived an appeal against the judgments and is entitled to be paid out. The Appellants are in a better position than many appellants as they had a guarantee from a substantial company, so that their substantive appeal will not become nugatory if the payment out is made to the Respondent.

[14] Although this is not an appeal from Paterson J, this Court considers that the considerations which led him to refuse a stay, should also lead it to refuse a stay under its concurrent jurisdiction.

[15] Accordingly, the application for stay is refused. Costs to the Respondent in \$2,000 plus disbursements as fixed by the Registrar.

*R. J. Barker, P.*  
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Barker, P