

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0057 OF 1996S

(on appeal from the High Court of Fiji at Suva in Civil Action No. HBC0458 of 1996S)

BETWEEN:

HARIFAM LIMITED a limited liability company having its registered office at 124 Renwick Road, Suva, Fiji

Appellant/Applicant  
(Original First Respondent)

- and -

FONGS HOLDINGS LIMITED a limited liability company having its registered office at 161 Renwick Road, Suva, Fiji

Respondent  
(Original Plaintiff)

*Mr. H. Nagin* for the Appellant/Applicant  
*Mr. K. E. Muaror* for the Respondent

Date and Place of Hearing: 28 January 1997, Suva  
Delivery of Decision: 2 May 1997

DECISION

(Chamber Application for a Stay Order)

This application for a stay pending determination of the Appellant/Applicant's appeal is against the decision of Fatiaki J. given in the High Court on 14 November 1996 whereby he declined to dissolve the interim injunction he had given on 4 October 1996 and in fact extended it until the final determination of the action before the High Court.

I note right at the outset that the stay order sought by the Appellant/Applicant (Original 1st Defendant) is in respect of an interlocutory decision. Furthermore the application comes before me by virtue of my concurrent jurisdiction and not in any appellate capacity.

It is also important to note at this stage the nature of appeal pending before the Fiji Court of Appeal. By Notice of Appeal filed on 22 of November 1996 the Appellant asks that Fatiaki J.'s interlocutory decision of 14 November 1996 "be wholly set aside AND FOR AN ORDER that the extension of ex-parte injunction be dissolved ....."

It is equally important to note that whilst the injunction was initially made ex-parte, the extension itself was made inter-partes after the Court heard submissions from the parties.

In dismissing the application before him Fatiaki J. set out the history of the litigation and gave full reasons for his decision which he ultimately made in the exercising of his discretion.

The factual background to the dispute between the parties is set out in the first few paragraphs of Fatiaki J.'s Ruling dated 14 November 1996. They read as follows:

*"On the 4th of October 1996 this Court granted the plaintiff company an interim injunction restraining the 1st defendant company from continuing further with construction work it was then undertaking over a strip of land comprised within the boundaries of Certificate of Title (C.T.) No. 11073 of which the 1st defendant company is the registered proprietor.*

*The plaintiff company in its Writ of Summons and affidavit in support of the injunction claims to be entitled to an easement 'right-of-way' over the said strip of land whereas the 1st defendant company in seeking the dissolution of the injunction, insists that its title over the strip of land is unencumbered and 'indefeasible' in the absence of fraud or a proper endorsement of such an easement on the title.*

*The particular strip of land in dispute measures 21.24 feet wide and runs along the north/eastern border of the 1st defendant's land and provides a rear accessway to the plaintiff's land from Cumming Street.*

*It appears from the annexures filed, that the plaintiff's and the defendant's land were originally contained within a single title document C.T. No. 7986 owned by Bhanabhai & Co. Ltd.*

*On or about 14th January 1963 the land comprised in C.T. 7986 was subdivided into three (3) separate and adjoining lots pursuant to a plan of subdivision Deposited Plan (D.P.) No. 2733 accepted by the registered proprietor and registered with the Registrar of Titles. Furthermore on 4th of February 1963 the Registrar of Titles issued two (2) certificates of title in place of the original C.T. 7986 and allocated the subdivided lots as follows :*

- (1) *C.T. 11072 being for an undivided half share of Lot 1 on D.P. No. 2733 (the plaintiff's land);*
- and*
- (2) *C.T. 11073 being the whole of Lots 2 & 3 on D.P. No. 2733 (the 1st defendant's land).*

*The relevant D.P. No. 2733 clearly and plainly marked in colour, the 'disputed strip' of land in C.T. 11073 as an 'Access and Drainage Reserve'. The D.P. also contained the following entry :*

*"Easements over areas coloured green and yellow to be granted in favour of Lots 1 and 2 respectively."*

*Despite the clear future intention expressed in the above note, it is common ground that no such easements were ever formally created by the original owners of the land, Banabhai & Co. Ltd. nor has the same been registered by a separate 'memorial' on C.T. 11073 and neither has the same been protected by the entry of a 'caveat' on the 1st defendant company's title.*

*I note however that the diagram of the land contained on the 1st defendant company's C.T. 11073 clearly and plainly delineates the disputed 'strip of land' and describes it as : "Access Dr. Reserve". Similarly the defendant company's land is described on the C.T. with reference to and in terms of D.P. 2733."*

The Appellant wishes to proceed with the completion of the building and this is the reason for seeking a stay of Justice Fatiaki's decision.

The Appellant claims that the injunction cannot be sustained against the Appellant because the Appellant is the registered proprietor of Certificate of Title No. 11073 and it has an indefeasible title subject only to such encumbrances as may be notified on the Folium of the Register. That there is no easement registered on C.T. 11073 is not in dispute.

The sections 38, 39 & 40 of Land Transfer Act deal with indefeasibility of title. Section 49 deals with creation of easements.

The Applicant argues that it has very good prospects of succeeding in its appeal. It claims that it is in the public interest to allow the building to be completed because the present structure is an ugly eyesore. Further the Applicant is suffering because the contract it has entered into with the builder cannot be proceeded with. It argues that the balance of convenience lies in favour the Applicant because the Respondent will not suffer any greater hardship if the building is completed.

On the other hand the Respondent submits *"that whilst there is no legal easement created over the disputed strip of land pursuant to Section 49 of the Land Transfer Act, the circumstances of this case constructively gives rise to an equitable interest or equitable easement specifically enforceable in equity by a Court acting in personam"*.

It further submits that the intention and understanding between the related parties has always been to create an easement on the disputed strip of land.

On the issue of "balance of convenience" the Respondent argue that if a stay of proceeding is granted thus effectively dissolving the injunction earlier granted by the High Court, it is highly likely that the Appellant Company would proceed further to complete the construction work on the strip of land in question. If this situation arises, it would effectively defeat the whole essence of the Respondent's case as the Respondent is likely to permanently lose the use of the access way which it always enjoyed in the past.

The substantive issue in this case is a serious matter involving a complex legal issue affecting the rights of the parties. It requires determination as to what extent

indefeasibility of title can if at all be adversely affected by an unregistered easement. As I am not sitting in an appellate capacity I feel I ought not to delve into the legal issues involved. Hence I have not discussed the various cases cited for and against the litigants nor expressed any opinion on them. To do so would be pre-empt the functions of the Court of Appeal or even the trial Court. I have however considered the written submissions but cannot find any really fresh material which was not before the trial judge. The substantive issue in this case has not been finally determined. The prospect of the Appellant succeeding before the Court of Appeal in getting it to dispose of the substantive issue without allowing the High Court to deal with it, is minimal to say the least.

To grant a stay as sought would be to encourage appeals against interlocutory orders. Indeed it will also encourage successive interlocutory applications on the same subject without the appearance of any fresh material. This is against the policy of the Court of Appeal which has time and again emphasised that appeals against interlocutory decisions and orders will rarely succeed. This is why leave to appeal against interlocutory orders are generally required (see Section 12(2)(f) of the Court of Appeal Act). Even where leave is not required as in the present case the Court's policy has been to uphold interlocutory decision of the trial judge unless they are plainly wrong. This policy is based on the need to eliminate delays and bring about finality in the disposal of the substantive issues. In the present case the substantive issue has not been definitively adjudicated upon. If the Appellant is not satisfied with the final determination of the substantive rights of the parties than it will have an opportunity to appeal to the Court of Appeal which can correct not only any wrong substantive decision but also correct, if necessary, any wrong interlocutory orders.

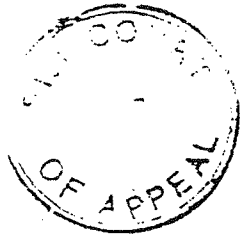
In the event of the Appellant succeeding on the appeal or indeed in the trial below, damages in my view would be an adequate remedy. Public interest will in no way be harmed by refusing the stay application.

There is no doubt that the purpose of seeking a dissolution of the interim injunction is to allow the Appellant to complete the building. If this happens then the very remedy that the Respondent (Original Plaintiff) is seeking could for all practical purposes be permanently destroyed.

Furthermore to grant the stay would be to virtually grant what the Appellant is seeking from the Court of Appeal thus rendering the appeal an exercise in academics.

I am satisfied that both the balance of convenience and the interest of justice demand that the application be not granted and the status quo maintained.

In the circumstance this application is refused with costs to the Respondent.



*M. Tikaram*  
.....  
Sir Moti Tikaram  
President Fiji Court of Appeal