IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0031 OF 1998S
(High Court Civil Action No.HBF0043 of 1997L)

BETWEEN:

CYRUS MOTORS COMPANY LIMITED
AND PREM KUMAR

Appellants

AND:

LUMBY PTY LIMITED

Respondent

In Chamber: **The Rt. Hon. Sir Maurice Casey, Justice of Appeal**

Counsel: **Mr. A.K. Singh for the Appellants**
Ms V. Pillay for the Respondent

Date of Hearing: **Monday, 17 August 1998**

Date of Decision: **Wednesday, 19 August 1998**

DECISION

The appellants apply under rule 25 of the Court of Appeal Rules for a stay of proceedings on the winding-up order made against Cyrus Motors Company Limited (the Company) by the High Court at Lautoka on 5 June 1998 on the petition of the respondent Lumby Pty Limited (the Creditor). An appeal was lodged against that order on 7 June 1998, the grounds being that the learned judge failed to determine whether the debt on which the petition was based was not due for payment until January 1999 as alleged by the Company; and that the Creditor did not have the necessary approvals under the Exchange Control Act (Cap.211). An application to the High Court for stay had been rejected by *Madraiwiwi J* on 3 July 1998.

This Court exercises a fresh discretion in respect of which there are some well settled guidelines. Generally a stay of execution on a judgment may be granted if there is an arguable appeal in the sense that it has some realistic possibility of success, and if execution would render it nugatory. However, with a winding-up order there are wider interests than those of the debtor company to be considered; there is the desirability of having an orderly administration of the assets of an insolvent company in the interest of all creditors, and the need to bear in mind the impact of s227(2) of the Companies Act, under which the winding-up commences at the time of presentation of the petition - see Re A & BC Chewing Gum [1975] 1 All ER 1017 at p.1029. It is also important in the public interest that the integrity of remedies for the enforcement and recovery of trade debts be maintained.

The Creditor claimed that approximately $94,686 was due to it on dishonoured bills of exchange and while the Company disputed the total, I am satisfied from the affidavits that substantially all of this is owing.

The plea of illegality for non-compliance with the Exchange Control Act was based on sections 7, 8 and 35, the effect of which is to prohibit the making in Fiji of payment to any person resident outside Fiji, or to the credit of such a person. However, under cl.4(1) of the Fourth Schedule to the Act a claim in the High Court for the recovery of a debt shall not be defeated by reason of lack of permission, while cl.5(1) allows such a claim to be admitted as proof of debt. Mr Singh accepted that the debt may be treated as owing for the purposes of establishing grounds for a winding-up order under the petition, but permission would be needed before

payment in terms of s.7. Accordingly on the material before me I do not think an appeal based on illegality could succeed.

Mr Singh relied principally on the ground relating to the alleged date for payment in January 1999. The debt arose as a result of the dishonour of four bills of exchange, payment of which had been extended to 31 May 1997. In response to the Creditor's demand the Company promised early payment, and after the petition was served it filed an affidavit in opposition in which its managing director, Mr Kumar, deposed that the Company had sufficient assets to satisfy the debt by 27 February 1998 and that the only reason for non-payment was a slump in vehicle sales. He sought four months' grace which was granted.

On 21 January the Company filed another affidavit by Mr Kumar proposing to pay the whole amount by 15 April 1998, and claimed for the first time there had been an oral agreement that the debt was not to be paid until January 1999. This allegation was strongly denied in affidavits by the Company representatives concerned. There were other promises to pay and adjournments which have been summarised in the ruling of *Madraiwiwi J,* and I do not propose to repeat them. The fact is that nothing has been paid. The Company has produced no financial statements to demonstrate its solvency or that it will be able to pay the debt in January 1999 or on any other date. The history of adjournments and broken promises and a dishonoured cheque for $20,000 given on 22.1.98, have the familiar ring of a debtor grasping at straws to stave off the inevitable.

Against this background the belated claim of an agreement to accept payment in January 1999 lacks credibility and can only be seen as another attempt to buy time. Had it been genuine, such a claim would be expected to have been the first matter raised by the Company, right back when demand was made and the winding-up notice and the petition were issued. I am satisfied that there are no realistic prospects of an appeal succeeding on the grounds put forward.

While one can sympathise with the position of the Company and its employees faced with the loss of its business and their livelihood, the Creditor has deposed that it also has problems through being left out of this substantial amount for so long. I see nothing unreasonable or oppressive in its wish to obtain finality of its claims by the orderly realisation of the Company's assets in the interests of all its creditors.

The application for stay is refused, with costs to the Creditor of $300.00 plus disbursements.

FIJI COURT OF APPEAL

M.L. Casey

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Sir Maurice Casey
Justice of Appeal

Solicitors:

Messrs. G.P. Shankar & Co, Nausori for the Appellants
Messrs. Young & Associate, Lautoka for the Respondent

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