IN THE COURT OF APPEAL, FIJI

IN CHAMBERS

CIVIL JURISDICTION

CIVIL APPEAL NO : ABU0061/99S

BEFORE THE HONOURABLE JUDGE OF APPEAL - JUSTICE SIR MAURICE CASEY
ON MONDAY THE 14TH DAY OF FEBRUARY, 2000 AT 9:30 A.M.

BETWEEN:

SHIU NARAYAN aka SHIU CHAND
DUKHRAN INVESTMENTS LIMITED

APPELLANTS

- v -

SHELL FIJI LIMITED

RESPONDENT

Counsels : Dr. Sahu Khan for the Appellants
Mr. H. Lateef for the Respondent

Date of Decision: 15 February 2000

DECISION IN CHAMBERS

The appellants have given notice of appeal against a decision of Shameem J delivered in the High Court Lautoka on 10 December 1999 in which she refused an order for interim injunction sought by them to restrain the respondent from taking possession of its service station premises at Sigatoka, in respect of which they claim to be its tenants. They had issued proceedings in the High Court claiming, among other things, a declaration of their right to occupy the premises and an order restraining the respondent from forcibly entering and taking possession. Those proceedings still await trial and the interim injunction was sought to preserve their position pending that trial.

The appellants have now applied to this Court for orders restraining the respondent from entering and interfering with their business pending determination of the appeal against Her Ladyship's refusal to grant the interim injunction. The application is made to a single Judge who, under S.20(1)(e) of the Court of Appeal Act (Cap 12) (as amended in 1998), is empowered to make an interim order to prevent prejudice to the claims of any party pending an appeal. This involves the exercise of an independent discretion and is not an appeal from or review of the decision in the High Court. Dr Sahu Khan thought there could be a further application to this Court as duly constituted should his application fail, but he accepted that this is not now the position in the light of the 1998 amendment to s.20, and confirmed that the matter could proceed before me.

Background

The respondent (Shell) owns the Sigatoka Service Station in which the appellants carry on business under a retail dealership agreement with it made on 1 January 1996 for 5 years. Although they are described in the agreement as licensees of the service station they claim to be tenants. On 8 September 1999 Shell's solicitors wrote to the appellants alleging that they had been selling adulterated fuel in breach of the agreement, and gave notice to quit the premises expiring on 9 October 1999, and of termination of the dealership agreement on the same date, reserving their client's right to recover all sums outstanding and damages. To this the appellants' solicitors replied stating the allegations were false and denying any breach, and they also referred to substantial sums owing by Shell.

The appellants issued the writ in these proceedings on 23 September 1999 and in

their statement of claim alleged threats by Shell to repossess and seize plant and equipment, and they sought a declaration that the notice of 8 September was invalid and did not terminate the tenancy they claimed to have. Alternatively they asked for relief against forfeiture. They also sought a declaration that Shell was not entitled to forcibly enter and take possession, except for the purposes of inspection as permitted under the agreement, and asked for an order restraining it in these terms. They claimed damages of $426,572.11 for rebates due to them on petrol sales. Shell filed a statement of defence traversing or denying those allegations and maintaining that the defendants were licensees only of the premises.

The appellants then took out a Summons in the High Court at Lautoka on 22 September asking for an order that Shell and its servants agents or workmen be restrained from entering and interfering with its business except for their rights of "instruction" (presumably "inspection") under the agreement until further order of the Court. Shell in its turn applied for orders requiring the appellant to carry on the business in conformity with the agreement, and to provide vacant possession. Both these matters came before Shameem J on 7 December 1999 and she gave the decison under appeal three days later.

The first matter she dealt with was a complaint that an affidavit by Mr Kirby on behalf of Shell could not be read because it had been sworn before that company's own solicitor, contrary to Order 41 r.8 of the High Court Rules. She accepted there was an irregularity, but exercised her discretion under Order 41 rule 4 to allow it to be used. That ruling constituted one of the grounds of appeal against her decision, but Dr. Sahu Khan accepts that notwithstanding this challenge, I may read and take into account the factual matters in that document.

Her Ladyship found there was a serious question about the existence of a tenancy to be tried, but concluded that damages would be an adequate remedy for the appellants if the interim injunction were not granted, and that the balance of convenience lay with Shell. She said it was not a case where it was prudent to preserve the status quo, adopting the well-known approach in American Cyanamid Co v Ethicon Ltd (1975) AC 396. She added that in any event the appellants had failed to disclose their indebtedness to Shell, and that they had not given the usual undertaking as to damages. It is now accepted that such an undertaking had been given late in the proceedings, a fact which had apparently escaped the attention of Mr Lateef and the Judge during course of argument. Her Ladyship refused the application and then went on to say:

> ***"Since the Defendant is not restrained from taking possession of the Service Station, it is unnecessary to consider the second application for injunction.***
>
> ***Furthermore because the taking of possession will be in pursuance of a court order, I see no reason why re-entry should be forcible or why there should be breaches of the peace."***

These concluding remarks referring to the summons taken out by Shell gave rise to differences between counsel over the effect of the judgment. The appellants sealed an order on 10 December 1999 stating simply that the application for an interlocutory injunction to restrain Shell from taking possession of the Service Station was refused. Shell on the other hand thought that the judgment allowed it to take possession and sealed an order on 14 December believed to reflect this situation, and on 17 December attempted to remove the appellants and to change the locks. It desisted after police intervention, and a flurry of Court applications followed in an attempt to have the meaning of the judgment clarified, during which the sealed order of 14 December was set aside as having been invalidly issued. The current position is that the applications and Shell's summons are set down for mention at Lautoka before another Judge on 23 February. The appeal and this

application for stay are based on the order sealed on 10 December 1999, which is the only one now on the record.

The Application

In the appellants' expansive grounds of appeal against the decision refusing an interim injunction the main point (apart from procedural ones) is that the Judge wrongly exercised her discretion. I am concerned only with preventing prejudice to the claims of any party pending the appeal (S.20(1)(e)), and in practical terms in the present case, this means balancing the appellants' right not to be denied the fruits of a successful appeal against the respondent's ability following the decision to pursue its claims against them under the agreement, untrammelled by any stay.

The appeal is unusual in seeking to achieve in a further interlocutory step the same interim stay as the appellants unsuccessfully sought in the High Court. Such a stay would be limited to the period up to the hearing of the appeal, but the consequences to the parties over that period are essentially the same as those which could result from the grant or refusal of the application to the High Court for stay pending trial. It is therefore appropriate, and indeed in accordance with common sense, for me to take into account those considerations which were relevant to the High Court application, together with additional facts about the attempted forcible entry after the decision was given, as disclosed in subsequent affidavits. In that regard I accept that Shell thought it was acting within its rights after taking legal advice, and that it was not attempting to over-reach or pre-empt the Court's authority. Mr Lateef made the obvious concession that his client has no intention of acting illegally.

Fundamental to the exercise of the discretion to grant a stay is the relative strength of the parties' cases in the High Court action.

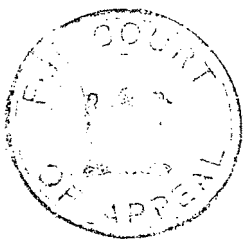
As noted above, Her Ladyship found there was a serious question to be tried relating to the existence of the tenancy. Under the agreement the dealer was granted the license to occupy the premises in common with Shell (Cl.28). The latter may remove its trade marks at any time when it reasonably considers such a course necessary or desirable (Cl.15). Shell (and its employees etc) have the right at all times to enter and remain there for the purpose of carrying out work in its interest (Cl.31). The equipment on the site as listed belongs to Shell, the dealer having only a license to use it. (Cl. 35 and 38). These provisions (only some among many) demonstrate the extensive interest Shell has in the business and the premises, and its right of entry under Cl.31 above goes well beyond merely for inspection, which is the only purpose conceded by the appellants in their injunction applications. The agreement affords a strong prima facie case for regarding their occupancy as that of licensees rather than tenants.

The next consideration is the strength of Shell's claim that it was entitled to terminate that agreement last October. There was a catalogue of complaints ranging from inefficiency to outright fraud and dishonesty in the appellant's conduct of business, including the adulteration of petrol causing damage to customers' vehicles, and culminating in a series of dishonoured cheques. While it is not appropriate at this stage to discuss the evidence on these matters in any detail, I found it cogent, while the appellants' explanations were far from convincing. Their cumulative effect persuades me that Shell could make out a very strong case to justify its termination of the dealership. The conduct of which it complains was intolerable and I am satisfied there is a substantial risk that the continued operation of this business by the appellants will cause it irreparable damage.

In these circumstances I think with respect that Shameem J reached the right conclusion in deciding that damages would be an appropriate remedy if Shell managed to recover possession of its premises and equipment, but was unsuccessful at the trial. It follows that Shell must have a strong case on the appeal to this Court against Her Ladyship's decision and, for the reasons outlined above, I am satisfied that it should retain the benefit of that decision pending determination of this appeal. Accordingly the order sought is refused. I record that counsel have agreed to this decision being delivered through the Registrar.

Decision

The order sought by the appellants restraining the respondent and/or its servants agents or workmen from entering and/or interfering with the business of the Appellant conducted from the Sigatoka Service Station is refused and the summon is dismissed, with costs to the respondent of $250 inclusive of disbursements.



M E Casey

Sir Maurice Casey
Justice of Appeal

Solicitors:

Messrs. Sahu Khan & Sahu Khan Ba, for the Appellants
Messrs Lateef & Lateef Suva, for the Respondent