

IN THE COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL ABU0025 OF 2000
(High Court Civil Action No. HBC0135 of 1996S)

BETWEEN: EDMUND MARCH

Appellant

AND : BANK OF HAWAII

First Respondent

AND : JOHN HOWARD

Second Respondent

AND : PURAN SUNDARJEE and
MURJEE SUNDARJEE
(sons of Sundarjee)

PRAVIN SUNDARJEE
(son of Murjee Sundarjee) and

HASMUKH SUNDARJEE
(son of Jethalal Sundarjee)

Third Respondents

Coram : The Hon Justice Devendra Pathik

Counsel : Mr. P. Howard with Mr. K. Muaror for the Appellant

Mr. G. Leung for the 1st & 2nd Respondents

Mr. G.P. Lala with Mr. N. Shivam for 3rd to 6th
Respondents

Date of hearing : 7th & 8th September 2000

Date of decision : 10 October 2000

DECISION**(Chamber applications for:**

- (i) leave to appeal from an interlocutory order
 - (ii) unconditional stay of execution of judgment pending appeal
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The Applications

The Court has before it two Motions filed by the Appellant. First, by Notice of Motion dated 26 July 2000 and filed 7 June 2000 the Appellant seeks the following Orders:

- a. that leave be granted to appeal against the interlocutory order made herein on 18 May 2000 by Byrne J. and for stay of execution of the Judgment herein delivered on 14 April 2000
- b. that the conditional stay granted be totally withdrawn and a stay be granted unconditionally.

Second, by Notice of Motion dated filed 24th August 2000 the Appellant prays for:

‘An interim order against the execution of judgment of the High Court of Fiji at Suva delivered on the 14th day of April 2000 until the Notice of motion issued on 26th day of July 2000 is finally decided’.

This second application is made pursuant to section 20(1)(e) and (k) of the Court of Appeal (Amendment) Act 1998 (Act No. 13 of 1998) which provides (inter alia) as follows under the caption “powers of a single judge of appeal”:

20. - (1) A judge of the Court may exercise the following powers of the Court -

- (a)
- (b)
- (c)
- (d)
- (e) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal;
- (f) to (j)
- (a) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.

In short, the appellant is seeking just two orders from the Court, namely:

- (i) leave to appeal against interlocutory order and
- (ii) unconditional stay of execution of the judgment in this action.

Counsel for the respective parties have made both oral and written submissions on the issues before the Court and I have given them due consideration.

Background: Judgment and Ruling of Byrne J

In view of what I am going to say in considering the motions, it is necessary that I give a chronological background to the case leading to the making of these applications.

On 14 April 2000 judgment was delivered by Byrne J in the two actions, namely 135/96 and 29/96S which were consolidated.

As His Lordship said in his judgment these cases concerned the sale by the First Defendant (First Respondent on appeal) as mortgagee in Action No. 135 to the Third Defendants (Third to Sixth Respondents on appeal) of property owned by the Plaintiff (Appellant). In Action No. 29/96S the 3rd to 6th Respondents claimed vacant possession from the Appellant.

It is pertinent to note the conclusion to which Byrne J came to after trial. He said:

In my judgment this case (135) was conceived in resentment and spawned of mendacity and spite. It is interesting to note that at the time the Plaintiff commenced these proceedings Action No. 29 of 1996 had already been instituted by the Third Defendants. This was expressly pleaded by the Plaintiff in paragraph 34 of the Amended Statement of Claim which is revealing. Had the Plaintiff sued the Bank only for a claim alleging breach of the Mortgagee's duty in relation to the power of sale, his only remedy would have been in damages. In order to avoid eviction from 10 Naroro Road it is clear in my judgment that the Plaintiff began Action 135 which required him to concoct a case alleging fraud and collusion against the Defendants. I have found not one skerrick of evidence to support his claim against the Defendants so that I have no hesitation in consigning Action 135 to the only fate it deserves: dismissal with costs in favour of all the Defendants.

His Lordship made an Order as follows at p.32 of his judgment.

In terms of the counter-claim in No. 135 of 1996 and the prayer in Action 29 of 1996 I order the Plaintiff Edmund March to give immediate vacant possession of 10 Nararo Road to the Third Defendants. I award the Third Defendants damages against the Plaintiff for the period 1st December 1995 to the date of this judgment at \$1,400.00 per month, namely \$72,800.00. In addition there will be interest on damages at the rate of 5% pursuant to section 3 of the Law Reform (Miscellaneous Provision (Death and Interest) Act Cap. 27 for that period amounting to \$15,773.33. The total of damages and interest is therefore \$88,573.33.

On 1 May 2000 the Appellant filed Notice of Appeal in this Court.

An application for stay of execution of the judgment was heard by Byrne J when on 18 May 2000 he made the following orders and expressed the opinion '*that the application for stay is without merit*'; it is also noted from His Lordship's notes in the file that Mr. Kato for the Appellant stated "*I have some notes from Mr. Howard but cannot offer any argument on the merits of the Appellant's application*".

His Lordship made the following Order:

*Applying the rule that a successful party to litigation is entitled to the fruits of a judgment and applying the now frequently cited decision of the High Court of Australia of **Inglis and Another v. Commonwealth Trading Bank of Australia** I grant stay of execution of the judgment in favour of the 3rd Respondents (Defendants) on condition that the Appellant (Plaintiff) pay into Court the sum of \$75,000.00 within 7 days that is by the 25th of May 2000, failing which the 3rd Respondents be at liberty to execute the judgment including by way of a Writ of Possession.*

The Appellant did not comply with the order to pay the said sum into Court. He now makes the present application for the orders as stated above.

Appellant's submission

On the question of whether leave to appeal should be granted or not from an interlocutory order of 18 May, Mr. Muaror the learned Counsel for the Appellant said that in law it is a discretionary matter for the Court and referred to **Niemann v Electronics Industries Ltd** (1978) VR 431 a decision of the Full Supreme Court of Victoria and **Decor Corporation Pty Ltd v. Dart Industries Inc** (1991) 104 ALR 621.

In the matter of stay of execution the Appellant in his Affidavit in Support sworn 7 June said that the conditional stay was '*unfair and unjustified*'. In a subsequent affidavit sworn 7 September 2000 filed as a result of this Court raising its concern that no reasons have been advanced for the orders sought, the Appellant swore an affidavit stating that: he has two unencumbered properties worth \$80,000 and \$60,000; he has ten per cent shares in a company K.W. March Limited the estimated value of the company's property is one million dollars; he has monthly income of \$2570 and he has encumbered properties comprising 140 acres. He said that due to the 'present crisis' the country is facing he has not been able to sell his properties or to secure finance from his Banker. These are the reasons he says why the conditional stay is 'unfair and unjustified' and that it will 'deprive' him of his appeal if the stay is not made unconditional bearing in mind that he has assets worth more than the required amount. The appellant is suggesting an alternative in that '*the Third Respondents will not be prejudiced in the interim if this Honourable Court is minded to hold my unencumbered two property Titles against the required payment in the interim*'.

First and Second Respondents' submission

The Respondents oppose the various orders sought. On the question of leave, Mr. Leung the learned counsel for the first and second Respondents submitted that in law appeal against interlocutory orders and decisions will rarely succeed as this would seem to be encouraging appeals (vide **Kelton Investments v Civil Aviation Authority of Fiji and Motibhai & Co. Ltd** FCA 34 of 1995, **Hubball v Everitt & Sons Ltd** 1900 16 TLR 168 and **Ashmore v Corporation of Lloyd's** 1992 2 All E.R. 486.

On the stay of execution Mr. Leung submitted that the Appellant's affidavit does not disclose any sufficient or good reason for the grant of stay. He says that a

successful litigant should not be deprived of the fruits of his litigation. He said that the appellant can be adequately compensated in damages if a stay is not granted (vide affidavit of Brian Bliss of First Respondent Bank). It is entirely a discretionary matter for the Court whether to grant a stay or not. The granting of a stay in terms is also discretionary.

Mr. Leung further submitted that there were good reasons for imposing conditions. This litigation commenced in 1994 when the property was advertised under a mortgage. The Third Respondents have been deprived of vacant possession since. He said that bearing in mind Byrne J's comments that Civil Action 135 '*was conceived in resentment and spawned of mendacity and spite*', they were additional factors which could have weighed heavily with the Court when it made an order for conditional stay.

Third to Sixth Respondents' submission

The Third to Sixth Respondents are opposing the Motions.

The learned counsel for the Respondents submitted that a stay of execution should not be granted as the Appellant will not be prejudiced in any way with the refusal as the Third Respondent has deposed in an affidavit filed before Byrne J that should the appeal eventually be successful the Third to Sixth Respondents will retransfer the property to the Appellant subject to any right of appeal and in the meantime will not transfer or charge the same.

These Respondents say that the Appellant has not advanced any reasons to show likely substantial injustice or that the order was plainly wrong. Counsel submits that leave should be refused as there has been a proper exercise of his discretion by the primary Judge [per O'Leary C.J. in *Nationwide News v*

Bradshaw (1960) SC (NT)1]; and that the requirement for leave is designed to reduce appeals from interlocutory orders as much as possible [per **Murphy J** in **Niemann Electronic Industries Ltd** (1978) VR 43 at 441-2].

Determination of the issues

(i) Leave to appeal from interlocutory order

Leave to appeal from interlocutory order is applied for by the Appellant under s12(2)(f) of the **Court of Appeal Act** which provides that “**no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court except**”

To grant or refuse leave is a discretionary matter in each case and “**may be reviewed if it is clear that it has been exercised on a wrong principle, or a conclusion has been reached which would work a manifest injustice**” (**G.L. Baker Ltd v Medway Building Supplies Ltd** 1958 1 W.L.R. 1216.)

The appellant has in his Grounds of Appeal raised a number of arguable issues. I do not propose to reiterate them suffice it to say that the issues stated therein were considered by Byrne J in the trial. His Lordship came to the decision which I have stated hereabove. He had in no uncertain terms dismissed the Appellant's claims as without merit. This background to the case has to be considered in considering the Motions bearing in mind the following passage in the judgment of this Court in the case of **The Fiji Public Service Commission v Manuvalagi Dalitucama Korovulavula** FCA Civ. Appeal No. 117 of 1989 at p.5 which is pertinent to the issue before me:

“Whilst I am inclined to agree that Air Canada’s case appears to be distinguishable, I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not.”

In the light of His Lordship’s comments in his ‘conclusion’ and the ‘judgment’ or ‘order’ it is abundantly clear that the appeal is unmeritorious. However, on an application made to him for a stay Byrne J granted a conditional order of stay of execution of the judgment. The Appellant has failed to comply with this order.

As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Spor (Fiji) Limited, Richard Evanson v John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 35 of 1996S p.15):

“it has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances”.

It was well within the powers of His Lordship to make the conditional order. There was nothing wrong with it in principle. This was a case of a Mortgagee (1st Respondent) exercising its power of sale and finally disposing of the property in question to the 3rd to 6th Respondents. The new purchasers have been deprived of vacant possession of the property since 1st December 1995 to date and they have not

derived any income from it. For this reason Byrne J. made an order for payment into Court by the Appellant the sum of \$75,000.

I find that there are no exceptional circumstances in this case. The appellant will not suffer any injustice or prejudice if the application for leave to appeal is refused. It is the Respondents who will be greatly prejudiced if leave is granted bearing in mind the background to the case and the firm decision by the trial judge. In my view looking at all the circumstances of the case in law the proposed appeal is doomed to failure even if leave was granted.

Therefore on the facts and circumstances of this case I find that there are insufficient grounds to grant leave to appeal from the said interlocutory order.

(ii) **Stay of Execution**

The Appellant further seeks an unconditional order of stay of execution of the judgment herein.

I have considered the submissions of counsel for the respective parties. On the authorities the Court **'does not make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled, pending an appeal'** (*The Annot Lyle* (1886) 11 PD. At 116 C.A), *Monk v Bartram* (1891) 1 Q.B. 346). However **'when a party is appealing exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'**. [*Wilson v Church* (No.2) (1879) 12 Ch.D at pp.458, 459 C.A.] So, **'without the very strongest grounds'** the Court will not make an order **'the possible effect of which would be to render nugatory, even for a time, a judgment of the High Court'**. (*McBride v Sandland* 25 C.L.R. 369 at 374).

The grant or refusal of a stay is a discretionary matter for the Court [*A.G. v Emberson* (1889), 24 QBD pp 58, 59]. It will be granted where the special circumstances of the case so require. There has to be sound reasons sufficient to justify the Court in suspending the rights of the successful party. In exercising its discretion the Court will look at the facts and circumstances which led to the judgment. The balance of convenience has also to be looked at as well as the competing rights of the parties before it.

I have already stated what the trial judge had to say in his judgment, suffice it to say that he had no hesitation in dismissing the Appellant's action against the Respondents. His Lordship even went to the extent of expressing his '*opinion*' in the application before him for a stay that it is '*without merit*'.

The Appellant argues that if the appeal is successful it will render it nugatory if stay is refused. If ever there was a case in which a successful party should enjoy the fruits of a judgment it is this bearing in mind the history of this case and the emphatic finding by Byrne J. The Appellant has had the benefit of occupying the residence on the property for some years without having to pay a single cent for its use and occupation to the new purchasers who are the 3rd to 6th Respondents and who are also a successful party to this action.

I find that in the circumstances of this case the appeal will not be rendered nugatory and it will also not prejudice the Appellant if stay is refused. For this was a Mortgagee sale and the 3rd to 6th Respondents were the successful bidders for the property. **"The Mortgagee's right to possession should not be curtailed. That right enabled the mortgagee to exercise its power of sale in the manner it chose and in the confidence that it could offer the purchasers vacant possession"**. (Lord Justice Phillips in *Cheltenham and Gloucester plc. v. Krausz and Another*, The Times Law Reports - 20.11.96 p655 at 656 C.A.) Had the Appellant

applied for injunction when the property was advertised for sale, the Appellant would have been required in law to deposit the amount due and owing into Court and failure to do that would have meant that the mortgagee would not be restrained from exercising his or its power of sale under the mortgage. The situation that prevails here is that there is judgment in favour of the 1st Respondent Mortgagee after trial. All the Respondents' rights have to be protected. There will be greater prejudice to the Respondents if stay was granted.

I see no merit in the Appellant's assertion that because he has property worth more than the amount ordered and that some of these properties could be taken as security, the Court should consider his application favourably, is not a sufficient ground to enable the Court to do that. This is not the kind of matter which is taken into account unless by consent. In any case doubt has been shown on the value of the properties with some of them heavily encumbered.

One essential matter to be considered in an application for a stay is that a 'serious injury' would result to the petitioner unless a stay was granted [**Nawab Sidhee Nuzur Ally Khan v. Rajah Oojoodhyaram Khan**] (10 Moo. Ind. App., at p.327). Here insufficient ground has been shown; the assertion in this case that the Court might be wrong is not sufficient and the court will not accept that as a sufficient ground for staying proceedings (**McBride**, supra at p375).

In this regard it is also pertinent to note the following passage from **Linotype Hell Finance Ltd v Baker** [1992] 4 All E.R. 887 C.A. where it was held:

"When an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success".

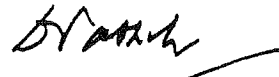
The appellant has not satisfied me that the grounds mentioned above exist to enable me to exercise my discretion in his favour. Here the refusal of a stay will not under any circumstances bring about his ruination or that it will render the outcome of a successful appeal nugatory. I share the statements of **Dyke J** in **Khairul Nisha d/o Changa Mia and Mohammed Alim Khan and Mohammed Aqib Khan v Ba Meat Company** (Action No. 114/80 West. Div. - unreported) while refusing the application in a similar situation involving vacant possession, said that **"if the defendant's appeal is successful the plaintiff will obviously have to give possession back to the defendant, or compensate him"**. As stated earlier the 3rd to 6th Respondents have already indicated their view in this regard which will favour the Appellant in that they are prepared to retransfer the property if the appeal is successful subject to any right of appeal and in the meantime will not encumber or dispose of the property.

For these reasons stay will be refused.

Conclusion

Upon a careful consideration of the submissions of counsel for the Respondents with which I agree and having heard the Appellant's counsel and taking into account the authorities and the principles involved in applications of this nature, I find that the circumstances which have been shown to exist do not, in my considered view, justify the making of the orders sought.

Therefore I make the following orders: (a) leave to appeal refused; (b) conditional order for stay remains intact; and (c) the Appellant to pay the Respondents' costs of the present application which is to be taxed unless agreed.



D. Pathik

Judge of Appeal