IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. ABU0051 OF 1999S
(High Court Civil Action Nos. HBA 0012,13,14 of 1998S)

BETWEEN:

CHIMAN LAL JAMNADAS
MICHELLE APARTMENTS LIMITED
PRIMETIME PROPERTIES LIMITED

Applicants

AND:

COMMISSIONER OF INLAND REVENUE

Respondent

In Chambers: Eichelbaum, JA

Hearing: 19, 25 August, 2003, Suva

Counsels: Mr. M. Arjun for Applicants
Ms. Roslyn Singh with Ms S. Tagicaki (19 August) and Ms R. Ali (25 August) for Respondent

Date of Decision: Tuesday, 26 August 2003

DECISION

This is a Motion by the three applicants for an order that the Judgment of this Court delivered 1 March 2002 be stayed pending the Supreme Court's determination of the appeal from that judgment, due to be heard on 15 October of this year. The Motion has been referred to a single Judge of this Court, pursuant to s8 of the Supreme Court Act.

The background, as rehearsed by Byrne J in his judgment in the High Court, and accepted by this Court on the appeal, was:

Mr. Jamnadas, the First Appellant, practised as a lawyer in Suva, Fiji. In 1982 he acquired control of Michelle Apartments Limited (Michelle). In 1987 he acquired control of Primetime Properties Limited (Primetime).

In 1988 Mr Jamnadas moved himself and his family to Adelaide, South Australia for the purpose of educating his children in Australia. He intends to return to the Fiji Islands upon completing the education of his children. He and his wife still retain their Fijian passports. When he left for Australia he let the family home in Suva. He had an interest in a family deceased's estate; which produces Fiji income and he retained his interests in Michelle and Primetime. He began to travel regularly and for considerable periods from his Australian residence to Fiji to look after the estate and business interests. He had no business interests in Australia and ran down his practice as a solicitor in Suva until it ceased at the end of 1990.

He derives no income in Australia other than small amounts of interest. His income is otherwise entirely sourced in this country.

When he came to Fiji the pattern of his visits was always the same. He left Adelaide, flew to Nadi and caught a bus from Nadi to Suva where he stayed at the then-called Travelodge now Centra.

While at the Travelodge he paid for accommodation, telephone calls, faxes, laundry, dry cleaning and meals.

When he returned to Adelaide immediately after he finished his business in Suva he left Suva, stayed overnight in Nadi and then flew across the following day to Adelaide. The reasons why he stayed at the Travelodge were that it was very central and that he could use the hotel's facilities such as the telephone and fax.

After various discussions with the Respondent's representatives, made necessary as the financial position of each Appellant changed Mr Jamnadas and his Accountant Mr Mudaliar reached agreement with the Commissioner on most of the items claimed as deductions by the Appellants. When the matter came before me only two issues remained for determination, whether as a matter of law the taxpayer's travel and accommodation expenses are deductible and what (if any) penalty should be imposed on Michelle Apartments for late lodgments of returns.

Byrne J, reversing the Court of Review in respect of the first of the two issues, held that the travel expenses were deductible. These expenses, it should be noted, were those of the applicant Mr Jamnadas, which he sought to deduct from his personal income, a point to which I return later. As to the second issue Byrne J, again differing from the Court of Review, held he had jurisdiction to reconsider the penalties. In the result, he reduced the penalties, which related solely to the respondent Michelle Apartments Ltd (Michelle).

When the matter reached this Court, it reversed Byrne J's decision regarding the expenses, and restored the decision of the Court of Review. On the penalties issue, the Court agreed with Byrne J regarding jurisdiction but, taking the view that the Commissioner had not

made any reviewable error in the exercise of his discretion in the assessment of the penalties, set aside Byrne J's order, thus restoring the penalties levied by the Commissioner.

The application now before the Court was triggered by the Commissioner's action in issuing certain garnishee notices. Evidently Primetime Properties Ltd (Primetime) owns a tenanted commercial building. In June of this year the Commissioner issued garnishee notices to some or all of the tenants. Obviously, being deprived of the income generated by the building is likely to have a significant impact on Primetime. I accept that tax is payable regardless of appeal proceedings, and that the Court would not lightly make stay orders against the Commissioner. Given however the substantial amounts of tax claimed, the likely impact of the garnishees on the taxpayer, and the imminence of the appeal hearing, I would have been inclined to grant a stay, subject to the issue discussed next.

What struck me as absent, when the application first came before the Court, was proof of a sufficient connection between the judgment in respect of which the stay was sought, and the "execution" issued by the Commissioner. I put that in quotation marks because as has since been confirmed he is not, in fact, executing the judgment of this court, or any judgment, but simply exercising an available remedy in respect of unpaid tax.

Since Mr Arjun (as was his right) was reluctant to have further information supplied from the Bar, and it seemed doubtful, in the absence of Mr Jamnadas and of senior counsel, that the applicants would be able to answer my concerns immediately, I requested the Commissioner to file a further affidavit, with the applicants having a right of reply. Both sides then filed affidavits and I am obliged to them for promptly making this information available. I record all this because the applicants' affidavit made comments critical of the Commissioner for not dealing with these matters earlier, when affidavits in support and in opposition were being filed in accordance with a timetable. But this criticism overlooks that it is the applicants who have the burden of making out a case for a stay.

Primetime's original connection with the objection proceedings was as follows. Over a period of years Mr Jamnadas's personal income reduced until his travel expenses exceeded his income. On the other hand the other 2 applicants achieved positions of significant

profitability. Mr Jamnadas, who had a controlling interest in the two companies, reached an agreement with the Commissioner that his expenses could be apportioned between them and himself. It may be implicit in the Court of Review's decision that such arrangement was unlawful. However, when the Court of Review disallowed the travel expenses in principle, Michelle and Primetime lost the benefit, for taxation purposes, of any claim to the proportion of the expenses that had been allocated to them. This appears to be the principal component, apart from penalties, in the substantial amounts of tax which the Commissioner maintains is owing by Michelle and Primetime. The subject of the legitimacy or otherwise of the arrangement for apportionment is not referred to in the judgments of the High Court or the Court of Appeal. In case it is suggested the point would still be open, should Mr Jamnadas be successful in the Supreme Court on the deductions issue, I record that in its judgment of 1 March 2002 this Court (at 2) said:

...the issue is not whether [Michelle and Primetime]....could have obtained deductions for Mr Jamnadas's travel, accommodation, meals and laundry had they incurred the expenditures for the purposes of their businesses. The facts as found by the Court of Review and by Byrne J was that Mr Jamnadas incurred the relevant expenses, and that was what Mr Jamnadas stated in his evidence and claimed in his rerurns.

The disputed deductions for travel expenses, as noted, relate to Mr Jamnadas's returns. The penalties issue relates to Michelle. The Commissioner has not issued execution against Mr Jamnadas or Michelle. Had the Commissioner done so, I would have been sympathetic to an application for stay. However, neither the High Court nor this Court on appeal had any issue before them relating to Primetime. Staying the judgment would not have any effect so far as Primetime was concerned. Primetime is at best a nominal party to the appeal.

Mr Arjun requested an adjournment so that further documents could be put before the Court, but was unable to point to any relevant matter of substance that could still be adduced. The further information would elaborate on the numerous points which, according to the taxpayers, are still in dispute regarding the calculation of their assessments. So far as Primetime is concerned, such matters are not in issue in the appeal to the Supreme Court, whether directly or indirectly. The conclusion in the previous paragraph is based on irrefutable facts

In short, so far as Primetime is concerned the judgment of 1 March 2002 does not affect it. Thus there is no basis for staying the judgment, and it would be pointless to do so. I therefore dismiss the application with costs to the respondent $500.

Result

Application dismissed. Costs to the respondent $500.

Dated at Suva 25 August 2003

FIJI COURT OF APPEAL

Thomas Eichelbaum, JA

Solicitors:

Messrs. Wm Scott Graham and Company, Suva for the Applicants
Legal Officer, Commissioner of Inland Revenue, Suva for the Respondent

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