IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. ABU0063 OF 2007

BETWEEN	:	**HONEYMOON ISLAND (FIJI) LIMITED**	*1st Appellant*
AND	:	**OCEANIC SCHOONER COMPANY (FIJI) LIMITED**	*2nd Appellant*
AND	:	**WILLIAM GOCK**	*3rd Appellant*
AND	:	**PAUL MYERS**	*4th Appellant*
AND	:	**FOLLIES INTERNATIONAL LIMITED**	*Respondent*

Counsel : C.B. Young for the Appellants
: H.K. Nagin for the Respondent

Dates of Hearing & Submissions : 16th October & 22nd November 2007

Date of Decision: 30th November 2007

DECISION

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[1] This litigation concerns a dispute between the Appellants and the Respondent in respect of an Agreement to Lease which was issued to Honeymoon Island (Fiji) Limited (the 1st Appellant) dated the 9th of May 2003 and another

subsequent Agreement to Lease issued to the Respondent on 7th June 2007. The Respondent says that the Agreement to Lease dated 9th May 2003 given to the 1st Appellant was cancelled by the Native Land Trust Board (NLTB) and the Appellants say that the cancellation was unlawful. The dispute between NLTB and the 1st Appellant is the subject of separate proceedings filed in Action No. 257 of 2007 in the High Court at Lautoka where damages have been sought for unlawful termination and for specific performance of the Agreement to Lease. A default judgment for damages to be assessed for unlawful termination has been obtained against NLTB for failure to file a Defence and NLTB is now seeking to set this aside. The other prayer for specific performance is being pursued by the 1st Appellant.

[2] The NLTB was joined by the Court as an interested party but neither the Appellants, nor the Respondent, nor NLTB applied to join the NLTB as a Defendant or a third party nor did the Court do so. The injunctive order granted by the Court against the Appellants on the 18th of September 2007 to which a Stay is being sought by the Appellants does not affect the NLTB. The 1st Appellant also contends that because it has an Agreement over Honeymoon Island dated 9th May 2003 that predates or precedes the

Respondent's Agreement of 7th June 2007, the 1st Appellant being first in time has a better title.

[3] In two carefully reasoned Rulings on the 31st of August and 18th of September 2007 Phillips J. first refused injunctive relief to the Appellants and the learned Judge said in the second Ruling in paragraph 7 that she found still no credible evidence of the Appellants' financial ability to meet any losses which might accrue to the Respondent. This remained her over-riding concern in weighing up the competing interests of the parties and her assessment of where the overall justice lies. She said that the Appellants had failed to establish the requirement of proffering sufficient evidence of their financial position.

[4] Affidavits by the Principals of the parties have been filed, William Gock on behalf of the 1st two Appellants and himself and Harold John Heely on behalf of the Respondent. The Respondent's submissions and John Heeley's Affidavit accept the following matters:

i) The Appellants' business will eventually cease to exist if the injunction granted in favour of the Respondent preventing it from using the Honeymoon Island (Mociu Island) would be

allowed to continue. Mr Heeley's Affidavit sworn on the 11th of September 2007 in paragraphs two and three, filed in the High Court and now forming part of the exhibits in the Affidavit of William Gock filed on the 20th of September 2007 in this Court in response to William Gock's Affidavit filed on 5th September 2007 in the High Court does not dispute what William Gock said in paragraph 4:

> ***"If the Defendants are successful on the appeal the success on it would be rendered nugatory for the following reasons:***
>
> ***i. Mociu Island has been marketed as a deserted and uninhabited (which is why all this time the only visible structures are the 4 small umbrella sized thatched bures used for providing shade only) Island all these years dating back even from 1994 when the previous lessee Mociu Island Limited had the lease;***

ii. *The Defendant's business is suffering drastically to the point of extinction because Honeymoon Island is the highlight of the whole of the 2nd Defendant's cruise; and*

iii. *I have recently spoken to sales persons at Rosie Tours, ATS Pacific and HIS Tours (who comprises of the biggest sellers of the 2nd Defendant's cruise) and each of these companies have informed me (and I verily believe this is so) that without the visit to Honeymoon Island and in another month or two if this continues, the tour business of the Defendants would not exist any more.*

Annexed hereto and marked with the letter "WG-2" is a sample copy of two booking confirmations from Rosie Tours showing and emphasising that the booking is for Honeymoon Island cruise with Mociu Island being the most important attraction".

[5] In reply Mr Heely does not refute this but says in paragraph 2(iii) that the Appellants' loss of Mociu Island as a tourist destination is not the only significant impact on the Defendants' (Appellants') business. Grounds of Appeal have been filed by the Appellants and I observe that the Respondent does not make any comments on these but especially ground 2 which states:

> ***"That the Judge erred in law when she relied on the late payment of rental of the NLTB agreement and the lack of explanation from William Gock which caused her to raise doubts in her mind about the Appellants' (Original Defendants') undertaking in damages:***
>
> ***i) When the Appellants (Original Defendants) were not given an opportunity to address this concern at the hearing as the Judge had not put the Appellants (Original Defendants) on notice that this was her concern and/or expressed her concern of the same;***

ii) In not appreciating the fact that the undertaking was given by two separate Appellants, namely the 1st and 2nd Appellants (Original 1st and 2nd Defendants);

iii) Failing to appreciate that the Respondent (Original Plaintiff) had not provided any evidence of damages that it would suffer.

iv) When they were not relevant issues between the Appellants and the Respondent".

[6] It is claimed by the Appellants that they have been trying to market another cruise without the stopover at Honeymoon Island but as William Gock says in his Affidavit, the business houses like Rosie Tours, ATS Pacific and HIS Tours who sell the Appellants' cruises say that the cruise cannot be sold successfully without the stopover on Honeymoon Island.

[7] **Will the Appeal be Rendered Nugatory?**

The principles governing Stay of Proceedings have been summarised adequately in the Judgment of Dawson J. in the High Court of Australia in [1986] 160 C.L.R. 220, the headnote to which reads:

> ***"The discretion conferred by r.12 to order the stay of proceedings is to be exercised only where special circumstances exist that justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal. Special circumstances justifying a stay will exist where it is necessary to prevent an appeal, if successful, from being nugatory. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment. Special circumstances are not limited to that situation and they will exist where, for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his***

former position if the judgment against him is executed".

[8] The Judge refers in his judgment to the most frequently cited cases on the subject - The Annot Lyle [1886] 11P.D. 114 at p.116; **Wilson** v. **Church** [1879] 12 Ch. D. 454, at p.458; **McBride** v. **Sandland** [No.2] [1918], 25 C.L.R. 369, at p.375; **Klinker Knitting Mills Pty. Ltd. v. L'Union Fire Accident and General Insurance Co. Ltd.** [1937] V.L.R. 142 and **Scarborough** v. **Lew's Junction Stores Pty. Ltd.**, [1963] V.R. 129, at p.130. There are other authorities both local and overseas to which I will later refer.

[9] In my opinion, in not disputing the fact that the Appellants' business would in all probability be extinguished, the Respondent cannot succeed in submitting that it is not correct that the appeal will be rendered nugatory. In my view this fact alone weighs very heavily in favour of the Appellants.

[10] **The Balance of Convenience**

The Appellants claim that the balance of convenience takes into account the arguable nature of the appeal and I note that the Respondent's submissions do not argue the contrary. Hence the Judgment of Queensland Court of

Appeal in **Kostopoulos v. G. E. Commercial Finance** [2005] Q.C.A. 311 which stated at paragraph 69 that:

> ***"Where there is an arguable case, considerations of convenience will usually tend to tip the balance in terms of the exercise of the discretion".***

[11] In this case I have formed the conclusion that the balance of convenience lies in favour of the Appellants for the following reasons:

[12] The Appellants' business only requires a visit to the Island on a daily basis of approximately 2 hours a day. The only complaint against such use made by the Respondent was that the toilet set-up on the Island was causing environmental damage. I can see no evidence of this in the Affidavits. The Appellants' answer to this criticism is that they constructed the toilet for use on the Island only two years ago and it is the standard type of toilet used by most tourist resorts on the Islands. The Appellants say that they are happy and invite the Court to order that the Appellants ensure that its guests and visitors use the toilet facilities on board the Appellants' vessel the Schooner Whales Tale, which was the previous arrangement.

[13] The Appellants submit that the Respondent has never disputed what William Gock said in his Affidavit filed in the High Court on 27th July 2007 at paragraph 20 where he stated:

> ***"The 1st and 2nd Defendants' business reputation in the tourism market has been established since 1985 and these recent acts by the Plaintiff have already shown the effect on its business. It is impossible to calculate the loss of goodwill which we had established in the tourism market over the years and while the drop in the number of bookings is a sure indication that damages have been suffered by the 1st and 2nd Defendants, the extent of damages, however, through the loss of goodwill in the international arena cannot be quantified as the repercussions of the Plaintiff's actions have a long and protracted period of effect. It could be up to 2 years or more before we can even have an idea of the damage it has caused to the companies in the Japanese, Australian, New Zealand, American and Europe markets. I know this from my 20***

> ***years of experience in the tourism business based on how the coups in 1987, 2000 and 2006 have affected the tourism market in Fiji and my attendances in the yearly tourism conventions hosted by Fiji Visitors Bureau along with my direct involvement with meeting travel agents, guests and hosting them and having discussions with them face to face, on the phone and by email".***

[14] **Special Circumstances Not an Inflexible Rule**

I think it is sometimes assumed that special circumstances have to exist before a Stay can be granted in a civil process but this is not an inflexible rule. For example in **Reddy's Enterprises Limited v. Governor of the Reserve Bank of Fiji** [1991] F.J.C.A. 4 ABU0067d. 90s Sir Moti Tikaram P. said:

> ***"In requiring the Applicant to establish special circumstances in this case I am not to be taken to hold that in all applications for a Stay it shall be incumbent on the Applicant to show special circumstances in the traditional sense. I subscribe to the view***

> ***that adherence to an inflexible rigid test to all types of stay on injunction cases without considering their nature is not to be favoured. The strict test rule can negate the wide discretion vested in Courts and could even lead to denial of justice in particular cases".***

I respectfully agree.

[15] **The Balancing Exercise**

Here, as Courts are frequently required to do, this Court must now perform a balancing exercise. The law is that if an Appellant puts forward solid grounds for seeking a Stay, the Court must then consider all the circumstances of the case. It must weigh up the risks inherent in granting a Stay and the risks inherent in refusing a Stay. In **Hammond Suddard Solicitors** v. **Agrichem International Holdings Limited** [2002] E.W.C.A. Civ. 2065, Clarke L.J. described the correct approach as follows:

> ***"Whether the Court should exercise its discretion to grant a Stay will depend upon all the circumstances of the case, but the***

> ***essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a Stay. In particular, if a Stay is refused what are the risks of an appeal being stifled? If a Stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment? On the other hand, if a Stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the Appellant being unable to recover any monies paid from the respondent?"***

[16] In **Powerflex Services Pty. Ltd. & Ors. v. Data Access Corporation** [1996] 137A.L.R. 498, a full Bench of the Federal Court of Australia confirmed that there was no need to demonstrate *"special"* circumstances before granting a Stay but that it was:

> ***"Sufficient that the Applicant for the Stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour".***

[17] The Respondent cites **Natural Waters of Viti Ltd. v. Crystal Clear Mineral Water (Fiji) Ltd.** Civil Appeal No. ABU0011 of 2004S, where a Stay pending appeal to the Supreme Court of an injunction order was refused. The Court of Appeal commented that the Stay was refused because *"the application for leave to appeal is unlikely to succeed"* and then went on to say *"we can find no factors that come anywhere near out-weighing this consideration - indeed most of the factors are to the contrary".*

[18] I cannot say the same about the facts as known in the present case. In my view the injunction granted against the Appellants affects the very ability of the Appellants to exist in their business and the Appellants say that it is impossible to even measure the damages that they will suffer. The Respondent does not dispute this either.

[19] Finally counsel for the Appellants referred me to a recent New Zealand Court of Appeal decision in **New Zealand Insulators Ltd. v. ABB Ltd. & Ors.** [2006] N.Z.C.A. 330 as indicating the approach that this Court should take on the present application.

[20] In that case an injunction was granted by the High Court and though a Stay was sought before the same Judge it was refused. The Appellant then applied to the Court of

Appeal for a Stay which was granted on conditions. I am prepared to accede to the Appellants' request on the following conditions:

1) *That the Appellants prepare their appeal for hearing in the second session of the Court from the 1st to the 18th of April 2008.*

2) *That tourists use the toilet facilities provided on the Appellants' Schooner Whales Tale.*

3) *That the Appellants do not interfere with the Respondent's rights to go on to the Island to inspect the Appellants' use of the Island and to do such surveys as the Respondent requires.*

[21] There will be liberty to apply on reasonable notice by any party. Orders accordingly.

FIJI COURT OF APPEAL

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[John E. Byrne]
JUDGE OF APPEAL

At Suva
30th November 2007