

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 25 of 2016
(High Court HBC 154 of 2015)

BETWEEN : **PETER ALLAN LOWING**
Appellant

AND : **PETER HOWELL**
Respondent

Coram : **Calanchini P**

Counsel : **Ms S Tabuadua with Mr N Vakacakau for the Appellant**
Ms B Doton for the Respondent

Date of Hearing : **11 April, 13 April, 20 May and 6 June 2016**

Date of Ruling : **22 July 2016**

RULING

[1] This is an application made by Notice of Motion dated 5 April 2016 and filed by the Appellant seeking two orders that may be described as ancillary to a notice of appeal also

dated 5 April 2016 and filed on 7 April 2016. The two orders sought by the Appellant (Lowing) are:

- “1. *That the Ruling and Orders of the Honourable Mr Justice M. H. Mohammed Ajmeer delivered on 21 March 2016 be stayed pending the determination of the within appeal proceedings.*
2. *That the [Respondent] herein be forthwith restrained and enjoined _ _ _ from executing and or enforcing _ _ _ the judgment or consent order obtained _ _ _ on or a bout 11 February 2016 _ _ _ in the Foreign Proceedings _ _ _ being case number 2015/0011 3044 in the Local Court [at] Ryde in New South Wales, Australia instituted by the [Respondent] against the [Appellant] herein claiming breaches of an employment contract entered into _ _ _ on or about 30 March 2014 pending the determination of the appeal proceedings [or until the Court of Appeal otherwise directs].”*

[2] The application was supported by an affidavit sworn on 5 April 2016 by Nitin Prakash and a supplementary affidavit which was filed on 15 April 2016. The Appellant filed a further affidavit sworn on 31 March 2016 by Peter Allan Lowing. The application was opposed and an answering affidavit sworn on 21 April 2016 by Peter Howell was filed on behalf of the Respondent. The Appellant filed a reply affidavit sworn by Peter Allan Lowing on 13 May 2016.

[3] An Agreed Chronology of Events dated 12 May 2016 and signed by the legal practitioners for both parties was filed on 13 May 2016. The Appellant filed two further affidavits sworn on 14 April 2016 and 13 May 2016 both by Peter Allan Lowing. Both parties filed written submissions and presented oral submissions on various issues that arose during the course of the proceedings.

[4] In his judgment dated 21 March 2016 the learned High Court Judge refused Lowing’s application for an interim injunction restraining Howell from enforcing the consent judgment obtained in the New South Wales Local Court on 11 February 2016 until the determination of the High Court proceedings in HBC 154 of 2015 being the proceedings

commenced by writ on 10 September 2015 and in respect of which the interim injunction was sought. (See Order 29 Rule 1 of the High Court Rules).

- [5] Being dissatisfied with that decision Lowing filed a timely appeal seeking an order that the Ruling and orders made on 21 March be set aside and that the interim injunction sought in the Court below be granted forthwith.
- [6] The notice of motion seeks two orders which have been set out in full earlier in this Ruling. The first application is for a stay and the second is for an interim injunction pending the determination of the appeal.
- [7] The application for a stay should have been made first to the High Court pursuant to the requirement in Rule 26(3) of the Court of Appeal Rules (the Rules). However, there is a further problem for the Appellant Lowing. There is in effect nothing to stay as a result of the order made by the learned High Court Judge. The application for an interim injunction was refused. The appeal is against the refusal to grant the interim injunction. However that order is not capable of being subject to a stay order. The application for a stay must be refused.
- [8] The application for an interim injunction is made pursuant to section 20(1) (e) of the Court of Appeal Act (the Act) which provides that:

“20 (1) A judge of the Court may exercise the following powers of the Court:
(a) - (d) _____
(e) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal
(f) - (k) _____ “

- [9] It should be noted that section 20(1) of the Act does not of itself extend the jurisdiction of the Court of Appeal. The effect of section 20(1) is that a judge of the Court may exercise certain powers of the Court which powers however, must be found elsewhere in the Act or which are exercised by the Court pursuant to its extremely limited inherent

jurisdiction. Furthermore section 20(1)(e) presupposes the existence of an appeal that is pending before the Court.

[10] It is obvious that the application for an interim injunction that is presently before the Court is in exactly the same form as the second order sought by Lowing in his notice of appeal. Furthermore the second order sought in the notice of appeal is in the same form as the interim injunction sought by Lowing in the High Court and this in turn is in similar terms to the permanent injunction sought as Relief (b) in the Statement of Claim indorsed on the Writ that was issued on 10 September 2015 and which states:

“(b) An injunction restraining the defendant by himself, his servants, counsels, workmen and agents or otherwise howsoever from continuing to pursue the Foreign Proceedings or any orders made in the Foreign Proceedings.”

[11] It is apparent that the application for a permanent injunction sought in the writ, the application for an interim injunction that was refused by the High Court, the applications for interim injunctions in this Court (i.e. in the notice of appeal and in the notice of motion) are all intended to prevent Howell from enforcing a consent judgment obtained against Lowing in the Local Court in New South Wales.

[12] The consent judgment was entered in settlement of a dispute that arose under an employment contract between Lowing and Howell. The claim by Howell was for about \$43,000.00 claimed as unpaid wages. Lowing has not sought to challenge nor to have set aside the consent judgment in New South Wales. Prior to the consent judgment being entered, the Local Court had dismissed two applications by Lowing to have the claim struck out. Lowing did not appeal either of those Rulings. Prior to the consent judgment, Lowing had filed in the Local Court a defence that pleaded to both the merits of the claim and the issue of jurisdiction.

[13] The basis of Lowing’s challenge is jurisdiction. The written employment agreement in clause 14 provided that the agreement was governed by the laws of Fiji and that exclusive

jurisdiction was given to the courts of Fiji. This stance taken by Lowing has been unsuccessful in both the Local Court in New South Wales and in the High Court in Fiji. For the reasons which are to be outlined below it is not now necessary for me to determine the application for an interim injunction on the question of jurisdiction.

[14] Under Order 29 Rule 1 it is apparent that an application for an injunction presupposes the existence of a cause or matter that is pending. It follows that although an application for an interim injunction may be refused, the cause or matter remains pending and is not itself affected by such refusal. However if the cause or matter is no longer pending or in existence, then the proceedings relating to the interim injunction are automatically brought to an end.

[15] In a judgment delivered on 28 June 2016 the learned High Court Judge set aside the writ action commenced by Lowing. It should be noted that it was not the service of the writ that was set aside by the Judge but rather the writ itself. In paragraph 27 of the Ruling the Judge states:

“I accordingly find that the writ of summons should be set aside on the ground that the service on the defendant is irregular.”

[16] The matter is further clarified in paragraph 46 of the Ruling:

“For the foregoing reasons I would declare that this court had jurisdiction over the defendant (Howell) in respect of the subject matter of the claim but the respondent (Lowing) by his conduct had chosen foreign court as forum convenience. I therefore set aside the writ of summons filed in this court by the respondent (Lowing).”

[17] The power to set aside the writ of summons was available to the learned Judge since Howell’s application had been made under Order 12 Rule 7 of the High Court Rules. The effect of the order setting aside the writ of summons is that the proceedings commenced by the writ have been brought to an end. The action has not been dismissed and consequently it would technically be possible for Lowing to commence fresh

proceedings by writ. However there are some findings by the learned Judge that may give rise to issue estoppel.

[18] As a result of the Ruling delivered on 28 June 2016 the statement of claim has been set aside. It follows that the application for a permanent injunction in the Statement of Claim has also been set aside. There can therefore be no basis for an interim injunction seeking to restrain Howell pending the determination of the proceedings which the High Court has set aside. If the application for an interim injunction, which had been refused by the High Court, has been set aside, then any further involvement by the Court of Appeal in respect of the appeal challenging the refusal by the High Court to grant the interim injunction is now moot or academic or hypothetical . There can no longer be any entitlement to the interim injunction claimed either in the High Court or in the Court of Appeal as the action has been wholly set aside. The proceedings in this Court have been overtaken by the Ruling delivered on 28 June 2016.

[19] The application under section 20(1)(e) for an interim injunction pending the determination of the appeal is dismissed. The appeal challenging the decision of the High Court refusing to grant an interim injunction is also dismissed. Under the circumstances each party should pay their own costs in this Court.



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL