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

CIVIL APPEAL NO. ABU 34 OF 2018
(High Court HBC 112 of 2014)

BETWEEN : **TE ARAWA LIMITED**

Appellant

AND : **ONE HUNDRED SANDS LIMITED**

Respondents

Coram : **Calanchini P**

Counsel : **Ms M Tikoisuva for the Appellant**
Mr A K Singh for the Respondent

Date of Hearing : **23 January 2019**

Date of Ruling : **5 February 2019**

RULING

[1] This is a renewed application for a stay pending appeal. On 3 May 2018 the High Court delivered judgment on a preliminary issue on the application of the Respondent (One Hundred Sands) pursuant to Order 33 Rule 3 of the High Court Rules. The issue to be determined by the Judge was whether the condition precedent in the sale and purchase

agreement dated 7 October 2011 between the appellant (Te Arawa) and One Hundred Sands for the sale and purchase of Native Lease No.434878 (the property) had been satisfied. Having found that the condition precedent had not been complied with the learned Judge concluded that the sale and purchase agreement was cancelled and that the amount of $1,200,000. should be returned promptly by Te Arawa to One Hundred Sands with costs of $5,000.00. The counterclaim by Te Arawa was dismissed with a further sum of $1,500.00 as costs to be paid to One Hundred Sands.

[2] Being dissatisfied with the Judgment the appellant filed and served a notice of appeal relying on the following grounds:-

> *"1. That the learned Judge erred in law in entering final judgment on an interlocutory application for preliminary issue under Order 33 Rule 3 of the High Court Rules.*
>
> *2. That the learned Judge erred in law by dealing with a substantive matter by way of an interlocutory summons and entering final judgment for a matter which ought to be determined by way of a trial.*
>
> *3. That the learned Judge erred in law by awarding excessive costs of $5,000.00 for a determination of a preliminary issue.*
>
> *4. That the learned Judge erred in law by dismissing the Defendant's counter claim against the Plaintiff without the benefit of a trial on the substantive issues."*

[3] The appellant has complied with Rule 16 of the Court of appeal Rules (the Rules) as to time and Rule 17 of the Rules as to proof of service and security for costs to prosecute the appeal.

[4] Under Rule 34 of the Rules an appeal does not operate as a stay of execution unless the court below or this Court otherwise orders. Pursuant to Rule 26(3) whenever an application, such as an application for a stay pending appeal, may be made either to the court below or to the Court of Appeal, it is required to be made in the first instance to the court below. In a judgment delivered on 13 July 2018 the learned High Court Judge

refused the application for a stay and awarded costs to One Hundred Sands in the sum of $1,250.00.

[5] It is as a result of that order that Te Arawa renews its application for a stay pending appeal before the Court of Appeal. Pursuant to section 20(1) of the Court of Appeal Act (the Act) a justice of appeal may grant a stay of execution pending appeal.

[6] It must be noted that the application before this Court is not an appeal from the decision of the High Court refusing a stay of execution pending appeal. This is a fresh application in the form of a renewed application. It is not the function of this Court to review the decision of the learned High Court Judge refusing to grant a stay. This court is exercising a concurrent original jurisdiction in such applications.

[7] The application was made by summons filed on 17 July 2018 and was supported by an affidavit sworn by Elizabeth Morris on 16 July 2018. The application was opposed. An answering affidavit sworn on 2 August 2018 by Timothy Manning was filed on behalf of the Respondent. A reply affidavit sworn on 24 August 2018 by Elizabeth Morris was filed on behalf of the appellant. Both parties filed written submissions prior to the hearing. An interim stay pending the determination of the substantive stay application was granted on 23 August 2018. That interim stay was granted on the condition that the appellant pay the sum of $1,200,000.00 into Court no later than 4.00pm on 29 August 2018. The appellant complied with the condition.

[8] The background facts to the matter may be stated briefly. Te Arawa was the registered proprietor of native leave No.43478 at Denarau. One Hundred Sands and Te Arawa entered into a conditional sale and purchase agreement dated 7 October 2011. The agreement contained conditional terms (as a condition precedent) and the requirement to pay a deposit of $1,000,000.00 together with $2,000,000.00 as option fees. The amount of $1,200,000.00 was paid by One Hundred Sands on about 8 February 2012 to the Stakeholder Howards Lawyers.

[9] At the time of this agreement there was in existence another agreement for the sale and purchase of the same property (the prior agreement) between Te Arawa and Carpenters Properties Limited (Carpenters). The agreement with One Hundred Sands was made subject to the following precedent:

> *"3 Condition Precedent*
> *3.1 Conditions: This agreement is subject to and conditional upon:*
> *(a) The vendor being entirely satisfied that*
> *(i) The prior agreement is at an end and*
> *(ii) No further claims proceedings or legal issues exist or may arise in relation to the prior agreement."*

[10] Clause 3.3 of the agreement required the two conditions in the condition precedent clause to be satisfied within 45 days and 4 months respectively from the date of exercise of the option. In the event that the agreement was cancelled due to any of the conditions not being satisfied the stakeholder was required to refund "promptly" to One Hundred Sands the option fees and the deposit less reasonable legal fees. The full text of the agreement between Te Arawa and One Hundred Sands was annexed to the affidavit of Timothy Manning. The claim for the refund of the option fees and the deposit to One Hundred Sands was the essence of the dispute between the parties in the High Court.

[11] It would appear that a summons was filed by the legal practitioners for One Hundred Sands to have a preliminary issue determined under Order 33 Rule 3 of the High Court Rules. The preliminary issue was whether the condition in the agreement had been satisfied. The summons was filed after pleadings had closed and after the minutes of the pre-trial conference had been filed. The action was otherwise ready for trial. Order 33 Rule 3 provides:

> *"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."*

[12] The learned High Court Judge proceeded to determine the application by affidavit material. Although there appears to have been objections raised in relation to the deponents and some of the material in the affidavits, no where in the material presently before me does there appear to have been any objection to the application for the preliminary issue to be determined. Furthermore there does not appear to have been any challenge by the legal practitioners for Te Arawa to the claim that the decision by the Judge on the preliminary issue would determine the dispute between the parties.

[13] The matters that should be considered by this Court in an application for stay pending appeal were discussed in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004, 18 March 2005. Both parties in their written submissions have made reference to the seven factors that are relevant to the issue of stay pending appeal. It is of course not always necessary to consider all seven matters as their relevance will to some extent depend upon the nature of the proceedings and the orders made by the court below.

[14] Generally, a successful party is entitled to the "*fruits of the judgment*" that has been obtained in the court below. For this court to interfere with that right the onus is on the appellant to establish that a stay should be granted. Te Arawa seeks a stay in respect of what may be termed as a money judgment. Since the decision of the Court in **Attorney-General of Fiji and Ministry of Health –v- Dre** [2011] FJCA 11; Misc. 13 of 2010, 17 February 2011, the ability of the appellant (as defendant) to recover the judgment amount in the event that a stay is not granted is not decisive and is only one of a number of factors that must be considered. It must be recalled that the sum of $1,200,000.00 is money paid by One Hundred Sands to a stakeholder pending satisfaction of the condition precedent. I am not convinced that the appeal will be rendered nugatory if a stay is not granted. I was informed by Counsel for One Hundred Sands that the company was incorporated in Fiji and has substantial assets in Fiji.

[15] The balance of convenience is not necessarily a decisive factor one way or the other in this application. Neither the public interest nor the nature of the issues involved are significant issues in this application.

[16] The remaining issue of some significance is the bona fides of Te Arawa as to the prosecution of the appeal. This is sometimes taken to be a reference to the chances of the appeal succeeding. Although the court will not speculate about the prospects of the appeal, it is appropriate in considering the issue of bona fides to make some preliminary assessment about whether the appellant has an arguable case. The grounds of appeal are directed at the procedure that was adopted by the learned Judge. Plainly the procedure is recognized under Order 33 Rule 3. It seems to me, having read the affidavits and the material annexed thereto that the preliminary issue raised by One Hundred Sands concerning satisfaction of the condition precedent could be considered and determined on affidavit material.

[17] The final disposition of the claim that was the subject matter of the writ action brought by One Hundred Sands and the counterclaim by Te Arawa following the decision on the preliminary issue was a procedure permitted under Order 33 Rule 7 which states:

> *"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."*

[18] As a result the court can order a preliminary issue to be tried separately and if the decision on the preliminary issue substantially disposes of the action the court may either (1) dismiss the cause, or (2) make such other order or (3) give such judgment as may be just. In my judgment the facts upon which the learned Judge relied were derived from the affidavit material. In **Gurbachans Foodtown Ltd –v- the New India Assurance Company Limited** [2016] FJSC 45; CBV 1 of 2016, 28 October 2016, the Supreme Court (per Chitrasiri J with whom Chandra and Keith JJ agreed) noted at paragraph 17:

> *"Ordinarily, a preliminary issue is tried at the commencement of the hearing only when the Court is of the opinion that there is a possibility of disposing the entire case finally. It is done so, in order to minimise delay and for convenience and to curtail expenses and also to avoid duplicity. Though it is the discretion of the Court to try a preliminary issue which may contain even facts, it is always better to take up all the matters in dispute in one trial particularly when the issues of facts are involved. Of course, clear questions of law that help disposing the matter finally, are always being tried as preliminary issues."*

[19] In my judgment, even when the Supreme Court's reservations are taken into, this was a case where the trial Judge had properly exercised the discretion to hear separately the preliminary issue raised by the One Hundred Sands in its summons. The claim in the writ was for the refund of $1,200,000.00. The entitlement to that refund was based on the agreement. In the event that the condition precedent had not been satisfied and as a result the agreement remained conditional beyond the two fixed dates, then the right to a refund arose. The facts and the agreement could be ascertained by reference to the affidavits.

[20] The appellant's grounds of appeal are not directed at the decision itself nor does the appellant challenge the procedure on the basis that it was not available to the judge under Order 33 of the High Court Rules. Nor is there any material to suggest that the appellant opposed the application for a separate hearing on the preliminary point. The appellant's grounds of appeal refer to the decision as an interlocutory decision. However in **White v Brunton** [1984] 2 All ER 606 the Court of Appeal held that where an order made or judgment given on an application would finally determine the matter in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal. The hearing of a preliminary can be considered as the first part of a final hearing and is not an issue preliminary to a final hearing. The appellant has obviously taken the view that the judgment given by the learned Judge on the application to determine the preliminary issue was a final judgment as Te Arawa has not sought leave to appeal an interlocutory judgment as would otherwise have been required under section 12(2) of the Court of Appeal Act.

Finally, an appeal on costs is not a basis for granting a stay.

[21] For all of the above reasons, I have concluded that there are insufficient grounds for granting a stay of execution pending appeal. Costs follow the event and the appellant is ordered to pay costs in the sum of $3,000.00 to the respondent within 21 days from the date of this Ruling.

Orders:

1) *Application for stay pending appeal is refused.*
2) *The interim stay granted on 23 August 2018 is discharged.*
3) *The Chief Registrar is ordered to release the sum of $1,200,000.00 together with the interest accrued thereon to the Respondent.*
4) *The Appellant is ordered to pay the sum of $3,000.00 costs to the respondent within 21 days from the date of this Ruling.*

W. Calanchini

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