

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC 316 of 2008**

**BETWEEN** : **DYNEX HOLDINGS LIMITED**

**PLAINTIFF**

**AND** : **BW HOLDINGS LIMITED**

**DEFENDANT**

**BEFORE** : The Hon. Mr Justice David Alfred

**Counsel** : Ms B Narayan for the Plaintiff  
Mr R Singh for the Defendant

**Date of Hearing** : 5 May 2016  
**Date of Ruling** : 13 May 2016

**RULING**

1. Two Applications were fixed for hearing before me on 5 May 2016.
2. One was for Enforcement of the Judgment, while the other was for a Stay of Execution of that Judgment, pending the determination of the appeal by the Court of Appeal.

3. Both Counsel agreed that the Stay Application be heard first before the Application for Enforcement. I therefore proceeded to hear the former application.
4. The Summons for Stay filed by the Defendant, prays that execution of the judgment herein delivered on 25 May 2015 and all proceedings thereunder be stayed until the determination of the appeal by the Court of Appeal.
5. This Summons is Supported by the affidavit of Ugesh Narayan, a director of the Defendant, wherein he deposes that there is a high probability that the appeal will succeed, that it will be rendered nugatory, if a stay is not granted, and that that would cause substantial prejudice to the Defendant.
6. In the Plaintiff's Affidavit in Opposition, Umendra Kumar, one of its directors states that there is no genuine ground of appeal put forward by the Defendant and that there will be no prejudice caused to the Defendant if a stay is not granted.
7. In his oral submission, Counsel for the Defendant said this was a sale and purchase of land situation where the Plaintiff is the purchaser and the Defendant is the vendor. The Plaintiff defaulted in making payment of the installments. Counsel said the Defendant had merits in its appeal and the Plaintiff would not suffer any prejudice if a stay were granted because it was in possession of one lot of land.
8. The value of the land had increased substantially since 2002. The sale was subject to the consent of the Director of Lands. If the Vendor defaults that would lead to specific performance. If the purchaser defaults then the vendor can either enforce or rescind the agreement. Counsel confirmed that the Defendant did not enforce the agreement and did not send a written notice of rescission as required by the agreement.

9. If a stay were not granted, the interests of a third party viz the financier would be affected. Counsel concluded by saying there is no public interest, and that the balance of convenience was for a stay.
10. Counsel for the Plaintiff now submitted. She said the Defendant's director in his affidavit did not state what the prejudice would be to the Defendant. Its breach went to the root of the Agreement. Both parties considered the Agreement to be still on foot. She said the Defendant had not terminated the Agreement because it considered the Plaintiff's breach was not a substantial one.
11. The Defendant's Counsel in his reply said there was a breach by each party and the matter has to be considered by the Court of Appeal.
12. At the end of the hearing, I informed Counsel that I would take time for consideration.
13. The point raised in this Application is an extremely short one: namely whether the Defendant is entitled to a stay of proceedings pending the determination of its Appeal.
14. The law applicable to this situation is stated lucidly and succinctly in Halsbury's Laws of England (4<sup>th</sup> edition) Volume 17, para 451, as follows:

“On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.”
15. The New Zealand Court of Appeal in : *Duncan v Osborne Building Ltd* [1992] 6 PRNZ 85, held as follows:-



- (1) In an application for stay of execution of a judgment, “it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful.”
  - (2) An application for stay should be filed promptly after judgment.
16. The Court did not accept the argument that if no stay is granted the right of appeal will be rendered nugatory, and refused to grant a stay.
17. In the instant case weighing the relevant factors, I find the following to be the case:-
  - (1) The Judgment orders specific performance of the agreement, which Counsel on both sides show in their arguments that they are at one in considering the agreement is still on foot.  
Therefore specific performance entails each party fulfilling its contractual obligations and obtaining the benefits thereunder.  
Thus, while the Plaintiff obtains the lots, the Defendant receives payment therefor.
  - (2) The Judgment was delivered on 25 May 2015 while the Defendant only filed its Summons for Stay on 3 September 2015. It would strain credulity to breaking point, if this were to be described as filing the application “promptly after judgment.”
18. This is not an appeal where the successful party in a suit has obtained damages from the unsuccessful party and the latter fears if it pays the former and its appeal is successful it will not be successful, in recovering the monies.
19. This is an appeal, where the Defendant states as grounds 1 and 2 of its appeal, that the Plaintiff has yet to pay the balance of the purchase price.

20. I would have thought that specific performance of the agreement would have compelled the Plaintiff to pay the balance of the purchase price to obtain the other two lots.
21. In the circumstances, I am not persuaded that the balance of convenience tilts in favour of granting a stay.
22. I therefore consider that the Defendant has not shown any circumstances that go to the enforcement of the judgment, notwithstanding its Appeal, that would satisfy me to grant a stay of execution of the Judgment.
23. I therefore dismiss the Defendant's Summons for Stay with costs which I summarily assess at \$1,000.00 to be paid to the Plaintiff.

**Delivered at Suva this 13<sup>th</sup> day of May 2016.**



DAVID ALFRED  
**JUDGE**  
High Court of Fiji