

IN THE SUPREME COURT OF FIJI  
AT SUVA

CRIMINAL PETITION NO: CBV 0004 of 2016  
[Court of Appeal No: ABU 76 of 2015]

BETWEEN : NEW WORLD LIMITED  
*Petitioner*

AND : VANUA LEVU HARDWARE [FIJI] LTD.  
*Respondent*

Coram : Chandra J

Counsel : Mr A K Narayan for the petitioner  
Mr F Haniff for the Respondents

Date of Hearing : 22 June 2016

Date of Ruling : 4 August 2016

RULING ON STAY

- [1] The Petitioner filed a Notice of Motion for stay and/or injunction on 30<sup>th</sup> May 2016 pending determination of its petition for Special Leave to appeal pursuant to Sections 11 and 14 of the Supreme Court Act, 1998.

- [2] The affidavit of Sudesh Kumar Chand, Administration Manager of the Petitioner was filed in support of the motion on 30<sup>th</sup> May 2016.
- [3] The 2<sup>nd</sup> Respondent filed an affidavit on behalf of himself and the 1<sup>st</sup> Respondent on 2<sup>nd</sup> June 2016 opposing the application for Stay, in response to the affidavit of Sudesh Kumar Chand.
- [4] A grant of stay is within the jurisdiction and powers of a single judge to hear and determine (Section 11 of the Supreme Court Act).

### **The Facts**

- [5] The Respondent holds Crown Leases No.718687, 91929 and 713833 which are protected leases.
- [6] The Petitioner is in occupation of the land comprising the three leases since 1991 on the basis of 4 separate lease agreements entered into between the Petitioner and the Respondents.
- [7] After three lease Agreements were entered into between the Petitioner and the Respondents which were with the consent of the Director of Lands, they entered into a lease agreement on 10 August 2009 for a period of three years from 1 September 2006 to 31 August 2009 with a renewal term of five years. The full term of the agreement was for eight years, expiring on 31 August 2014 and had the consent of the Director of Lands.

- [8] The Petitioner filed proceedings in the High Court seeking a declaration that the Petitioner was a tenant of the Respondents for a period of 10 years with effect from 1 January 2014 and for an order that the Respondents' specifically perform the agreement that had been entered into between the parties on 25<sup>th</sup> January 2014 which were on the same terms as before except for the rental and a right of renewal.
- [9] The said Agreement however had not been consented to by the Director of Lands, but the Petitioner remained in possession.
- [10] The Respondents' filed an application in the High Court to determine whether the Agreement purportedly entered into on 25 January 2014 was null and void for want of consent of the Director of Lands, as a preliminary issue.
- [11] In the High Court, a trial of the preliminary point was ordered and after hearing judgment was delivered in favour of the Respondents on the basis that the purported agreement of 25 January 2014 was null and void, since the written consent of the Director of Lands was not obtained as required by section 13 of the Crown Lands Act.
- [12] The Petitioner filed an appeal and applied for stay and injunctive relief by summons filed in the High Court which was refused by the High Court.

### **Proceedings before the Court of Appeal**

- [13] While the appeal filed by the Petitioner was pending in the Court of Appeal, the Petitioner renewed the application for stay and injunction pending the appeal and orders were accordingly granted subject to the caveat that rentals be paid to the Respondents.

[14] The appeal was heard on 6<sup>th</sup> May 2016 and judgment was delivered dismissing the Petitioner's appeal.

#### Appeal before the Supreme Court

[15] The Petitioner has filed a petition for special leave to appeal to the Supreme Court and the present application is for a stay pending the appeal.

[16] At the hearing of the application for stay, an interim stay was granted pending the ruling regarding the stay application.

[17] The principles upon which a stay is granted in the Supreme Court were set out in Stephen Patrick Ward v. Yogesh Chandra CBV0010 (20 April 2010) by Gates P :

“[4] The issue for determination is whether the Petitioner's case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a stronger test than that favoured in New South Wales where the hurdle was said to be overcome if “the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour”: Alexander v. Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685 at p.694; applied in Penrith Whitwater Stadium Ltd & Anor v. Lesvos Pty Ltd & Anor [2007] NSWCA 103.”

[18] In arriving at a decision as to whether the Petitioner's circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal ABU 0011.04S, 18<sup>th</sup> March 2005. They were:

“(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co. (NZ) Ltd [1972] 2 NZLR 41 (CA) 1.

(b) Whether the successful party will be injuriously affected by the stay.

(c) The bona fides of the applicants as to the prosecution of the appeal.

(d) The effect on third parties.

(e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience and the status quo.”

[19] The main thrust of the arguments of Counsel for the Petitioner was that:

(i) the appeal involved a question as to the interpretation of S.13 of the State Lands Act;

(ii) the appeal is novel as there are no authorities in Fiji relating to the circumstances of this case;

(iii) whether continued lease to one party over many years who had received consent under section 13 requires further consent when parties extend or renew the letting;

(iv) whether written consent to a letting providing for holding over for an indefinite period after the express letting for a specified term requires further consent for a renewed or extended letting to the same person;

(v) of implied consent which has been subject to previous decisions of the Courts without a final determination after a full hearing canvassing the circumstances of the parties.

[20] A reading of the Judgments of the High Court and the Court of Appeal shows that these were the same arguments that were placed before the respective Courts on behalf of the Petitioner. They had been considered and dealt by both Courts in favour of the Respondents. These grounds are being urged by the Petitioner before the Supreme Court

and it is to be seen whether the Petitioner would achieve getting special leave to appeal. However, these grounds have a bearing on the present application for a stay.

- [21] Before considering whether there is a likelihood of the Petitioner achieving special leave for his petition, the principles laid down in Natural Water of Viti Ltd. case would be considered.
- [22] As to the position whether, if no stay is granted, the Petitioner's right of appeal will be rendered nugatory. It is likely that the Respondents will seek to evict the Petitioner and get vacant possession of the premises if no stay is granted.
- [23] There had been long drawn out litigation between the parties over a period of time and the Respondents will obviously hasten to reap the fruits of the judgment they have got in their favour. The Petitioner who had been on the premises since 1991 knew very well that after August 2014, their staying on the premises was at risk as the agreement they entered with the Respondent had not got the consent of the Director of Lands and would be made use of by the Respondents, which they did and succeeded both in the High Court and the Court of Appeal.
- [24] The Petitioner was heard to say that if a third party gets possession of the premises, the appeal to the Supreme Court would be nugatory on the assumed basis that the interests of the Respondents was mainly pecuniary.
- [25] As the Respondents have a got a judgment in their favour from the High Court which was affirmed by the Court of Appeal, the question as to what use the Respondents would make use of the premises is not relevant as it is their right to choose whatever they wish

to do with their premises. After a string of litigation and strained feelings the Respondents would be wanting to reap the fruits of the judgments in their favour as early as possible. The Petitioner in those circumstances would have to look after their own interests from the predicament that they have been placed.

- [26] This ground of whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory is subject to the condition that it is not determinative. Therefore as to whether the appeal will be rendered nugatory is to be seen. The Petitioner has sought leave to appeal no doubt, but that by itself does not entitle the Petitioner to have a stay as the grounds of appeal relied upon have to be considered and seen whether they satisfy the principles relating to stay of execution and more so the threshold of getting special leave to appeal from the Supreme Court. Unlike in the Court of Appeal, when grounds of appeal are arguable a stay may be granted, in the Supreme Court that would not be sufficient as the burden is much higher on an Appellant.
- [27] As to principle (b) in the Viti Ltd. principles, it is necessary to see as to whether the successful party will be injuriously affected by the stay. The affidavit filed by the Respondents sets out matters relating to the condition of the premises, which relate to the premises not being properly maintained and that they have been condemned by the National Occupational Health Service. Further the possibility of the Respondent getting a higher rent has been deprived as a result of the Petitioner being in occupation. In addition going by the number of instances the parties have been in Court on various matters, the relationship between them appears to be strained very much. In these circumstances it would be the Respondent who would be affected if a stay is granted.
- [28] Principle (c) in Viti Ltd. deals with the bona fides of the applicants as to the prosecution of the appeal. The lease which was valid came to an end on the 31<sup>st</sup> August 2014 and the Petitioner has been in occupation since then.

- [29] It is only when they applied for a stay pending their appeal to the Court of Appeal that a higher rent was paid, which was as a result of the conditions laid down in the grant of the stay pending the appeal to the Court of Appeal. The Petitioner had not paid rent after 31 August 2014. In their affidavit they showed an impressive asset base but their being compelled to pay rent at a higher amount for their occupation after 31 August 2014 pending the appeal to the Court of Appeal as a condition for the stay does not speak well of their bona fides.
- [30] As regards principle (d), the effect of third parties, there are no third parties involved as this appeal is between these two parties only.
- [31] The novelty and importance of questions involved is principle (e). Petitioner's Counsel was at great pains to submit that there is novelty in this matter as it involves a question of interpretation of the statutory provision which is section 13 of the State Lands Act and that it has not been settled finally by any Court.
- [32] Petitioner's Counsel relied on the authorities of Subramani v. Prices and Income Board (1981) FCA 70 and Naganbai Kewal v. Manikkam Reddy [1982] FCA 30 to the effect that the question of implied consent was raised and stated that the Court of Appeal had erred in dealing with these authorities. Though the argument was raised the decisions were not based on implied consent.
- [33] Petitioner's Counsel submitted that this case gave rise to a need for statutory interpretation. It is a well established principle that where the provisions in a statute are clear and unambiguous, words cannot be read into such provisions under the guise of statutory interpretation. This was clearly set out in the judgment of the Court of Appeal.



[34] The judgment of the Court of Appeal is supported by decisions which were on the same lines. In Director of Lands v. Abdul Razak Hasin Ali [1993] 39 FLR 292 with reference to section 13 of the State Lands Act the Court of Appeal stated:

“We consider the wording of that section is clear. It makes it unlawful for the lessee to deal with the land in any way without the prior written consent of the Director of Lands. In all cases covered by section 13, failure to comply renders the dealing null and void.”

[34] In Gonzales v. Akhtar [2004] FJSC 2 CBV 11.00011.2002S (21 May 2004) the Supreme Court in dealing with Section 6(1) of the Land Sales Act did not accept the interpretation sought to be given by Counsel to the effect that prior consent that was required to be in writing in that section was either express or implied.

[35] Counsel for the Petitioner also advanced an argument on the basis of the holding over provisions in the 2006 Agreement to the effect that the holding over clause permitted the lease to continue for an indefinite period. This too was not accepted by the Court of Appeal. In any event, such holding over according to the said Agreement should be with the consent of the Lessor which the Petitioner did not have. Therefore this argument has no bearing on the present application for stay.

[36] As section 13 of the State Lands Act is clear and unambiguous, it is hard to perceive any novel and important question to be decided in this appeal.

[37] The public interest in the proceedings is the next principle (f) in Viti Ltd. Counsel for the Petitioner submitted since there are many matters before Court regarding matters involving section 13 of the State Land Act and therefore a finality is necessary regarding its interpretation. The fact that there are cases involving this section does not make it a situation involving public interest and specially the present case is one between the two parties and would affect only them.

[38] The overall balance of convenience and the status quo is the last principle (g) in Viti Ltd. The Petitioner has been on the premises after 31<sup>st</sup> August 2014 without any legal basis which has deprived the Respondents from obtaining possession of the premises. As to what the Petitioner proposes to do on obtaining possession is immaterial, the Respondents are entitled to enjoy the fruits of his successful litigation. In Stephen Patrick Ward v. Yogesh Chandra (Supra) it was stated :

“[25] In Atul Kumar Ambalal Patel v. Krishna Murti (unreported) Civil Action HBC0225.99L in ruling against the grant of a stay, the High Court stated at pages 2-3;

“Once successful, the litigant should not lightly be deprived of the fruits of his successful litigation: The Annot Lyle 91886 11P.D at 116CA; Monk v. Bartram (1891) 1 AB 346. The Power of the Court to grant a stay is discretionary. The Attorney-General v. Emerson and Others (1890) 24 QB 56; and it is “an unfettered discretion” Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 and 648.

If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed, and the successful litigant in effect held back from his remedy” Tuck v Southern Countries Deposit Bank (1889) 42 Ch.D.471 t 478 per Kay J; Atkins v G.W. Railway (1886) 2 TLR 400; Barker v. Lavery (1885) 14 QBD 760. In the Winchester Cigarette Case (supra) at 648 Lord Justice Hobhouse put it “The Appellant has to show some special circumstances which took the case out of the ordinary.”

[26] That summary was cited with approval by this Court in Prem Singh v. Krishna Prasad and Anor. CBV0001.02S 25<sup>th</sup> April 2002.

In the circumstances of this case the balance of convenience would favour the Respondents.

#### Threshold criteria for Special Leave

[39] The next consideration for the grant of stay is whether there is likelihood of the Petitioner achieving special leave for his petition.

[40] Section 7(3) of the Supreme Court inhibits the Court stating:

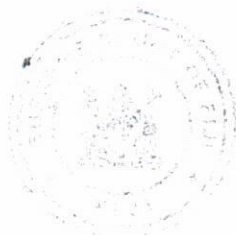
“(3) In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant special leave to appeal unless the case raises -  
(a) A far reaching question of law;  
(b) a matter of great general or public importance;  
(c) a matter that is otherwise of substantial general interest to the administration of civil justice.”

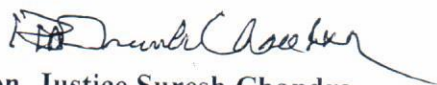
[41] As stated in Nivis Motors and Machinery Company Ltd v. Attorney General [2007] FJSC 1; CBV0007.2006 (13 March 2007) do the appeal grounds fit into the category of “far reaching questions of law” or “a matter of great general or public importance”. Was the Court of Appeal correct in deciding that the High Court in affirming the judgment of the High Court in the interpretation of section 13 of the State Lands Act? Considering the manner in which this section has been couched it is unlikely that special leave will be granted for the appeal to proceed. The grounds lack novelty and importance other than to the respective parties.

[42] As stated above the Petitioner’s submissions seeking special leave to appeal from the Supreme Court on the grounds urged are unlikely to meet the threshold criteria set out above.

[43] In the above circumstances the application seeking an order to stay is refused.

[44] The Petitioner shall pay costs of \$1000 each to the Respondents.



  
**Hon. Justice Suresh Chandra**  
**JUDGE OF THE SUPREME COURT**