IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0002/94S
(High Court Action No. 416/93)

BETWEEN:

PETER WILLIAM BOTT   APPLICANT

and

1.   IAN GILBERT BURNESS
2.   DAVID FOWLER BURGESS   RESPONDENTS

Mr John Howard for the Applicant
Mr W. Morgan for the Respondents

R U L I N G
(In chambers)

There are two applications before me. Both were filed together on 20th January, 1994. One seeks leave to appeal out of time against a vacant possession order made by consent by the High Court (per Pathik J.) on 13th October, 1993 in Civil Action No. 416 of 1993 and stayed until 1st December, 1993. This consent order was sealed on 28th October, 1993. The other seeks a stay against execution of the said possession order which had been further extended by the Court below until 14th January, ~~1993~~ 1994 on the application of the Applicant/Defendant.

On 14th January, 1993 the Applicant made an ex parte application to the High Court for a further stay order. Pathik J. stayed the order until 17th January, 1994 when inter partes hearing took place. He then refused the stay application and also gave his reasons for doing so in writing. He considered the application for a stay order to be frivolous, devoid of any merit and an abuse of the process of the Court. He noted that 2 different counsel had consented to vacant possession order and that the sealed Consent Order was served on the Applicant personally on 3rd November, 1993.

On 20th January, 1994 the Applicant filed an ex parte motion in this Court for leave to appeal out of time and also an ex parte application for a stay order pending appeal. He did this through his present solicitors who were third in a series. After hearing Mr John Howard and reading the supporting affidavit filed I granted a temporary stay until 25/1/94 on certain conditions which were complied with.

At the inter partes hearing on 25/1/94 I had the benefit of reading 2 affidavits filed in opposition. Mr Morgan who appeared for the Respondents raised a preliminary objection relating to the jurisdiction of this Court.

He referred me to Section 12(2)(e) of the Court of Appeal Act which reads as follows:

"(2)   No appeal shall lie -

(a) ──────────
(b) ──────────
(c) ──────────
(d) ──────────
(e)   without the leave of the Court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only;"

It is Mr Morgan's contention that the stay application cannot be considered unless and until the condition precedent is complied with, the condition precedent being leave to appeal from the "Court or judge making the order". He submitted that "Court" means the Court below. He argued that the stay application is dependant on leave to appeal. If there is no leave to appeal there can be no appeal pending and therefore there will be nothing to stay.

Mr Howard submitted that "Court" means the Court of Appeal and he referred to the definition of "Court" in Section 2 of the Court of Appeal Act which says "Court" means the Court of Appeal. He does not dispute that this Court is obliged to take judicial notice of the sealed consent order but asked me to bear in mind the conflicting affidavits made by the parties relating to the Consent Order. He also submitted that the stay application is not an appeal but is brought by virtue of this Court's concurrent jurisdiction.

Although common sense dictates that in the context in which the word "Court" appears it should mean the Court below, I am inclined to agree with Mr Howard and give meaning and effect to the definition of "Court" as spelt out in Section 2 of the Act

which is the interpretation Section. Consequently I am of the view that this Court has jurisdiction to deal with an application for leave to appeal against a consent order provided there is in fact such an application before this Court and provided further that the provisions of Rule 26(3) of the Court of Appeal Rules have been complied with. This Rule states that *"(3) Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below"*. This is an eminently desirable Rule particularly where an appeal against a consent order is contemplated because the judge making the consent order will be acquainted with the circumstances in which it was made.

I neither have an application before me for leave to appeal nor has the Applicant first attempted to seek such a leave from the Court below. Some of the considerations which apply to granting of leave to appeal out of time differ significantly from those that apply to an application for leave to appeal.

My jurisdiction, as a single judge, to deal with a stay application is indeed a concurrent one and it arises by virtue of Section 20(f) of the Court of Appeal Act which gives me power "to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal". There is no appeal pending. Strictly there can be no pending appeal until leave to appeal is granted as required by Section 12(2)(e). However, I can envisage situations where it might be possible for a Court to make an interim order to prevent prejudice when in the process of considering an actual application for leave to appeal. Such is not the situation here.

Consequently I uphold the submission made by Mr Morgan and rule that I have no power or jurisdiction at this stage to deal with the 2 applications before me. I, therefore, dismiss both applications for want of jurisdiction. This does not mean that the Applicant is left without any remedy. He can still make an application to the Court below and take such steps thereafter as may be advised depending on the outcome of his application. Similarly he is at liberty to apply afresh to this Court for leave to file an appeal out of time if the Court below grants him leave to appeal.

The Respondents are entitled to the costs of the proceedings before me and they are to be taxed if not agreed upon.

Sir Moti Tikaram
Acting President, Fiji Court of Appeal

Suva
27th January, 1994.