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

CIVIL APPEAL NO. ABU0014 OF 1999S
(High Court Civil Action No.HBC 496 of 1992)

BETWEEN:

ATTORNEY-GENERAL OF FIJI
FIJI TRADE AND INVESTMENT BOARD

Appellants

AND:

PACOIL FIJI LIMITED

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Justice Kenneth R. Handley, Justice of Appeal

Hearing: **Monday, 9 August 1999, Suva**

Counsel: **Mr. R. Naidu for the Appellants**
Mr. G. P. Shankar for the Respondent

Date of Judgment: **Friday, 13 August 1999**

DECISION OF THE COURT ON RESPONDENT'S MOTION TO SET ASIDE STAY

In proceedings commenced in 1992 the respondent obtained judgment against the appellants for liability, and an appeal to this Court against the finding of liability was dismissed. Subsequently damages were assessed, the judgment of the High Court on the assessment being delivered on 16 April 1999. Both sides have appealed to this Court against the assessment of damages, which we were told amounted to some $4.5 million. The appellants applied for a stay of execution pending the determination of their appeal, and on 18 June 1999 the High Court granted a stay on terms that they pay $2,265,066.00 into court within 28 days, directing the Chief Registrar to place the sum on short term interest bearing deposit pending the hearing and determination of the appeal.

The appellants applied to the High Court for leave to appeal against the decision. In a judgment delivered on 16 July the Judge recorded the appellants had informed the Court that time was needed to obtain approval for the payment of funds, that their affidavits had failed to state the grounds on which the appeal against the judgment staying execution might succeed, and that no written application had been made to stay the order for payment into court, although the appellants had applied orally. The appellants had submitted that no order for payment into Court should have been made, since there was no power to enforce such an order against them. The Judge, stating the appellants would suffer the greater prejudice if their application were not granted, gave leave to appeal, made an order staying the direction for payment into Court, and ordered the appellants to expedite the appeal.

The latest move is the respondent's application now before the Court, that the orders of 18 June and 16 July be set aside, discharged or vacated and that the Court should order a certificate to be issued under s.20 of the Crown Proceedings Act (Cap 24). A preliminary matter is this Court's power to deal with the respondent's application. Section 20 of the Court of Appeal Act (Cap 12) as amended provides that a Judge of the Court may exercise a number of powers, such as granting leave to appeal, giving leave to amend a notice of appeal, giving directions as to service, and so on. Among those listed is "(e) to ...make an interim order to prevent prejudice to the claims of any party pending an appeal." The present application falls within that description.

In its terms s.20 confers power on a single Judge. However the powers in question are powers of the Court and as such they may be exercised by a full Court.

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The appellants' first objection to the respondent's application is that the respondent had a remedy by way of appeal which it did not exercise. It is true that if the respondent was dissatisfied with the order for stay made on 18 June it could have applied for leave to appeal from that order or, when the appellants obtained leave to appeal, could have given a respondent's notice under rule 19 of the Court of Appeal rules seeking to vary that order. Similarly, if it was dissatisfied with the order of 16 July the respondent could have applied for leave to appeal from that order. In general, an appeal would be the appropriate way to challenge the correctness of such decisions. However, as noted, this Court has been given broad powers, exercisable on an application made directly to it, to ensure that appeals are dealt with justly and expeditiously. Where the circumstances so require the Court may exercise those powers notwithstanding the availability of the alternative route of an interlocutory appeal. For reasons which will appear we consider it appropriate to exercise the powers in this instance.

We turn then to the merits of the respondent's application. As we understand it the award of damages was made against the appellants jointly. Mr. Shankar and Mr. Naidu both accepted that s.20 of the Crown Proceedings Act did not apply to the second appellant, the Fiji Trade and Investment Board. Mr. Shankar did not contend that the judge was wrong to order a stay of execution in favour of the second appellant. In our view he was plainly right to do so. It is true that generally a successful party is entitled to the fruits of the judgment, and the party against whom judgment has been entered is required to show special circumstances for a stay. However, one sufficient ground for a stay can be the absence of reasonable prospects that the money paid over will be recovered in the event of a successful appeal. The respondent has been placed in receivership by one major creditor, and there are other secured creditors who

may take action against it. If the amount of the judgment was paid to the receiver it may not be recoverable.

In the recent interlocutory proceedings there has been some misunderstanding of the effect of s.20 of the Crown Proceedings Act. S.20 relates to the satisfaction of orders made against the State. It does not inhibit the Court's power to give judgment against the State, but restricts the mode of enforcement normally available. It provides that where in any civil proceedings a Court makes any order in favour of a person against the State, or against a government department, or an officer of the State as such, the proper officer of the Court shall on application issue a certificate in the prescribed form containing particulars of the order. When the appropppriate time has expired, as provided in the section, the registry must issue the certificate. No judicial direction to that effect is required.

If the order provides for payment of money by way of damages or otherwise, the certificate shall state the amount so payable and the chief accountant shall then pay to the person entitled or to his Barrister and Solicitor the amount appearing by the certificate to be due. Under s.20(3) however, the Court by which any such order is made, or the Court to which an appeal against the order lies, may direct that pending an appeal or otherwise, payment of the amount shall be suspended. Subsection (4) provides that except as stated in the section, no execution shall issue enforcing payment by the State of any such money or costs. It is apparent that the Judge's attention was not drawn to the effect of these provisions. So far as the first appellant was concerned the application for a stay was misconceived and the order for a stay with the condition for payment into Court should not have been made.

However, for the reasons already given, the Judge was correct in deciding on 16 July that the first appellant should be relieved from having to meet the judgment pending resolution of the damages appeal. Accordingly, under s.20(3) it is appropriate to make an order suspending payment of the whole of the judgment, until further order.

The respondent's main concern was to preserve, or revive, the condition imposed by the Judge, that part of the judgment be paid into Court. Mr. Shankar argued that the respondent's creditors would feel greater confidence if part of the judgment was actually in Court. Even for a Government, to put aside, in cash, a sum in excess of $2 million must involve some inconvenience. The Court should not direct such a step unless there is point to it. As Mr. Shankar accepted, if the sum were paid into Court it would not be available to the respondent until the proceedings have been finally disposed of in its favour. The respondent's creditors may feel more assured if money is actually in Court (although there has not been any affidavit by a creditor to this effect) but as business people they must realise this would only be a symbolic exercise of no practical import. Although this is not an appeal against the Judge's condition, in this respect we consider he exercised his discretion on a wrong principle. We are not prepared to order payment into Court, as a condition of the order for suspension we have made under s.20(3).

Although in the event, the application has not produced the result the respondent would have wished, we are concerned that it may may suffer unfair prejudice if the appeal is not advanced promptly. Under the Judgments Act 1838 (Imp), in force in Fiji under s.22 of the Supreme Court Act (Cap.13), the statutory rate of interest on the judgment is 4% whereas we were informed by counsel, without objection, that the rate payable by the respondent to its three

principal secured creditors is 18%. It is three and a half years since the respondent obtained judgment for liability in the High Court. The appellants' notice of appeal against the assessment of damages was filed nearly four months ago but little had been done by the appellants to prosecute the appeal prior to these matters coming before this Court on 9 August. This prompted us to canvas with counsel the steps that ought to be taken to expedite the appeals. We record the orders made during the hearing, namely that by 16 August 1999 (a) the appellants shall notify the Chief Registrar in writing that (as stated at the hearing) the parties are agreed that security for costs on both sides is waived and therefore there is no need for any application to fix security (b) the appellants shall provide the Chief Registrar and the respondent with the list of documents they consider should be included in the record. Other orders with the same objective will be included in the further orders we now make as follows:

1. Set aside the order of the High Court made on 18 June staying execution of the judgment against the first appellant, and ordering the first appellant to pay a sum of money into Court.

2. Direct that until further order payment of the judgment by the first appellant be suspended, and that such direction be inserted in any certificate to be issued under s.20(1) of the Crown Proceedings Act.

3. Subject to any variation of the judgment of 16 April as the result of any appeal, in the case of the first appellant, as a condition of the suspension of payment and, in the case of the second appellant, as a condition of the continuation of

the stay of execution, they shall pay simple interest to the respondent on the amount of that judgment from 16 April 1999 until satisfaction at the rate of 18% per annum.

4. The appellants are to file and serve any amended notice of appeal within 21 days of 9 August 1999.

5. The respondent is to file and serve any amended notice of appeal within 21 days of 9 August 1999.

6. Any respondent's notice is to be filed and served within 7 days of service of the appellants' amended notice of appeal.

7. The appellants' and respondent's appeals relating to the assessment of damages (herein called "the appeal") are consolidated.

8. The appellants to have the carriage of the appeal.

9. The hearing of the appeal is peremptorily fixed for the November 1999 sittings of this Court.

10. Both sides must use their best endeavours to have the appeal ready for hearing at the November sittings.

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11. The appeal is to be listed for mention at the next call-over day (28 October 1999).

12. The respondent has liberty to apply for dismissal of the appellants' appeal for want of prosecution if the appeal is not ready for hearing at the November sittings, unless that is for reasons beyond the appellants' control.

13. The record is to be prepared in two parts. Part I (to be available by 3 September 1999) is to contain all relevant documents except the material in Part II. Part II (to be available by 24 September 1999) is to contain the transcript of the Judge's note of the proceedings and the evidence given orally.

14. For submissions the following timetable shall apply:

By 1 October 1999 - appellants to file and serve submissions in support of their appeal.

By 18 October 1999 - respondent to file and serve submissions

(a) in reply to appellants', and

(b) in support of its appeal, and any respondent's notice

By 27 October 1999 - appellants to file and serve submissions in reply to respondent's submissions under (b) above.

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15. The non-availability, for any reason, of the record or any part thereof shall not excuse compliance with the timetable set out in para.14.

16. Both sides may apply to a single Judge of this Court for any further directions required.

17. Costs to the respondent against the appellants of $500.00 plus any disbursements as fixed by the Registrar.

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Sir Maurice Casey
Justice of Appeal

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Sir Thomas Eichelbaum
Justice of Appeal

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Justice Kenneth R. Handley
Justice of Appeal

Solicitors:

Messrs. Munro Leys and Company, Suva for the Appellants
Messrs. G.P. Shankar and Company, Ba for the Respondent

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