

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

CIVIL APPEAL NO. ABU002 OF 2007
(High Court Civil Case No. HBC 84 of
2006)

BETWEEN: **DAVID PREM SINGH & OTHERS** *Appellants*

AND : **PETER SINGH AND OTHERS** *Respondents*

Hearing: 30 March and 19 April 2007

Ruling : 24 April 2007

Counsel: K Ramrakha for applicants/appellants
R Lal for respondents

RULING

[1] This is an application for a stay of execution pending appeal. The parties are all siblings now living in Australia, New Zealand or the United States of America. The action concerns a property in Suva at 30 Des Voeux Road inherited by all the parties in differing proportions under their mother's will. The applicants owned a total of 70% and the respondents 30%.

[2] The matter first came before Jiten Singh J in the High Court in March 2006 when the applicants filed an originating summons seeking an order for sale of the property and distribution of the proceeds according to the respective shares under the will.

[3] On 28 July 2006 a number of orders were made by the High Court Master by consent:

“1. The defendants do concur with the plaintiffs in selling the property ... by tender, such tender to be advertised three times in the Fiji Times over a period of 14 days, where at close of tenders the Plaintiffs and Defendants solicitors to review the tenders and after agreement award a tender.

2. The sale proceeds from the tender to be paid into the Trust Account of Muaror and Co in the names of the Plaintiffs and Defendants.

3. The proceeds to be held in the account until agreement is reached between the parties.

4. Cost of the sale proceed is to be paid from the sale proceeds.

5. The parties are at liberty to apply for further changes on the division of the proceeds and generally if Hearing may be required.

6. This matter has now been taken off the list.”

[4] The Order was sealed on 16 October 2006.

[5] In compliance with that Order, the property was advertised for tender and, to increase the exposure, an “open home” was conducted. On 23 August 2006 the defendants’ solicitor attended at the office of the applicants’ solicitor and the tenders were opened. The solicitors agreed to a tender by the Taveuni Development Company and the successful tenderer was advised the following day. A deposit of 10% of the agreed sale price was paid into the Trust Account of the applicants’ solicitor by the Taveuni Development Company. On 25 August 2006, the solicitor for the applicants wrote to the defendants’ solicitor advising not accept the tender because the applicants were not satisfied with the amount and wanted to appoint an agent to obtain a better price.

[6] The respondents' solicitor replied that the orders had been by consent and had been complied with in respect of acceptance of tenders. It was pointed out that it was the applicants who had brought the action in the High Court and the respondents had co-operated because their wish was simply to complete the matter.

[7] Following various attempts by the respondents to ensure compliance with the Order of 28 July 2006, the respondents applied to the court for orders to advance the matter. On 14 December 2006, the solicitors for both parties were present and Jiten Singh J made the following order:

“It is hereby ruled by consent that

1. There were consent orders made by the Master dated 20th July 2006. Those were orders sought by the plaintiffs. The defendants have complied with the Order. Certain steps were taken in conjunction with Plaintiffs. Purchaser has paid deposit. Order that the Deputy Registrar of the High Court of Fiji execute the Sale and Purchase, Land Sales Declarations, transfer and all other relevant documents on behalf of the plaintiffs”

[8] The applicants filed an appeal against that order and applied to Jiten Singh J for a stay. It was refused on 12 February 2007. On 20 March 2007 they similarly applied to this Court.

[9] The decision whether to order a stay is a matter for the discretion of the court and the principles to be applied were set out by this Court in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*; ABU 11/04, 18 March 2005, in which they adopted a passage from McGechan on Procedure.

“On a stay application the court’s task is “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”: *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA), at p 87.

*The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999)*

13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

(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 [1977] 2 NZLR 41 (CA).*

(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."*

[10] In view of the steps already effected, the applicants point out that the only real effect of the stay will be to prevent the transfer from being registered. It appears that the purchaser of the property has already taken possession and there can be no challenge that it is a bona fide purchaser for value.

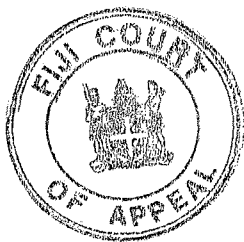
[11] The applicants challenge that, pointing out that the final purchaser is a subsidiary of the successful tenderer. That may become a matter for the appeal but I do not consider it is relevant for this application.

[12] The respondents point out that they have complied with the court Order and all formalities have been completed under it. The stay cannot reverse the events that have already taken place and the registration was not part of the Order being appealed.

[13] I can deal with it shortly. I do not consider that a refusal of the stay will render the appeal, if successful, nugatory. The applicants' wish to halt the proceedings is based on the hope that a better price may be obtained. I fail to see why that

cannot be covered by a monetary award. I do consider refusal of a stay may harm the applicants' interest but any such a prejudice is slight. The respondents have apparently been paid their 30% share but a failure to register the transfer could lead to them being involved in unwanted litigation. The real prejudice is to the innocent third party. I am satisfied that a stay would undoubtedly have a substantial adverse effect on its occupation and use of the property.

- [14] The application is refused. I order that the applicants pay the respondents' costs of \$500.00. This application was unnecessary and the costs should not be taken from the proceeds of sale.



Gordon Ward
PRESIDENT