

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

MISCELLANEOUS CASE NO. 11 OF
2007
(High Court Action No. 305 of 2003)

BETWEEN: RAKESH KUMAR Appellant

AND : HABIB BANK LIMITED Respondent

Hearing: 18 May 2007
Ruling: 22 May 2007

Counsel: D Naidu for applicant
 B Narayan for respondent

RULING

[1] This is an application for a stay pending appeal from a judgment of Finnigan J delivered on 1 November 2006 and sealed on 12 December 2006.

[2] The learned judge commenced his judgment:

“In this action the plaintiff seeks declarations that a registered mortgage be declared null and void and that it is unreasonable and unfair for him to pay back monies advanced under it. He seeks an Order that the Memorandum of Mortgage ‘be re-opened and varied so that the plaintiff does not have to pay-back the monies advanced under the said mortgage’.

In his statement of claim he pleads estoppel against the defendant, unconscionable conduct and unfair trading practice contrary to the Consumer Credit Act 1999 and the Fair Trading Decree 1992 as amended in 1999. He seeks equitable and statutory relief but no relief under the Land Transfer Act, Cap 131.

The defendant counter claims for the balance due under its loan and no challenge was raised to that in the hearing either by statement of defence or by evidence. The plaintiff's case seems to be that he must pay all or nothing. ...

I am aware of no authority for what [the plaintiff] seeks. The action is a plea for an equitable remedy, a cry for justice outside the law."

[3] Having recited the facts and his assessment of the case, he concluded:

"I uphold the closing submission of counsel for the defendant that the debt is not denied, only liability for payment and that there is no basis upon which this debt is the liability of Roxy Motorparts [the principal debtor]. There is no basis for holding it to be the liability of any person other than the plaintiff. All of the claims made by the plaintiff in attempting to have the mortgage set aside are in my view without merit. The claims for the counterclaim have not been denied or even answered by the plaintiff. On the claim, there must be judgment for the defendant and on the counterclaim there must be judgment also for the defendant."

[4] He also discharged an interim stay order made on 18 November 2003.

[5] An application for stay pending appeal was lodged in the High Court on 12 December 2006. It was heard by Connors J and refused on 26 February 2007.

[6] The defendant, relying on the judgment of Finnigan J, advertised a mortgagee sale by tender of the property the subject of the mortgage. A tender has been accepted and a sale and purchase agreement, dated 15 December 2006, completed save only for the consent of the Director of Lands.

[7] The applicant's grounds for a stay are set out in his affidavit:

“9. That I believe that if a stay is not granted ... the appeal will be rendered nugatory as the respondent’s banking licence in Fiji has been revoked therefore it will no longer be able to operate as bankers in Fiji, hence damages will not be an adequate remedy.

10. That I am advised by my solicitors that I have a strong arguable case on legal issues on appeal and have strong chance of success.”

[8] The suggestion that the respondent bank’s licence has been revoked is correct but the added suggestion that it may not in the circumstances be able to pay an award of damages is incorrect. Ms Narayan for the respondent has produced affidavit evidence of a sale and purchase agreement between the respondent bank and the Bank of South Pacific under which it was agreed the latter would “buy the HBL Fiji Assets and Liabilities” and also “assume the conduct of HBL litigation”. The suggestion that the revocation of its licence left the applicant with no real remedy is so inaccurate as to be mischievous.

[9] I am satisfied that, should the applicant succeed on appeal, damages will be an adequate remedy and so I do not consider that the applicant’s right of appeal will be rendered nugatory if a stay is refused.

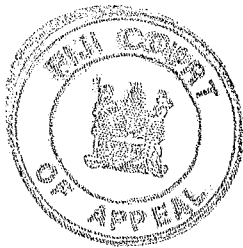
[10] However, although that is the principal ground raised by the applicant, the Court should still consider the matters set out by this court in Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd; Civil Appeal ABU 11/04, 18 March 2005. I have done so but need only refer to two, the merits of the appeal and the novelty and importance of the issues raised and the degree of prejudice to either party.

[11] I have considered the grounds and the amended grounds of appeal and, whilst some may be arguable, they do not appear to have any substantial chance of success.

[12] The prejudice to either party also goes in favour of the respondent. Counsel for the applicant urged various matters which were neither before the High Court nor disclosed by the affidavit evidence before me. I disregard them. On the papers at

present before this Court, the suggestion that the loss of the property cannot be adequately compensated by an award of damages is, as I have stated, less than persuasive. On the other hand, the respondent has been kept out of its remedy since the interim order on 18 November 2003. A stay will extend that further for no good reason.

[13] The application for a stay pending appeal is refused with costs of \$300.00.



Gordon Ward

Gordon Ward
PRESIDENT