

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. ABU0080 OF 2008

*[On Appeal from the High Court of Fiji at Suva,
Civil Action HBC178 of 2005]*

BETWEEN : B.W. HOLDINGS LIMITED *Appellant*
AND : PROPERTIES PACIFIC (FIJI) LIMITED *Respondent*

Before the Honourable Judge of Appeal Mr Justice John E Byrne

Counsel : D. Prasad for the Appellant
S. Lateef for the Respondent

Date of Hearing : 21st January 2008
Date of Ruling : 3rd February 2009 - In Court

R U L I N G

On Application for a Stay of Decision

- [1] The Appellant applies for a Stay of an Ex-tempore Decision of Jitoko J. in the High Court of Suva on the 25th of September 2008 when His Lordship assessed damages pursuant to a breach of Agreement between the Appellant and the Respondent. The Agreement was sealed by Order of the Court on 31st August 2007.
- [2] The facts of the case were not in dispute and are set out in the Respondent's Statement of Claim. Negotiations between the parties resulted in a settlement the terms of which were

filed in Court. To understand the question which arises for my decision I now set out these terms:

- 1) In exchange for Lots 1, 2 and 3 being leasehold property situated at Viria Road, Vatuwaqa covered in LD Ref. No. 7/6/59 which the Defendant had agreed to sell to the Plaintiff through a Sale and Purchase Agreement executed between them on 26 August 2003, the Defendant in lieu thereof agrees to provide the Plaintiff with Lots 1 and 2 which are shaded on the Map attached to these Terms of Settlement whose total area will amount to 1.5 acres after survey, which the Plaintiff now accepts on payment of the purchase price of \$264,000.00 (Two Hundred and Sixty Four Thousand Dollars) as hereinafter stipulated.
- 2) Vacant Possession over Lots 1 and 2 referred to in Clause 1 will be granted to the Plaintiff within 3 months from the date of this Order. Within this time, the Defendant will also have lodged survey plans for the above lots with the relevant authorities, and on possession, provide executed registerable transfer over the said lots to the plaintiff, and shall be kept in escrow until the date of settlement by the plaintiff's solicitor.
- 3) The Defendant will comply with all legal and statutory requirements necessary to acquire

and transfer leasehold title for Lots 1 and 2 to the Plaintiff within 6 months from the date of this Order.

- 4) Upon full satisfaction of all requirements of Clause (2) within the time stipulated herein, the Plaintiff will lodge a sum of \$100,000.00 (One Hundred Thousand Dollars) as a deposit in Diven Prasad Lawyers Trust Account with lodgment receipt issued for the same to be forwarded immediately by the said solicitors to the Plaintiff's solicitor for its record. These funds shall be released to the defendant for completion of works related to Lots 1 and 2, within the stipulated time above.
- 5) Upon issuance of title to the Plaintiff over Lots 1 and 2 as described in Clause (1) herein, within the time stipulated in Clause 3 herein, the Plaintiff will instruct its solicitors to forthwith release the deposit and pay the balance of the purchase price amounting to a total of \$164,000.00 (One Hundred and Sixty Four Thousand Dollars) into the Defendant's Solicitors Trust Account in exchange for an executed and connected instrument of Transfer and original lease.
- 6) Should a party default in complying with any of the obligations vested on it by the foregoing terms of settlement that party will

allow the other party one further period of 30 days to remedy the specific default upon written notice of the default and other outstanding obligations will be extended accordingly.

7) In the event the Defendant does not comply within the period stated in Clause (6) herein the order for Specific Performance sought in the Writ of Summons issued by the Plaintiff in this action shall become effective immediately and as the Defendant has resold the properties stated in the said Writ of Summons, the Plaintiff shall be entitled to damages for the value of the property at the market rate as per independent valuation.

8) The other party will be entitled to seek damages against the party in default to be assessed and fixed by the Court at a date to be assigned by it on application by its solicitors.

9) The parties reserve the right to pursue additional relief accruing to it for breach or non-compliance with the terms of settlement herein.

10) These Terms of Settlement shall become Consent Orders of the Court.

[3] The Judge was satisfied from the evidence that the Appellant had not performed his part of the Agreement for reasons

which he gave on page 4 of his Decision. The Judge stated that two valuations had been tendered to the Court by the Respondent. These were by two reputable firms namely Fairview Valuations and Rolle Associates. The Fair View Valuation was for \$975,000.00 and the Rolle Valuation was for \$990,000.00. The Judge then said:

“The issue before the Court is not whether proper valuation had been done. I have no doubt that valuation had been carried out in accordance with proper valuation practice. Both valuers assured the Court that their valuations are based on comparison with similar industrial blocks or sub-divisions around Suva and Lami areas.

[4] The Judge said that he was satisfied that the valuations produced to the Court were independent and carried out in accordance with normal valuers' practice. He said he accepted the valuation of the two independent valuers and assessed damage of \$718,500.00 being the addition of -

i)	Fair View Valuations	-	\$ 975,000.00
ii)	Rolle Valuation	-	<u>\$ 990,000.00</u>
		-	\$1,965,000.00
iii)	Less 50%	-	\$ 982,500.00
iv)	Less the initial purchase price-	<u>\$</u>	<u>264,000.00</u>
			<u>\$ 718,500.00</u>

[5] The Grounds of Appeal

Ten grounds of appeal were filed originally but on the 29th of October 2008 the Appellant added three others one of which, 11(B) reads as follows:

“That the learned trial Judge failed to give any or any plausible reasons as to why the valuations were accepted. The learned trial Judge further erred in failing to give reasons as to the rejection of the Defendant’s evidence and, in particular, of its valuers failing to ascribe any or any reasons as to why that evidence was not accepted or, if rejected, as to the reasons thereof”.

[6] Ground 11(C) reads:

“That the learned trial Judge erred in the acceptance of the valuations by failing to enquire and to have determined that the valuations were given according to the principles and practices of what a prudent valuation method would require in the circumstances of the valuation so presented and accepted by him in his reasons for judgment”.

[7] The Submissions

The parties handed over written submissions and some photocopies of various authorities on the question of Stay and the question of when reasons should be given in a judgment. I was assured that it is really this latter ground on which the Appellant proposes to rely so that it becomes necessary first to consider whether the learned Judge did give reasons for accepting the Respondent's claim and whether, arguably, he did not state the evidence given before him accurately.

[8] In my opinion the matter before me also raises the question of the desirability of Extempore Judgments. Years ago Sir Owen Dixon, former Chief Justice of the High Court of Australia, was asked at a talk he gave to law students at Melbourne University whether he approved of Extempore Judgments, because it was a practice then and is still in England particularly, for Judges to give Extempore Judgments after the conclusion of the evidence in a case.

[9] Sir Owen Dixon replied that generally he thought it preferable for a Judge, having heard the evidence in a case, to reserve his decision, if only for a brief time, to enable him to consider the evidence again and decide whether or not any opinions which he had formed during the hearing should be revised.

[10] I have noticed since I returned to Fiji that more and more Extempore Judgments or rulings are being given and I agree with Sir Owen Dixon that it is quite possible when a Judge gives an Extempore Decision or Judgment immediately after

the evidence and submissions conclude that he will overlook some important parts of the evidence. In this case the Appellant contends that this is precisely what Jitoko J. did.

[11] The Need for Reasons

In R. -v- Trade & Industry Secretary Ex-parte Lonhro PLC [1969] 1WLR 525 at 540 Lord Keith of Kinkel said:

“The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the Court draws the inference that he had no rational reason for his decision”.

[12] In Beale -v- Government Insurance Office of New South Wales [1997] NSWLR 430 at Meagher J A said at pp 441-442:

“Perhaps the primary reason for an obligation on Courts to provide reasons is the fact that a party seeking an appeal may generally only appeal where the trial judge has made an error of law. The absence of reasons or insufficient reasons may not allow an appeal Court to determine whether the trial Judge’s verdict was or was not based on an error of law or an appealable error. However, the provision of full reasons has other benefits.

The provision of reasons has an educative effect: it exposes the trial Judge or Magistrate to review and criticism and it facilitates and encourages consistency in decisions. The educative effect does not stop with judges but extends to other lawyers, to government and to the public. Decisions of Courts usually influence the way in which society acts and it is trite to point out that it is better to understand why one should act in a particular way”.

- [13] Later on the same page the Judge quoted with approval the remarks of Samuels J A in Mifsud -v- Campbell [1991] 31 NSWLR 725 at 728:

“... it is an incident of judicial duty for the Judge to consider all the evidence in the case. It is plainly unnecessary for a Judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case”.

- [14] In this case I have the benefit of the Judge’s notes of the evidence. In cross-examination the first witness for the Plaintiff stated that he was aware that the Defendant

(Appellant) has not made any effort to develop the land. He was then asked in re-examination:

“Did you engage professional valuers?” He replied:
“Yes”.

The first of these valuers said his valuation was subject to proper leases being issued. In cross-examination the witness said that the valuation in this case had been done on developed lots. He was then asked:

“If a lot is underdeveloped can you ascertain the proper value?” The witness replied:

“Yes, but subject to development”.

The last witness called by the Respondent was also a registered valuer. He was asked the basis of his valuation and he said it was based on industrial 1½ acres. It was also based on similar type of land in and around Suva and also subject to development. He also said in re-examination that his valuation took into account that the land would be developed later. The Appellant then began his case and in examination-in-chief the witness Tulsi Ram stated that one could not put a value on the land in question because it was not developed. In cross-examination the witness said that he could not comment on the valuation given by the two witnesses for the Respondent.

- [15] The second witness for the Respondent said in examination-in-chief that he could only give a valuation of land to which there was title and was then asked, "*Can any valuer put a value on the land*"? The witness replied, "*Only subject to title*". He said in cross-examination that a valuation could be made subject to a lease but this was not common practice.
- [16] At page 2 of its submissions, paragraph 8 the Appellant alleges that the learned trial Judge failed to identify what was an issue by indicating that:

"The issue before the Court is whether proper valuation had been done. I have no doubt that valuation had been carried out in accordance with proper valuation practice. Both valuers assured the Court that their valuations are based on comparison with similar industrial block or sub-divisions around Suva and Lami areas".

- [17] I make two comments on that passage. The first is that it is not quoted correctly. The learned Judge said that the issue before the Court was not whether proper valuation had been done and not as quoted by the Appellant. In paragraph 9 the Appellant then says this was not the evidence and was, with respect directly against the evidence in so far as counsel for the Defendant challenged the valuations and received admissions from the valuers that there were no comparable valuations in respect of this particular piece of land. I cannot

accept that submission. On page 3 the Judge's handwritten notes say:

"The valuation was based on Industrial properties in Lami and Suva of 1½ acres sited in comparable areas valued at \$400,000.00 to \$900,000.00".

[18] To my mind it is clear that although the learned Judge did not refer specifically to the evidence of the Appellant's valuers, he had noted it and as he said in his decision accepted the evidence of the Respondent's valuers. It would probably have been preferable for the Judge to have referred directly to the evidence called by the Appellant but I am satisfied that there is nothing in his Decision to suggest that he had not considered this but rather, having considered it, preferred the evidence of the Respondent's witnesses. Again, had the Judge reserved his Decision he may have considered it desirable, as I think he should have, to have stated his reasons for rejecting the evidence of the Appellant's witnesses. His failure to do so however does not in my view constitute sufficient reason for granting a Stay. I think here the remark of Lord Keith of Kinkel *supra* is relevant. I am not satisfied that in this case all the known facts and circumstances point overwhelmingly in favour of a different decision. In other words I am satisfied that arguably the learned Judge was correct in reaching his decision. The final decision must be left to the Full Court.

[19] Should a Stay be Granted?

The law on granting a Stay of execution is well settled and the principles governing this application are fully set out in the notes to Order 59 Rule 13/1 of the Supreme Court Practice 1985, Volume I, P.842 where it is said, inter alia, that “the Court does not make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled pending an appeal (The Annot Lyle [1886] 11P.D.114 at p.116). In Powerflex Services Proprietary Ltd. & Ors -v- Data Access Corporation [1996] 137 ALR 498, a full Bench of the Federal Court of Australia confirmed that there was no need to demonstrate special circumstances before granting a Stay but that it was:

“Sufficient that the applicant for the Stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour”. In this case the Respondent submits that the Appellant does not satisfy the criteria for granting a Stay because:

- a) *The grounds of appeal have no merit and they are based on findings of fact by the learned trial Judge which the Court of Appeal will not interfere with;*
- b) *The appeal will not in any way be rendered nugatory by the refusal*

of a Stay in the event the Appellant is successful since the Appellant can be recompensed by return of the Judgment sum paid to the Respondent which is a substantial company;

c) The overall balance of convenience and justice lies in favour of the Respondent being entitled to the fruits of its Judgment immediately.

[20] **Merits of the Appeal**

It would be wrong for me to consider the merits of the Grounds of Appeal at this time but it seems to me that they are based not on any serious question of law or on some misunderstanding of law or of the evidence before the learned trial Judge but mainly on findings of facts made by the trial Judge. It is well settled law that an Appellate Court will seldom interfere with findings of fact by a trial Judge having seen and heard the evidence of witnesses. (see: **Benmax -v- Austin Motor Co. Ltd.**, [1955] AC370.)

[21] The decision of the trial Judge was based on Clauses 7 and 8 of the Consent Order which I have set out earlier in this Ruling. Clearly the Judge assessed damages under Clause 8 by which they were to be assessed upon the value of the property at the market rate after independent valuation. I cannot find any issue raised by the Appellant in the High

Court challenging the evidence of the two independent reputable valuers on their assessment of the market value of the property. The Judge said:

"I have no doubt that valuation had been carried out in accordance with proper valuation practice".

[22] This is clearly a finding of fact by the learned trial Judge based on his evaluation of the evidence and in my view cannot be challenged by way of an appeal.

[23] **The Need for Good Faith**

An Applicant for a Stay must satisfy the Court that he is acting in good faith in making the application. In this case the Appellant facilitated settlement of the action with the Respondent on the footing that it would provide the property in question to the Respondent and that if it failed to do so, the Respondent would immediately be entitled to an order for specific performance of the contract by seeking damages for the value of the property (since the Appellant has resold the property) at the market rate to be assessed by the Court after independent valuation. I note that when the Respondent exercised its right to assessment of damages by the Court on the agreed method of valuation of the property by independent valuers, the Appellant opposed this in Court on the ground that no valuation of the property could be carried out since the land had not been subdivided and there was no lease of it.

[24] Arguably this shows bad faith on behalf of the Appellant.

[25] **Will the Appeal be Rendered Nugatory?**

In my Judgment the Appellant has not shown any good reason in its Affidavit in Support of the Motion to show how the appeal will be rendered nugatory if a Stay of execution is not granted. One of the directors of the Appellant, Ugesh Narayan states in an Affidavit sworn on the 22nd of October 2008 that the Appellant is a substantial Company with assets in excess of \$11,000,000.00 and numerous contracts in train valued at about \$17,000,000.00. He then appears to contradict himself by saying that if the Respondent tries to enforce payment of the Judgment sum this may lead to the Appellant losing all its assets, contracts, employees and be forced to shut down. Therefore the refusal of a Stay will prejudice his company entirely.

[26] In paragraph 11 of the Affidavit he says that the effect of a refusal of a Stay will have the possible result of acting as a catalyst to prematurely trigger facilities which would not be able to be realized but for the Judgment. I simply cannot understand this last sentence.

[27] I fail to see how a company which claims to be worth millions of dollars will be so adversely affected by having to pay an amount of less than three quarters of a million dollars if its claims to the value of its assets are correct. In fact the

Appellant concedes this because in paragraph 9 of his Affidavit of the 27th of October Mr Narayan says that his company is in a position to satisfy the Judgment sum in the event of the appeal failing. These are not Mr Narayan's exact words but I consider this to be the only meaning of them in paragraph 9. Mr Narayan also says that the Plaintiff is also a substantial company. I therefore deduce that the Respondent will be able to adequately compensate the Appellant by repaying the Judgment sum in the event the Appellant is successful in its appeal.

[28] I note also that the learned Judge commented on the bonafides of the application for Stay made to him on the 9th of December 2008. He said at page 3 of his decision:

"The bonafides of this application as to the determination of the issue of valuation are questionable. Contrary to the Applicant's submission, the Court had considered not only the two independent valuations submitted by the Respondent but also the evidence of the Applicant's two expert witnesses as well as the cross-examinations by both Counsel".

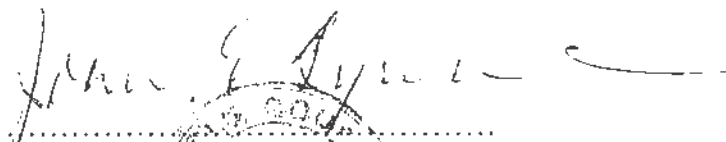
[29] Then on page 5 of his Decision he says:

"It is quite proper for the Court therefore to reach the conclusion it did after having listened to the expert evidence from both sides. The valuation was properly done in

accordance with acceptable, normal valuation practice. The decision may in the words of Counsel for the Applicant, had been arrived at with "admirable brevity", but it was reached after careful deliberation".

[30] I have no reason to doubt what the Judge said there. I also agree with his conclusion that the final consideration, the overall balance of convenience, favours the Respondent.

[31] The Judge concluded that he was satisfied that there was no merit in the application. I am also satisfied on the material and in the light of the further submissions made to me by both parties that the application for a Stay must be dismissed and I so order. I also order the Appellant to pay the Respondent its costs of \$1,000.00 of this application.


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[John E. Byrne]
JUDGE

At Suva

3rd February 2009