

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO.HBC 26 of 2016L

BETWEEN : **PRAVEEN LATA** aka **PARMEEN LATA** of Wailailai, Ba,
Unemployed.

PLAINTIFF

A N D : **SUN INSURANCE COMPANY LIMITED** a limited liability
company duly incorporated under CompaniesAct (Cap 247,
Laws of Fiji) having its registered office at 1st Floor, Harbour
Front Building, Rodwell Road, Suva, Fiji.

DEFENDANT

Appearances : Mr A. K. Narayan for defendant/applicant
Mr N. Padarath for plaintiff/respondent

Date of Hearing : 03 February 2017

Date of Oral Ruling : 24 March 2017

Date of written Reasons: 28 April 2017

R U L I N G

[On Stay of Proceedings]

Introduction

[01] On 24 March 2017, I announced my decision to grant a stay of proceedings, with written reasons to follow. These are my reasons for granting a stay of proceedings.

[02] This is an application seeking a stay of proceedings.

[03] By summons filed on 28 July 2017 (*the application*), the defendant/applicant (hereinafter ‘the defendant’) seeks the following orders:

1. *There be a stay of proceedings in this matter pending the determination of appeal in Civil Appeal No. ABU11 of 2016 to the Fiji Court of Appeal;*
2. *That there be an interim stay granted until the determination of this application;*
3. *That the costs of this application be costs in the course.*

[04] The application is made pursuant to the High Court Rules (“HCR”) and the inherent jurisdiction of the court.

[05] The Defendant has filed an Affidavit of Arvendra Kumar in support of the application.

[06] Opposing the application, the plaintiff/respondent (hereinafter ‘the plaintiff’) filed an affidavit of Praveen Lata aka ParmeenLata.

[07] At the hearing, both parties advanced their respective oral submissions and additionally, they also filed their written submissions.

Background

[08] The brief background facts are as follows:

[09] In Lautoka Civil Action No.224/06L (‘Substantive Claim’), the Plaintiff filed a Writ of Summons and Statement of Claim in the tort action against Mohammed Nasib and Sheik AmzadSaheb (the first and second Defendants respectively therein) for injuries she had sustained on

2 June 2006 as a result of a collision with the motor vehicle registration number BW132 (hereinafter referred to as "the vehicle"). The vehicle was insured by the first Defendant in the substantive proceedings under a Third Party Policy pursuant to the Motor Vehicle (Third Party Insurance) Act (hereinafter referred to as "the policy") covering the period within which the accident occurred subject to the terms and conditions of the policy. The policy was issued to the vehicle owner Mr Mohammed Nasib (i.e. the first Defendant in the substantive action).

[10] Following investigations conducted by Sun Insurance (hereinafter referred to as "Sun") it was revealed that the vehicle had been sold by the first Defendant to one Sheik Amzad Saheb on 2 November, 2005 who was the son of the second Defendant in the substantive action.

[11] Sun then notified the Defendants in the substantive action that it was not required either to provide an indemnity to them or to satisfy any judgment the Plaintiff may obtain against them. Sun's then solicitors issued the said notice to the Defendants of the tort action on 15 June 2010.

[12] The Defendants in the substantive action then appeared in person and undertook the defence. The trial proceeded and judgment was delivered by Justice Tuilevuka on 5 August 2015 holding, amongst other things, that the vehicle belonged to the first Defendant and that both the first and second Defendants were jointly and severally liable for the Plaintiff's injuries. It is against that finding and other related findings in the judgment that has now prompted the Plaintiff to bring the current action against Sun seeking a declaration that Sun is liable to indemnify the Defendant in view of the policy.

- [13] Sun was never a party to the substantive action and therefore was unaware of the judgment. Sun only became aware of the judgment when the Plaintiffs'solicitors directly wrote to it on 13 October 2015.
- [14] Being aggrieved by the judgment, Sun has filed an application in the Court of Appeal seeking leave Sun for to be added as an interested party and to appeal out of time. That application is pending in the Court of Appeal.
- [15] The Plaintiff filed the current action against Sun by way of originating summons for enforcement of the judgment sum ordered in the substantive action. The Defendant applies to the court for stay of the current proceedings.

The Law

- [16] The Defendant relies upon Rule 26 (3) and Rule 34 of the Court of Appeal Rules ("CAR") and the inherent jurisdiction of the court.

- [17] Rule 26 (3) 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."

- [18] Rule 34 provides that:

'34.- (1) Except so far as the court below or the Court of Appeal may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no immediate act or proceeding shall be invalidated by an appeal.

(2) ...' (Emphasis provided)

The Principles on Stay Pending Appeal

[19] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Waters (Fiji) Ltd** (2005) FJCA 13, ABU 0011.2004s (18 March 2005), the Fiji Court of Appeal highlighted the principles of stay pending appeal as follows:

"a. Whether, if no stay is granted, the applicants right of appeal will be rendered nugatory (this is not determinative).

b. Whether the successful party will be injuriously affected by the stay.

c. The bona fide 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 proceedings

g. The overall balance of convenience and the status quo"

[20] The Supreme Court in **Ward v Chandra** (2011) FJSC 8 re-affirmed the above principles.

[21] The relevant questions to be asked when considering an application for stay of execution include:

(a) If a stay is refused, what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?

(See **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 1915, LTL 18/12/2001)

The Grounds of Appeal

[22] The Defendant intends to appeal the judgment in the substantive action to the Court of Appeal on the following grounds:

1. *The Learned Trial Judge erred in law and in fact in formulating and determining the issue of liability of the Second Respondent [1st Defendant] for vicarious liability for the negligent driving of the Third Respondent [2nd Defendant] on the fact of ownership of the vehicle registration number BW 132 [paragraph 70 of the Judgment] and failed to consider or to properly consider that:*

- [i] any presumption of vicarious liability based on ownership was rebutted by the evidence that there was unconditional sale of the truck by exchange;*
- [ii] evidence that the Third Respondent [2nd Defendant] was in possession of the truck;*
- [iii] the Second Respondent [1st Defendant] had parted with the possession of the truck; and/or*
- [iv] the absence of any evidence to show that the Third Respondent [2nd Defendant] was driving for any purpose of the Second Respondent [1st Defendant].*

2. *The Learned Trial Judge's finding that the Second Respondent [1st Defendant] was vicariously liable for the negligence of the Third Respondent [2nd Defendant] was otherwise contrary to the principles of various liability in the absence of a master/servant or any agency relationship between the Second Respondent [1st Defendant] and Third Respondent [2nd Defendant].*

3. *The Learned Trial Judge erred in law and in fact in finding that vicarious liability arose between the Second Respondent [1stDefendant] and Third Respondent [Second Defendant] as the transfer, which had been given to the Third Respondent [Second Defendant] by the Second Respondent [1stDefendant], had not been registered and the vehicle registration number BW 132 remained in the records of the Land Transport Authority in the name of the Second Respondent [1st Defendant] when registration was not conclusive as to ownership of the said vehicle.*
4. *The Learned Trial judge erred in law and in fact in failing to hold that the evidence established (in the absence of any rebuttals) that a sale had in fact been concluded without any reservation of passing of title in the vehicle registration number BW 132 to the Third Respondent [2nd Defendant] and that no issue of vicarious liability of the Second Respondent [1st Defendant] arose or could be found nor was there any other legal basis in view of the sale to ground liability against the Second Respondent [1st Defendant].*
5. *The Learned Trial Judge failed to make any finding that the Third Respondent was driving with the permission or authority of the second Respondent.*

Discussion and Decision

[23] The Applicant (Sun) seeks an order staying the proceedings in this action originated by the Respondent with a view to enforce the judgment of 5 August 2015 delivered in favour of the Respondent in the substantive action (HBC 224/2006).

[24] Sun was not a party to the substantive action. That is why the Respondent initiates this action by way of originating summons and seeks determination on the following questions:

- [i] *Whether the Defendant is required to compensate the Plaintiff (and therefore indemnify Mohammed Nasib and Sheik AmzadSaheb) for the full judgment sum in the High Court Civil Action NO. 244 of 2006L under the Motor Vehicles (Third Party Insurance) Act (Cap 177 Laws of Fiji).*

[ii] *Whether the Defendant can refuse to compensate the Plaintiff on the mere allegation that the First Defendant in Civil Action No. 244 of 2006L had sold the vehicle registration no. BW 132 when the High Court has made a finding that the insured was the owner of the vehicle at the time of the accident.*

[iii] *Whether the Defendant can refuse to compensate the Plaintiff if they have not obtained a declaration as required by the Motor Vehicles (Third Party Insurance) Act (cap 177, Laws of Fiji).*

[25] Based on the above questions, the respondent seeks the following relief:

[i] *A declaration that the Defendant is required to indemnify the insured being Mohammed Nasib and Sheik Amzad Saheb and compensate the Plaintiff for the full judgment sum in High Court Civil Action No. 244 of 2006/L.*

[ii] *A declaration that the Defendant cannot refuse to compensate the Plaintiff.*

[iii] *The Defendant be ordered to pay the full sum ordered in the High Court Lautoka Civil Action No. 244 of 2006/L against Mohammed Nasib and Sheik Amzad Saheb to the Plaintiff.*

[26] According to Sun, it became aware of the judgment when the Plaintiff's solicitors directly wrote to it on 13 October 2015. Being aggrieved by the judgment, Sun decided to appeal the judgment and filed an application in the Court of Appeal seeking leave to appeal the judgment. Leave to appeal is necessitated by the fact that Sun was not a party to the substantive action. Otherwise, Sun has no direct right of appeal. Apparently, Sun's appeal hinges on its leave to appeal application. Leave to appeal, in my opinion, is a part of appeal process, especially where no direct right of appeal, as in this case, is available. I would therefore

consider this stay application on the basis that an appeal is pending in the Court of Appeal. I reject the contention advanced by the Respondent that currently there is no appeal on foot.

- [27] I now consider the relevant principles applicable to an application to stay of execution or proceedings pending determination of the appeal.

Whether the appeal will be rendered nugatory if a stay is refused

- [28] The pertinent question to be asked is that if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?

- [29] The impugned judgment in the substantive action orders the Defendants to pay a sum of \$88,059.00 with interest to the Plaintiff. The first defendant had current third party policy obtained from Sun for the vehicle. The first Defendant had transferred vehicle to the second Defendant. However, this transfer was not registered with the Land Transport Authority. As a result, the court made a finding that there was no such transfer and that the first Defendant is vicariously liable for the negligence of the second Defendant. The Applicant is attempting to challenge these findings in the Court of Appeal. The Respondent demands indemnification by virtue of the policy in the meantime.

- [30] There would be risks of the Applicant being able to recover what has been paid to the Respondent if a stay is refused and the leave to appeal and the appeal succeeds, and the judgment is enforced in the meantime. The reason being that the Respondent in her affidavit states that she is unemployed and has no source of income and there is no evidence that the Respondent has assets which could secure Sun's interest. On the

other hand, the Applicant is an Insurance company with assets worth in excess of \$70m (See para 20 and annexure "AK-9" of the applicant's affidavit). If a stay is granted and the appeal fails, there are no risks that the Respondent will be unable to enforce the judgment. The Respondent will be able to enforce the judgment with interest under the Insurance Law Reform Act 1996 and no prejudice will be caused to the Respondent by the delay.

[31] As I have found that the appeal will be stifled if a stay is not granted, other factors relevant to a stay of proceedings attract no consideration.

Conclusion

[32] For all these reasons, I conclude that there should be a stay of proceedings pending the determination of the leave to appeal application or pending the determination of the appeal if leave to appeal is granted by the Fiji Court of Appeal. I would order costs of these proceedings shall be in the cause.

The Outcome

1. There will be a stay of proceedings pending the determination of the leave to appeal application or pending the determination of the appeal if leave is granted by the Fiji Court of Appeal.
2. Costs of these proceedings shall be in the cause.

..... *M.H. Mohamed Ajmeer* 28/4/17

M.H. Mohamed Ajmeer

JUDGE

**At Lautoka
28 April 2017**

