IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 159/2018

BETWEEN		**MUSKET COVE RESORTS LIMITED** a limited company having its registered office at Dick's Place, Molololailai Island, Nadi **PLAINTIFF/RESPONDENT**
AND		**FRANK YEATES** of Molololailai Island **FIRST DEFENDANT/APPELLANT**
AND		**RESHMI NAICKER** of Molololailai Island **SECOND DEFENDANT/APPELLANT**
APPEARANCES	:	Mr C Young for the Plaintiff Mr O'Driscoll for the First & Second Defendants
DATE OF HEARING	:	12th October 2020
DATE OF JUDGMENT	:	4th December 2020

DECISION

1. By a Notice of Appeal dated 11 August 2020 the first and second appellants appealed against a decision of the Master of the High Court at Lautoka dated 24 July 2020 in which he made orders in favour of the plaintiff/respondent (hereinafter called *the plaintiff*):

   i. pursuant to s169 Land Transfer Act 1971 ordering the appellants to vacate the property comprised in Lease No. 233046 (being part of Certificate of Title No. 17202 Lot 2 on DP 5633 on Molololailai island (off Nadi) containing an area of 33.7843 hectares upon which there are 18 resort type concrete bures including the ones occupied by the appellants (NB: it is not completely clear from the judgment, or the other material filed, whether the property occupied by the appellants is all or only a part of the property comprised in the lease, and whether that property comprises all, or only some of the 18 resort style bures referred to. Hopefully the parties have a clearer view of this than they have given the court).

   ii. costs of $3000.00 to be paid within a month of the decision.

2. On 20 August 2020 the appellants, through their solicitors, applied by Notice of Motion for a stay of execution of the orders made by the Master, pending the hearing and decision on the appeal. This application was supported by an affidavit filed by Aliti Tinai, a secretary of the firm of solicitors representing the appellants, who says that the enforcement of the Master's orders will irreparably damage the appellants (although she does not say how), whereas – she believes – the plaintiff

will not be prejudiced by the grant of a stay. Although no objection has been taken to the affidavit by Ms Tinai it would have been helpful if she had included at least some information about how she says the appellants will be damaged/harmed by the enforcement of the orders, particularly since it seems that the appellants are not themselves in occupation of the property, but have allowed it to be occupied by others (on an unspecified basis). If ultimately the appeal is successful the appellants should be able to resume whatever arrangements they have for occupation of the property. The fact that Ms Tinai apparently believes that enforcement will damage the appellants does not persuade me (in the absence of evidence of how this damage will arise) that her belief is something upon which the Court should act.

3. Also before the Court for decision is an application filed on 5th October 2020 by the plaintiff/respondent for an order pursuant to O.45, r.2 for leave to issue a Writ of Possession to enforce the orders made by the Master on 24 July. This order is sought against the first and second defendants/appellants, and against Semisi Tavuto and Naivote Kubukawa, who are said to be in occupation (apparently with the permission of the defendants) of the property in respect of which the court order was made. This application is supported by an affidavit of service of the application, showing that although it has not been served on the named appellants (because they are thought to be overseas), it was served personally on Semisi Tavuto, and that a copy of the application and affidavit in support was posted on the bure thought to be occupied by Mr Kubukawa, but not otherwise served on him.

4. This decision then relates to the application by the appellants for a stay of enforcement pending appeal, and the application by the plaintiff for leave to issue a warrant for possession against those in occupation of the property.

Preliminary issue

5. The plaintiff's counsel, Mr Young, raised as a preliminary issue, in response to the appellants application for a stay, the argument that the appellant's appeal is deemed to have lapsed pursuant to Order 59, rule 17(3) High Court Rules because of the failure of the appellants to file a timely summons for directions and a hearing date. The rule relied on by the plaintiff (Order 59 deals generally with the jurisdiction of Masters, including appeals against a decision of a Master) states:

> ***Procedure after filing appeal (O.59, r.17)***
> *17(1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service.*
> *(2) The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.*
> *(3) If this rule is not complied with, the appeal is deemed to have been abandoned.*

6. Since the appeal is dated 11 August 2020, and there was unquestionably no summons filed by the appellants under Rule 17(2) at the time of the hearing (more than 21 days after the filing of the appeal), the plaintiff argues that the appeal is deemed to have been abandoned, and there is therefore no basis upon which the

court should make an order to stay the enforcement of the judgment of 24 July 2020.

7. Although the operation and effect of O.59, r.17 is clear, it is equally clear that the appellant's failure to comply with the rule was inadvertent, that no delay has occurred and the plaintiff is in no way prejudiced because of the failure to seek directions (particularly if a stay is refused). In his decision in **Sarojni v Native Land Trust Board** [2016] FJHC 1018; HBC230.2000 (4 November 2016) Ajmeer J noted that the court has an *unfettered discretion to reinstate an appeal deemed abandoned* under this rule. The purpose of the rule is, as noted by Wati J in **Vishal Kumar v Avikash Pillay** [2014] FJHC (HBA 4/2013 14 February 2014), to ensure that appellants do not have the opportunity to simply 'park' their cases by appealing. That is not a risk in the present case, where the respondent is entitled – unless a stay is granted – to enforce the judgment in its favour.

8. However, in a very recent decision of Mansoor J in **Verma v Young** [2020] FJHC 438 the High Court dealt with the same preliminary issue that arises in this case, also in the context of an appeal against a judgment of a Master under s169 Land Transfer Act 1971. In that decision the learned judge concluded that the appeal was deemed to have been abandoned. It should be noted however that the decision was reached in circumstances where counsel for the appellant had failed to take the opportunity given by the court to file submissions or an application on the issue, and the court was no doubt left with the clear impression that the appeal had indeed been lodged only for the purpose of 'parking' the case. In that situation the decision reached by the court was understandable, if not inevitable. But that is not the situation here, and the learned judge in **Verma** does not, because he was not asked to, consider whether the time for making the application referred to in O.59, r.17 should be extended to save the appeal from deemed abandonment. I also note that Mansoor J was prepared to excuse the absence of a timely application for directions in terms of rule 17(2) because the appeal had been called for mention before the court within the period of 21 days. Obviously, he took the view, as I do, that the rule does not require slavish enforcement without regard to the objective that the rule is intended to address.

9. In all the circumstances, rather than require the parties to go to the expense and trouble of filing and responding to a formal application for reinstatement of the appeal I am willing, in exercise of the courts discretion under O.2, r.1 to extend the time for compliance, and to make consequential orders arising from that, to treat the appellants' submissions on this issue as an application for reinstatement, which is granted subject to the appellants making the necessary application for directions or a hearing at the next mention date as directed in the orders made at the conclusion of this judgment.

Law

10. In **Natural Waters of Viti Ltd v Chrystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13 (described as a 'seminal decision' on the topic by Gunaratne JA in **Ahmed v Kumar**

[2020] FJCA 89) the Court of Appeal adopted the following criteria as applicable to an application for stay of execution pending appeal:

> *(a) Whether, if no stay is granted, the applicant's 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 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.*

11. The decision of Dawson J in the High Court of Australia in **Federal Commissioner of Taxation v Myer Emporium Ltd (No.1)** (1986) 160 CLR 220 explained how these principles are applied:

> *It is well established by authority that the discretion which [the court has] to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.*
> *Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.*

12. In relation to the plaintiff's application for leave to issue a Writ of Possession O.45, r.2 provides:

> ***Enforcement of judgment for possession of land (O.45, r.2)***
> *2(1) Subject to the provisions of these Rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say–*
> *(a) writ of possession;*
> *(b) in a case in which rule 4 applies, an order of committal;*
> *(c) in such a case, writ of sequestration.*
> *(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 88 applies.*
> *(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.*
> *(4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.*

Analysis

13. This proceeding relates to the possession of land the head lease of which (under a lease registered pursuant to the Land Transfer Act) is unquestionably owned by the plaintiff. It is apparently not in dispute that the land was sub-leased by the plaintiff (or its predecessor in title) in 1990 for a term of 150 years to a company Pine Limited

pursuant to an arrangement involving a substantial payment by the first named appellant to the sub-lessor, which is said to have represented payment of rent in advance for the whole term of the lease. Pine Limited is a company that is not controlled by the appellants, but which – the appellants say – is obliged to hold the sub-lease from the plaintiff in trust for them. The legitimacy of that arrangement is now in dispute, although it was apparently acceptable to the plaintiff at the time it was entered into. It seems that those in control of Pine Limited have fallen out with the appellants, and in circumstances that have not been fully canvassed in this case, but are the subject of separate proceedings in the High Court at Lautoka in HBC 236/2018 between the same parties and Pine Limited, the lease to Pine Limited was terminated by the plaintiff for non- payment of rent - an action which Pine Limited did not resist. If, as the appellants say, the rent was indeed paid in full in advance, termination for non-payment of rent does not seem legitimate, nevertheless the plaintiff now seeks by its application in these proceedings to give effect to its termination of the lease and to recover possession of the property from the appellants.

14. It will be apparent even from this brief – and no doubt incomplete– summary of what the case is about, that there is great potential for dispute, both factual and legal. In argument before the Master the parties focussed on the issue of the legitimacy of any arrangement in 1990 between the plaintiff, the appellants and Pine Limited, in particular the absence of evidence showing that the arrangements were known to and had the consent of the Minister of Lands under section 6 of the Lands Sales Act 1974. Although the alleged absence of ministerial consent was raised only in the plaintiff's affidavits in reply to the appellants' response to the plaintiff's application, and has not yet been properly examined, and in spite of the fact that the arrangement reached in 1990 was apparently adhered to by all parties for approximately 28 years, and that separate proceedings are still under way in relation to the re-entry and status of the lease, the Court nevertheless concluded that there was no arguable defence to the plaintiff's application for vacant possession.

15. These are matters of course that do not arise here in any substantial way, except in relation to any question about the substance and bona fides of the appeal, and need to await the appeal proper to be considered, but I am not sure that I accept the proposition by the Master in paragraph 32 of his judgment that:

> *The protection of indefeasible title from illegal occupation is the high priority of [the Torrens] registration system. This protection is not only against any illegal occupant of a particular land or property, but also is extended against any person who otherwise entered any property by a legal authority, but continued to occupy that property even after cessation of such authority or permission. That is why the section 169 (b) and (c) allow the lessor to bring the summons for eviction even the rental for a month is due or notice to quit has been given or term of tenancy has expired. This shows that even a tenant, who legally entered any property, becomes an illegal occupant if the rental falls in arrears or notice to quit is served or term expired. At this point, the law does not allow considering any dispute between the lessor and lessee in relation to the tenancy agreement, but the court should grant order for vacant possession unless the full rental and cost paid before the hearing as provided in proviso of section 172 of the Land Transfer Act (Cap 131). The rationale is that, the moment any lessee fails to pay the rental or has been served with notice to quit or his tern has expired, he or she*

should be evicted and the indefeasible title of the lessor, which is the high priority of the registration system, should be upheld.

16. With respect, the idea that proper recognition of the Torrens system of title registration requires applications under s.169 Land Transfer Act to be readily granted, is putting the cart before the horse. It is because the Torrens system guarantees (in most cases) unimpeachable/indefeasible title to the registered proprietor that summary applications for possession such as that under s.169 become possible. The process established under that section does not provide a registered proprietor immunity from a challenge to its title, or – in the case of a lease such as the present – ensure that the lessor's termination cannot be challenged. Rather, ss.169-172 provide an efficient process for the owner of a registered interest to obtain vacant possession when there is no defence to the claim, or when any challenge to title or to termination of a right of occupation has insufficient merit to warrant further examination. Section 172 directs that if a defendant *proves a right to the possession of the land* the Court *shall dismiss the summons with costs against the proprietor* (my emphasis), but I don't read the section as obliging the court to grant the proprietor's application in every situation short of proof by the defendant of the right to possession. Sections 171 and 172 cover the obvious cases, where there is either no defence (s.171), or a proven defence (s.172). The sections do not expressly deal with all those intermediate situations where a defendant raises an arguable case that requires further evidence, argument or analysis. In those cases the Court should usually dismiss the application under s.169 and leave the plaintiff to make its application for possession via a process more suitable to determine contentious issues. The first proviso in section 172 makes this clear – a dismissal of the application is without prejudice to the right of the plaintiff to commence any other action it is entitled to. The second proviso gives statutory recognition to the ancient principle that where re-entry/termination of a lease has occurred for non-payment of rent, a tenant paying all arrears and costs is entitled in equity to have its lease continue (see **Daalman v Oosterdijk** [1973] NZLR 717), and the presence of this proviso shows that the process is not all about the primacy of registration, but is concerned only with the right to possession (something that is not necessarily a challenge to the registered proprietor's title).

17. The present case is an illustration of this. It does not involve a challenge to the plaintiffs registered title. What the defendant is saying is that it has a right to possession (under the lease granted by the plaintiff or its predecessors), and because of that the plaintiff is not entitled to immediate possession of the property. The answer to this dispute lies in deciding the validity of the lease to Pine Limited, and of the plaintiff's termination of that lease. I do not immediately see how these questions can be answered without some participation from Pine Limited – which has not occurred in this proceeding.

18. However, as I have observed, these issues do not require decision in the present applications, and must await the hearing of the appeal. The above reflections are made in the absence of proper argument, and should not be understood as a decision on the matters that may arise in the appeal. They do however suggest that the appeal cannot be dismissed as having no prospect of success.

19. Addressing the points that are more immediately relevant to the applications before me, I am not persuaded, In the absence of evidence showing how the appellants will be impacted by the enforcement of the judgment of 24 July 2020. that the refusal of a stay of enforcement will render any appeal nugatory. Such evidence as has been provided suggests that the appellants are not in actual possession of the property, and there is no evidence as to the basis upon which Messrs Tuvuto and Kubukawa are in occupation. There is no evidence either of whether or how being temporarily (assuming that the appeal is ultimately successful) denied occupation of the property will injure the appellants. This is not a situation where the enforcement of the judgment of 24 July 2020 will be irreversible. If the appeal is successful, or if in the proceedings in HBC 236/2018 the appellants are able to establish some basis for possession, they will be entitled to resume their occupation of the property. There is no suggestion that the property is to be sold, but even if there were, the appellants could presumably protect their claimed interest by registration of a caveat.

20. With regard to the other criteria listed in paragraph 11 above, there is either no evidence on those issues (for example the impact on third parties), or no argument has been addressed to me on those matters. I therefore assume that the parties do not regard them as relevant to a decision on this application.

21. On the plaintiff's application for leave to issue a warrant for possession I note that section 173 of the Land Transfer Act means that a writ of possession would not be required in this case except for the fact that there are third parties, rather than the appellants themselves, in possession of the property. Messrs Tuvuto and Kubukawa are third parties, and their presence on the property requires that they be served in such manner as the Court considers is *sufficient to enable [them] to apply to the Court for any relief to which [they] may be entitled* (Order 45, rule 2(3) – see paragraph 13 above). The affidavit of Ashok Chand sworn on 9 October 2020 and filed by the plaintiff in support of its application for leave shows that the application – showing 12 October as the mention date - was served personally on Mr Tuvuto on 5 October, and – in the absence of Mr Kubukawa – was posted on the door of his bure on the same date. Neither Mr Tuvuto or Mr Kubukawa appeared when the application was first called on 12 October, and counsel for the appellants – who presumably know something of the basis upon which these gentlemen are in occupation of the property - did not seek to intervene on their behalf. In the absence of submissions to the contrary I am willing to accept that Messrs Tuvuto and Kubukawa have now had 'sufficient' notice to enable them to apply to the court for any relief they may be entitled to. In the absence of an application for relief the plaintiff is entitled to the benefit of the judgment it has obtained.

Conclusion

22. Accordingly, and for the reasons given, I make the following orders:

    i. The time for the appellant to file a summons seeking directions under O.59, r.17(3) is extended to the next date on which this file is called for mention.

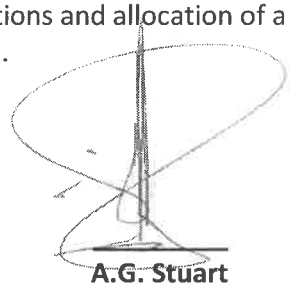
ii. The appellants' application for a stay of enforcement pending appeal is dismissed.

iii. The plaintiff's application for leave to issue a writ of possession is granted.

iv. The appeal is adjourned for mention before me on 12 February 2021 at 10.30am for directions and allocation of a hearing date for the appeal.

v. Costs are reserved.

HIGH COURT OF FIJI
LAUTOKA



A.G. Stuart
Judge

At Lautoka this 4th day of December, 2020

SOLICITORS:
Young & Associates, Lautoka for the plaintiff/respondent
O'Driscoll & Co, Suva for the appellants/defendants