IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 275 of 2013

BETWEEN

JOSEPH LUM KON WISE of Lot 3 Kaunitoni Street,

Delainavesi, Lami, Businessman.

DEFENDANT/APPELLANT

AND

FIJI DEVELOPMENT BANK a body corporate having its head office at

360 Victoria Parade, Suva, Fiji

PLAINTIFF/RESPONDENT

Counsel : Ms. Jackson L. for the Defendant/Appellant

Mr. Nand S. for the Plaintiff/Respondent

Date of Hearing : 31st July 2020

Date of Judgment : 27th August 2020

RULING

(On the application for stay pending appeal)

[1] The respondent bank instituted these proceedings to recover $195,956.41 with interest accruing thereon at the rate of 9.5% per annum with effect from 1st April 2014 until the full payment and costs. After hearing the parties and their witnesses the court entered judgment for the respondent as prayed for in the amended statement of claim with costs of $10,000.00.

[2] The defendant being aggrieved with the decision of the court appealed to the Court of appeal and made this application for stay the execution of the judgment pending the outcome of the appeal.

[3] The grounds of appeal relied on by the appellant are as follows:

1. The Learned Judge erred in law in fact when he failed to hold that the Respondent's Amended Statement of Clam filed on 23 July 2019 against the Appellant was defective and contrary to common law and Order 81 Rule 1 of the High Court Riles 1988.

2. The Learned Judge erred in law and fact when he relied on clause 3.3 of a "guarantee bond" which not referred to in the Respondent's pleading nor formally tendered by the Plaintiff as evidence at the trial.

3. The Learned Judge erred in law and fact when he held that the Appellant was personally liable to pay the Respondent's claim when the Loan Agreement dated 22 February 2007 was entered into between the

Respondent and Wai Pac Company, through its partners and not by the Appellant in his personally capacity.

4. The Learned Judge erred in fact and in law when h concluded at paragraph 24 that the interest rate charged by the Respondent was 9.5% per annum when the Respondent had failed to produce any evidence to support this.

5. The Learned Judge erred in law and fact when he held that the Appellant was to pay the Respondent the sum of $195,956.41 with interest at the rate of 9.5% per annum when the Respondent had failed to tender any evidence to show that:

   (a) the alleged balance due to the Respondent under the Loan Agreement dated 22 February 2007 was $195,956.41; or
   (b) the Respondent was entitled to charge or did in fact charged interest at the rate of 9.5% per annum under the Loan Agreement dated 22 February 2007.

6. The Learned Judge erred in law and fact when he failed to conclude that the Respondent's duty to take reasonable care of MV Shogun while it was in its possession included general maintenance to preserve its condition and value.

7. The Learned Judge erred in law and in fact when he disregarded the overwhelming evidence adduced at the trial that the Respondent's failure to take reasonable care of MV Shogan caused the significant deterioration of the vessel.

8. The Leaned Judge erred in fact and in law when he misinterpreted the Appellant's counterclaim as one demanding damages for the Respondent's failure to "repair" the seized vessel when the Appellant's claim clearly stated his claim to be based on the Respondent's failure to take reasonable care of the vessel by effecting general maintenance on the seized vessel.

9. The Learned Judge erred in law and fact when he held that the Respondent had "done its best to dispose the vessel (sic) the maximum price" when there was no evidence tendered by the Respondent to show that Respondent had properly discharged its duty to take to obtain a proper price by adequately and sufficiently advertising the sale of the vessel MV Shogun and all its fishing equipment, refrigeration appliances and navigational equipment.

10. The Learned Judge erred in law when he summarily assessed the costs in the sum of $10,000.00 as the same is harsh and excessive in all circumstances of the case.

[4] The law relating to stay of execution of the judgment pending appeal has been discussed in the following decisions:

In **Natural Waters of Viti Ltd v Chrystal Clear Mineral Waters (Fiji) Ltd** ABU 0011.04s on the question whether stay of the judgment pending the appeal should be granted or not:

(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 applicant 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.

In **Federal Commissioner of Taxation v Myer Emporium Ltd** (No. 1)(1986) 160 CLR 220; 4 April 1986 where it was observed:

It is well established by authority that the discretion which it confers 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.

Per Dawson J. - Whilst I was initially inclined to accept the taxpayer's submission, upon reflection I think that there is sufficient force in the argument advanced by the commissioner to cast doubt upon the power of this court to grant relief upon appeal as the taxpayer contends. I do not think that in these proceedings I have to go further than that; I do not have to conclude the issue. It is sufficient to say that in my view there is a real risk that if the judgment made by the Supreme Court is not stayed, the Commissioner may be prejudiced by the payment pursuant to a statutory obligation, of a substantial amount of money which will prove to be irrevocable notwithstanding the conclusion of the appeal in his favour.

In the case of **Linotype - Hell Finance Ltd v Baker** (1992) 4 All ER 887 it was held:

Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

[5] In **March v Bank of Hawaii** [2000] FJLawRp 6; [2000] 1 FLR 230 (10 October 2000) referring to the decision in Linotype Hell Finance Ltd v Baker [1992] 4 All ER 887 C.A., it was held:

> When an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success".

[6] One of the grounds averred in the affidavit in support is that this court in its judgment has relied on the guarantee bond which was not pleaded or tendered in evidence at the trial. The Court did not rely on the guarantee bond but it cited the guarantee bond in addition to the statutory provision contained in Order 81 rule one of the High Court Rules 1988. Further, the guarantee bond is part and parcel of the loan agreement and the appellant at the pre-trial conference has admitted obtaining the loan, he was in default in payment and also the mortgage. Therefore, court was not in error in relying on the guarantee bond.

[7] Order 81 rule 1 of the High Court Rules 1988 provides:

> Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

[8] Therefore with or without the guarantee bond the respondent was entitled to sue the defendant without making other partners as parties to the proceedings. A partnership has no legal or corporate personality. Each and every partner is liable to pay the loan jointly and severally.

[9] However, this issue was not raised at the trial. The question here is whether the appellant and the other two were running a business or it was a legally established partnership. There was no evidence of partnership registration nor was there a partnership agreement was tendered by the appellant. The loan agreement was not with a company or partnership but it was signed by three people including the respondent and it only says trading as Wai Pac Company. There is also no evidence the vessel was owned by all three of them. The insurance was only in the name of the appellant.

[10] The learned counsel for the appellant submitted that the court has ordered to pay 9.5% interest without any evidence being adduced. The appellant has admitted that he had agreed to repay the said loan to the respondent in instalments with interest at the rate of 12% per annum on the first $325,000.00 and 17.5% per annum on any excess

together with bank fees upon disbursement of the loan. The respondent only claimed in the amended writ of summons 9.5% interest. I do not think there was no requirement to give reasons for awarding less interest which is favourable to the appellant.

[11] The other issue raised by the appellant is that the court ignored overwhelming evidence that the plaintiff failed to take reasonable care of the vessel. As I have said in my judgment the vehicle was seized by the respondent to sell and recover the loan. There is no duty cast on the respondent to repair or maintain it. What it was expected to do is to sell it as early as possible and the respondent had made every attempt to sell it without any delay. In fact the bank employed a person to look after the vehicle who was residing in it.

[12] The defendant in this regard relied on the decision in **Funworld Centre (Fiji) Ltd v Bank of Baroda** [2019] FJHC 914; HBC224.2016 (23 September 2019) where it was held:

> A mortgagee who goes into possession becomes the manager of the charged property. He thereby assumes a duty to take reasonable care of the property. This requires him to be active in protecting and exploiting the security, maximising the return, but with taking undue risks (see: Halsbury's Laws of England 5th Ed Mortgage (Vol. 77 (2016), para 429).

[13] What is reasonable care has not been explained by the appellant. In that case certain items seized by the mortgagor were missing. No such incident happened in the case. All what happened in this case is with the elapse of time the value of the vessel decreased.

[14] The other issue raised by the appellant is that the court has ordered $10,000.00 costs without giving reasons. The court is entitled to award costs assessed summarily. On the other hand even if the Court of Appeal reduces the costs awarded it will be not a ground to stay the execution of the judgment pending appeal.

[15] The court will have consider next whether the appellant will be ruined if the stay pending appeal is not granted as held in **Linotype – Hell Finance Ltd v Baker** (supra). The respondent in this matter is a state bank and the appellant is a businessman. If

the judgment is executed pending appeal the appellant will have no difficulty what so ever to recover any monies paid in satisfaction of the judgment appealed against with costs in the event Court of appeal awards costs.

[16] For the above reasons the court makes the following orders.

ORDERS

1. The application of the appellant for stay of execution of the judgment pending the determination of the appeal is refused.
2. I will not make orders as to costs of this application.

HIGH COURT OF FIJI SUVA

Lyone Seneviratne

JUDGE

27th August 2020