IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 125 of 2015

BETWEEN

CARPENTERS FIJI LIMITED trading as **CARPENTERS FINANCE** a company duly incorporated under the Companies Act having its registered address at Robertson Road, Suva.

PLAINTIFF

AND

GYANESHWAR SANEHI RUP trading as **GYANESHWAR & COMPANY** having its place of business at 28 Bouwalu Street, Lautoka.

DEFENDANT

Counsel : Mr. Narayan E. with Ms. S. Lal for Plaintiff
Mr. A. Dayal for Defendant

Dates of Hearing : 19th & 20th September 2022

Date of Ruling : 06th October 2022

JUDGMENT

[1] The plaintiff filed the writ of summons and the statement of claim seeking the following reliefs:

(i) Judgment in the sum of $71,731.95;

(ii) Interest on the judgment sum at the rate of 18% per annum until full payment but limited to the jurisdiction of the court;

(iii) Damages;

(iv) Costs; and

(v) Any further remedies this court deems appropriate.

[2] The court heard the matter and made the following orders:

1. The defendant is ordered to pay the plaintiff $71,731.95 with interest pursuant to Law Reforms (Miscellaneous Provisions)(Death and Interest) Act.
2. The defendant's counter claim is struck out.
3. The defendant is also order to pay the plaintiff $7500.00 as costs.

[3] Being aggrieved by the judgment of this court the defendant appealed to the Court of Appeal on the following grounds:

1. The Learned trial Judge erred in law when he did not consider that the Notice of Repossession was issued by the respondent when the Bill of Sale had lapsed and that the vehicle was in custody of the respondent since December 2011.

2. That Learned trial Judge erred in law when he did not consider section 78 of the Consumer Credit Act in respect of the claim made by the

respondent that the respondent should have sold the chattel and thereafter claim outstanding loan amount.

3. The Learned trial Judge erred in law and in fact by not considering that the vehicle in 2011 was valued at $30,000.00 and in 2015 it was valued $4,000.00 by the respondent and that no independent valuation report was submitted in court to determine its valuation when the matter went to trial and vehicle still remained in possession of the respondent.

4. The Learned trial Judge erred in law and in fact when he made a finding that the vehicle had no value when the evidence tendered in court speaks otherwise.

5. The Learned trial Judge erred in law and fact by not considering the fact that the brand new vehicle was not of merchantable quality under the Sale of Goods Act as ignition starting system problem started at 2500kms and it had persisted after being driven above 60,000 kms.

6. The Learned trial Judge erred in law and fact by not taking into consideration that the vehicle value diminished whilst in possession of the respondent as it was not properly taken care of by the respondent.

7. The Learned trial Judge erred in the interpretation and application of the law in the case of *Henderson v Mars Motors Limited Reference No. MVD 361/2018 [2018] NZMVDT (20TH November 2018)* which defined the acceptable quality f goods, defects drawn to attention of consumer before acceptances of goods, defect being failure of goods to comply with guarantee of acceptable quality and court to take reasonable consumer perspective for factors on an objective view.

8. The Learned trial Judge erred in law and in fact in not considering the following: -

8.1 The Contract Document had annual interest rate fixed at 13% and in default
notice and rate interest to be levied was 1.75% per month whereas the respondent had levied 2.2% per month as default interest breaching the essential terms of the contract document.

8.2 That the respondent had possession of the vehicle and it could have repaired and charged the costs to the account of the appellant;

8.3 That the respondent had possession of the vehicle since December 2011 and had all the opportunities to sell the vehicle to recover part of its debts when the value was established by them to be $30,000.00;

8.4 That the respondent still had possession of the vehicle till to date and that the vehicle's value has depreciated since 2011;

8.5 That the respondent already had possession of the vehicle since December 2011 and that the Notice of Repossession was only issued when Bill of Sale had lapsed in 2014;

8.6 That the respondent had covered minor part – power steering pump under warranty and refused to cover the major parts under warranty;

8.7 That the appellant did not make payments when the respondent only covered warranty for minor parts and refused to cover major parts under its warranty;

8.8 That there were no independent reports available before the Honourable Court that the non-service of vehicle resulted in the damage of the engine and the appellant did not get an opportunity to cross examine the author of the report submitted by the respondent;

9. The Learned trial Judge erred in law and in fact by not considering the evidence in light of Public Interest and in not taking into consideration sections 70, 71 and 72 of the Consumer Credit Act.

10. That the Learned trial Judge erred in law and in fact by not taking into consideration section 78 of the Consumer Credit Act that the vehicle ought to have been sold by the respondent before making a claim against the appellant.

11. That the Learned trial Judge erred in law and in fact by not taking into consideration section 79 of the Consumer Credit Act and the respondent had not complied with the same and damages should have been in favour of the appellant as the appellant had delivered the vehicle to the respondent's possession in December 2011.

12. The Learned trial Judge erred in law in dismissing the counter claim of the appellant when he had given sworn evidence that he had to hire and purchase another vehicle as replacement to this vehicle.

13. Such further grounds of appeal as may be added upon receipt of the record.

[4] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** *(Supra)* the Court of Appeal held that in an application of stay pending appeal the court should consider the following;

a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).

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.

In the same judgment the Court of Appeal made the following observations;

Many of the factors to which we have referred relate to the overall balance of convenience and the status quo. When regard is had to all of these factors, we are satisfied that the interests of justice are against the grant of a stay. This is particularly so in view of our comment above that the application for leave to appeal is unlikely to succeed. We can find no factors that come anywhere near outweighing this consideration -indeed most of the factors are to the contrary.

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.

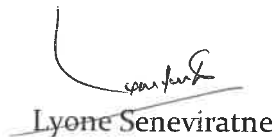
[5] At the hearing of the application for stay pending appeal both parties admitted that the judgment sum has already been deposited by the defendant in an interest-bearing account to the credit of the case. The plaintiff has not yet made an application to have the money released to it. On the other hand, the defendant in his affidavit in support of the application for stay pending appeal

has not stated any ground supporting his application. In paragraph 9 of the affidavit, he states that if the stay is not granted his appeal would be rendered nugatory and defeat is appeal purpose. However, he does not say that the plaintiff does not have the capacity to pay that amount if the Court of Appeal decides the appeal in his favour.

[6] For these reasons the application for stay pending appeal must fail.

ORDERS

1. The application for stay pending appeal is refused.
2. The defendant is ordered to pay the plaintiff $2,000.00 as costs of this application.



Lyone Seneviratne

JUDGE

06th October 2023