

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 62 OF 2022

BETWEEN : COURIER DOCUMENT PARCEL SERVICES LIMITED
Plaintiff/Respondent

AND : BIRONDA FIJI LIMITED
Defendant/Applicant

Counsel : Mr N Sharma for the Applicant
Ms S Saheb for the Respondent

Hearing : 13 June 2025
Judgment : 13 June 2025

EXTEMPORE JUDGMENT

- [1] Bironda Fiji Ltd (**the Applicant**) appeals from my decision of 11 April 2025 and seeks a stay of the judgement until the determination of the appeal by the Court of Appeal. Courier Document Parcel Services Ltd (**the Respondent**) opposes any stay.
- [2] The proceeding concerns a sale of a lease over iTaukei land. The Respondent sought to purchase a share of the lease held by the Applicant. A Sale and Purchase Agreement was signed. The Respondent paid a deposit of \$90,000 to the Applicant. Both parties claimed that the other had breached the agreement.

- [3] In my judgement, I found that the Sale and Purchase Agreement was null and void because there had been no provision made to obtain consent from the iTaukei Land Trust Board as is required under s 12 of the iTaukei Land Trust Act 1940. I ordered that the deposit be refunded to the Respondent.
- [4] The Applicant has appealed to the Court of Appeal and seeks a stay of the order to pay the amount of \$90,000 to the Respondent.

Relevant provisions and principles

- [5] The starting point is O.45, r.10 which affords the court a discretion to grant a stay.
- [6] The principles on which the discretion is exercised is set out in the decision of *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13 (18 March 2005) wherein the Court of Appeal stated:

On a stay application, the Court's task is 'carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful': Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA) , at p 87.

- [7] The Court of Appeal identified '*the following non-comprehensive list of factors conventionally taken into account by a Court*' as being relevant to the court's exercise of its discretion:
- i. Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory.
 - ii. Whether the successful party will be injuriously affected by the stay.
 - iii. The bona fides of the applicants as to the prosecution of the appeal.
 - iv. The effect on third parties.

- v. The novelty and importance of questions involved.
- vi. The public interest in the proceeding.
- vii. The overall balance of convenience and the status quo.

[8] The following passage is also helpful, as provided by the Court of Appeal in *Murthy v Patel* [2000] FJCA 17 (5 May 2000), where Thompson JA stated

A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie, the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal, and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favor.

Decision

- [9] The Applicant advances several grounds in support of its application for stay which I summarise as follows:
- i. Failure to grant a stay will render the appeal negatory. The Applicant claims that the Respondent will serve a statutory demand on it and pursue winding up proceedings. If successful, its liquidation will prevent the Applicant pursuing its appeal.
 - ii. The Respondent is not injuriously affected if a stay is granted. I agree.
 - iii. The appeal is brought in good faith. I accept this.

- iv. The appeal involves a novel or important question. I fail to see such an issue in this case. The substantive issue turns on the failure of the parties to make provision for the consent of the Board – this issue has been considered on many occasions including by Fiji’s highest court. The Applicant also takes issue with my decision to allow the Plaintiff to call one of its witnesses, who was overseas, by video conference. The Applicant takes issue with the timing of the application being on the day of trial. This issue is neither novel nor important. Nor am I convinced that the Applicant was prejudiced as the Applicant was aware that the witness was being called in advance of the trial date.
- v. There is a public interest aspect to this appeal. I fail to see any.
- vi. The balance of convenience lies in favour of granting the stay.

[10] The question here is whether the need to preserve the position should the Applicant succeed with its appeal outweighs the Respondent’s right to the fruits of its judgment. As I see it, the two main issues for the Court to consider concerns the potential winding up of the Applicant and the balance of convenience.

[11] The Applicant argues that if a stay is not granted the Respondent will pursue winding up proceedings against it which will ultimately result in the Applicant being unable to continue with its appeal. There are many unknowns associated with this argument, ie whether the Respondent will serve a statutory demand, whether the Applicant can successfully apply to set it aside, and whether the Respondent can successfully obtain winding up orders where there is a pending appeal over the disputed debt.

[12] The Applicant has not produced any evidence with its application for a stay to suggest that it is insolvent or unable to pay its debts. Nor was any evidence led to this effect during the trial. Indeed, the evidence provided at trial indicated that the Applicant owned a hotel business in Sigatoka as well as the property that is the subject of this proceeding. Further, the main shareholder of the company appears to have a business operating in Australia. In short, there is no evidential foundation to support the

argument that the Applicant is at risk of being wound up and thus prevented from pursuing the appeal, thus rendering the appeal nugatory.

- [13] A further word on the matter in the event that the Respondent is considering serving a statutory demand with a view to winding up the Applicant. Unless there is an evidential foundation for the Respondent to believe that the Applicant is insolvent, it should not be pursuing such a course to simply recover a debt. The winding up proceedings are not a debt collecting vehicle. The Court of Appeal made this clear in *Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd* [2024] FJCA (26 July 2024). Heath JA stated at [41]:

...a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttable presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment. Should that occur, any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers)¹ may be at risk of a substantial award of costs to mark the abuse of process.

- [14] I am satisfied that the balance of convenience does not lie with granting the stay. The Respondent is entitled to the fruits of its judgment. The Applicant will not be thwarted should he succeed with his appeal. There is no evidence that the Respondent is unable to repay the amount of \$90,000 if the Court of Appeal orders the same. There is simply no valid basis to grant a stay to the Applicant.

Orders

- [15] Accordingly, my orders are as follows:

- i. The application for a stay is dismissed.

¹ *Harley v McDonald* [2002] 1 NZLR 1 (PC) at paras [45]– [47].

- ii. The Respondent is entitled to costs which I summarily assess in the amount of \$500.00 to be paid by the Applicant within 28 days.



D.K.L. Tuiqereqere
JUDGE

Solicitors:

Parshotam Lawyers for the Plaintiff/Respondent

Kumar Legal for the Defendant/Applicant