

**RAVIND MILLAN LAL and 3 Ors v DEO KUMAR and 6 Ors (HBC213 of 1994)**

HIGH COURT — CIVIL JURISDICTION

5

PHILLIPS J

12 December 2007, 25 January 2008

10 **Transport — damages — collision — application to stay judgment — breach of duty of care — failure to fulfil statutory obligations as to motor vehicle (third party) insurance — balance of convenience.**

The Respondent obtained a favourable judgment award for damages against the Applicant Land Transportation Authority of Fiji. The Applicant filed a motion that sought an order to stay the judgment pending an appeal. It was alleged that there was a real risk that the Respondent would not be in a position to repay the sum if the Applicant's appeal was successful. At issue was which of the two parties would suffer greater harm from a grant or refusal of an interim stay pending a determination of an appeal on merits.

15

20 **Held** — The Applicant's appeal would be rendered nugatory if a stay would not be granted. Under the circumstances, the Applicant would suffer greater prejudice (if the application was refused) than the Respondent (if it was granted). The balance of convenience demanded that the status quo be maintained. The court would not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he was entitled pending appeal. Judgment stayed pending appeal.

25

Application granted.

**Cases referred to**

*Annot Lyle* (1886) 11 PD 114; *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* Civ App No ABU0011 of 2004S; [2005] FJCA 13; *Wilson v Church* (1879) 11 Ch D 576, considered.

30

*Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* (1993) 7 PRNZ 200; *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48; *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85; *Monk v Bartram* (1891) 1 QB 346; *Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41, cited.

35

*M. Prakash* for the Plaintiff/Respondents

*V. Qoro* for the sixth Defendant/Applicant

40 [1] **Phillips J.** The sixth Defendant, Land Transport Authority of Fiji (LTA) by motion filed on 30 October 2007 seeks an order to stay the decision of Connors J of the 22 June 2007. The application is supported by the affidavits of William Wong sworn on 4 December 2007 and Isikeli Lagilagi sworn on 30 October 2007.

45 [2] The application is strongly opposed. The Plaintiff chose not to file an answering affidavit.

**Background**

50 [3] The Plaintiff's writ was issued on 8 August 1994. The claim was originally for damages for death and personal injuries after a collision between two motor vehicles on 17 August 1991. Judgment in liability was entered against the first three Defendants, being the driver and owners of the other vehicle, on

30 November 1998. Subsequently the Attorney-General was joined in respect of a claim against the police and the LTA was joined in a respect of a claim against its predecessor, the Transport Control Board. The matter came up for hearing before Finnigan J on 17 July 2006. The LTA had taken no steps in the action and  
 5 Finnigan J granted the Plaintiffs application and entered judgment in liability by default against the LTA. The hearing proceeded before Finnigan J as a hearing of assessment of personal injury damages primarily against the first, second and third Defendants. Judgment against the first, second and third Defendants was delivered on 22 August 2006. In total the Plaintiffs were awarded compensation  
 10 in the sum of \$884,272.

[4] In a further ruling on 26 January 2007, his Lordship granted leave to the Plaintiffs to amend their statement of claim against the LTA.

[5] The amended statement of claim was heard by Connors J in May 2007. In his judgment of 22 June 2007, Connors J found inter alia that the LTA owed to  
 15 the Plaintiff a duty of care and that it breached that duty in failing to fulfill its statutory obligations as to the Motor Vehicle (Third Party) Insurance at the time that the motor vehicle registration was effected or renewed. His Lordship found that the LTA by virtue of its breach of statutory duty steps into the shoes of the  
 20 third party insurer and was accordingly liable to the Plaintiff for damages determined by Finnigan J in his judgment of 22 August 2006 and entered judgment against the LTA for the amounts as determined by Finnigan J. The LTA have filed an appeal against the judgment of Connors J.

### The relevant principles on a stay application

25 [6] The relevant principle for consideration on applications for stay pending appeal were recently enunciated by the Fiji Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*.<sup>1</sup> The court held as follows:

30 The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, *McGechan on Procedure* (2005):

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 at 87.

35 The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 at 50 and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* (1993) 7 PRNZ 200:

- 40 (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See *Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41.
- (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.
- 45 (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.

[7] I comment briefly on such of those factors as may be relevant in the present case.

50

---

1. Civ App No ABU 0011 of 2004S; [2005] FJCA 13 at 3.

**Whether, if no stay is granted, the Applicants right of appeal will be rendered nugatory**

[8] The Court of Appeal held that this was not determinative. Mr Wong contends in his affidavit that “there is a real risk that the Plaintiffs would not be  
5 in a position to repay the said sum if LTA’s appeal is successful next year”. The statement is based on his belief that the Plaintiffs do not have the means to repay such a large amount of money. He believes that the Plaintiffs are unemployed. The source of his belief was not disclosed. Mr Lal who sued on his own behalf and on behalf of his infant children did not file an answering affidavit, a course  
10 which he was entitled to take especially given deficiencies in the application. In the course of the hearing, I indicated to LTA’s counsel that the evidence adduced by LTA to show that the Plaintiff would be unable to repay monies paid out should the appeal be successful, was inadequate. In a stay application, the onus of establishing inability to repay, lies with the Applicant. It has been held that this  
15 burden will not be discharged unless the Applicant “condescends to particulars”.<sup>2</sup> The LTA has not disclosed the requisite particulars. Given the significant compensation award this factor is important. Although the information made available for assessment of this factor is wholly insufficient, there is material available on record which I can draw on to assist in determining whether the  
20 LTA’s concerns have any merit.

[9] In the judgment on quantum of damages delivered on 22 August 2006, Finnigan J found that Mr Lal, “had been reduced to virtual total dependency”, as a result of the injuries he sustained in the motor vehicle accident giving rise to the proceedings.<sup>3</sup> Finnigan J found that Mr Lal’s brother-in-law, Mr V Sharma,  
25 had to pay for his hospital and transport expenses for him and his children’s school fees. He found that Mr Lal has mental deficiencies and cannot even speak very clearly or think as he used to. Given these findings, which I take judicial notice of, I have concluded that LTA would suffer possible irreparable financial loss if monies were paid out. Given Mr Lal’s state of dependency, the risk of  
30 irrecovery is not remote. It is a very real risk which I must take into account. In these circumstances I have upheld the Applicants submission that if no stay is granted, the LTA’s right of appeal will be rendered nugatory. The risk that LTA cannot be reinstated to its previous position if monies are paid out is far too obvious to ignore.  
35

**Whether the successful party will be injuriously affected by the stay**

[10] Obviously the Plaintiffs will be affected by being kept out of the proceeds of judgment. There has been significant delay in finalisation of the claim, which is likely to be aggravated by the pending appeal.

**40 The bona fides of the Applicants as to the prosecution of the appeal**

[11] Although it is not desirable to assess the merits of the grounds of appeal, prima facie it is apparent that the appeal is clearly arguable and is neither wholly unmeritorious nor wholly unlikely to proceed.

**45 The effect on third parties**

[12] The LTA contends that if a stay is not granted, its finances would be impacted to the extent of affecting its operations and meeting its administrative and financial commitments. A substantial detrimental impact on the sustainability

50

2. *Peter Elsworth v Yanuca Island Ltd* HBC 0157.97L.

3. Page 10 of the judgment.

of it's operations would result, it claims. Again the evidentiary basis of this contention has not been sufficiently traversed. Nevertheless I take into account the important public function the LTA is mandated to undertake. A significant impact on it's operational costs may affect its functions and that is also a factor  
 5 I take into consideration when balancing the competing interests of the parties.

### **The novelty and importance of questions involved**

[13] In my view, the points of law involved in the appeal are not only novel but are also of general public importance. Of critical significance is the issue  
 10 surrounding the finding that as a consequence of a breach of statutory duty, the LTA steps into the shoes of the third party insurer and is liable to a Plaintiff for damages arising in an action grounded in negligence. A further issue of importance is the question of joinder and amendment well after expiry of the limitation period.

### **The overall balance of convenience and status quo**

[14] The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits. A balancing of conflicting considerations is required,  
 20 between the underlying principle that a litigant is entitled to the fruits of his judgment forthwith and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory.<sup>4</sup> The loss or prejudice that each party alleges it is likely to suffer has been comprehensively addressed in the written submissions filed. I have no hesitation in concluding that  
 25 if the application was refused and the appeal is successful, the LTA will suffer considerable irreparable loss if the judgment sum or even a portion of it was paid out to the Plaintiffs. There is an appreciable risk, given the impecuniosity of the Plaintiff that monies paid out would be irrecoverable. On the other hand, if the appeal is unsuccessful, LTA has the resources to pay the judgment sum.

### **Conclusion**

[15] In my view, the LTA will suffer greater prejudice (if the application is refused) than the Plaintiff (if it is granted). The balance of convenience demands that the status quo be maintained. I am satisfied that the Applicant's appeal will  
 35 be rendered nugatory or substantially so if a stay is not granted. In arriving at this conclusion, I have borne in mind what was said in *Wilson v Church* (1879) 11 Ch D 576 (CA) quoted by Sir Moti Tikaram in *Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji*.<sup>5</sup>

40 Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such orders for staying proceedings under a judgment appealed from, as would prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances.

45 I have also borne in mind the general rule that the court does not "make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is entitled" pending appeal. (*Annot Lyle* (1886) 11 PD 114 at 116, CA; *Monk v Bartram* (1891) 1 QB 346.)

50 4. *Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji* (Court of Appeal, Tikaram RJA, 9 August 1991, unreported, at 87).

5. Court of Appeal, Tikaram RJA, 9 August 1991, unreported, at 88.

[16] The delay in filing this application will result in a cost order against LTA.

**Orders**

- 5 (1) The judgment of 22 June 2007 is stayed pending appeal.  
(2) The Applicant is to pay costs of the application assessed in sum of \$500.

*Application granted.*

10

15

20

25

30

35

40

45

50