

ISLAND ENTERPRISES LTD -v- REEF PACIFIC TRADING LTD

High Court of Solomon Islands

(Ward C.J.)

Civil Case No. 119 of 1990

Hearing: 5 December 1991

Judgment: 12 December 1991

J. C. Corrin for the Plaintiff

R. Teutao for the Defendant

WARD CJ: There are two matters before me. First, by summons dated 28 November 1991, the defendant seeks an order that the writ of fieri facias issued on 6th August be stayed and execution of the judgment obtained on 4th July against the defendant be stayed pending appeal. Second, an application to me as a judge of the Court of Appeal for an order extending the time to 31st January 1992 for appealing the orders of the High Court made on 9th May 1991 and 2nd July 1991.

The defendant bases his argument for staying the writ of fieri facias and execution of the judgment on the merits of his appeal and so counsel have agreed to the matters being argued together. That seems a sensible course and so I sit, as it were, in two roles simultaneously.

The order of 9th May 1990 mentioned in the application to extend the time to appeal was in favour of the defendant and so the application is now limited to the order of July 2nd which is the same judgment referred to in the summons to stay execution. The order made by me on 2nd July was one in which I refused an application to extend time to file answers to interrogatories. I had made an "unless" order and the time had expired when the summons was served.

I relied on the cases of *Whistler -v- Hancock* and *King -v- Davenport* as being binding on me. It is clear that the position set by those cases has been modified in England, Australia and New Zealand and the power to extend time given in our O.64 r.5 has been taken to cover such cases. The defendant cites in particular, the cases of *Samuels -v- Linzi Dresses Ltd* in England and *FAI General Insurance Co. Ltd and Ors -v- Southern Cross Exploration NL and Others* in Australia. The plaintiff relies on the authority of *Cheung -v- Tanda* as stating the binding effect on this Court of earlier

English decisions. The decision in *Samuels'* case was in the Court of Appeal and therefore not superior to the Divisional Court in 1878.

The history of the action is set out in my judgment of July 2nd and I do not repeat it here. Neither should I express an opinion on the points raised in support of the proposed appeal save to say that, had I accepted the proposition in *Samuels'* case as binding on this Court, I should have exercised my discretion to refuse the application to extend time because of that history.

I have in a number of cases referred to the need for peremptory orders as did my learned predecessor, Daly C.J. In a country where failure by lawyers to keep to the timetable set by the Court all too often keeps a party from his just remedy, it must only be in the most exceptional case that such a discretion, if it exists, should be exercised. Much has been said by the defendant about the appointment by the Court of a Receiver earlier this year. The writ in this case was filed 9 months before the appointment. By the time the Receiver was appointed, judgment in default of appearance had already been entered and set aside.

I feel, however, in view of the importance of the procedural point, the defendant should have an opportunity, if he so wishes, to take the matter before a higher court. I order that the time for appealing my order of July 2nd be extended to 31st January 1992.

I pass now to the application to stay the writ of fieri facias and execution of the judgment.

Counsel for the defendant bases his ground entirely on the merits of the appeal. It is, he suggests, so strong a point that execution would result in a serious injustice. This Court has the power to stay execution under O.45 r.19 if satisfied that there are special circumstances that render it inexpedient or that the judgment debtor is unable from any cause to pay the money.

Any such applications must be supported by affidavit and, on the grounds of inability to pay, set out the applicant's income, the nature and value of any of his property and the amount of any other of his liabilities. I have no such evidence on which to be satisfied in this case except that I have knowledge that a Receiver was appointed and has since been removed.

The defendant urges as special circumstances the disruption to the Company caused by the appointment of the Receiver. I am not satisfied that discloses sufficient

special circumstances to render it inexpedient to execute this writ and I refuse that first application.

The general principle where there is a application for a stay pending appeal is that, when the judgment is for payment of money, it will not be granted unless the appellant is able to produce evidence to show that, if the damages are paid, there is no reasonable possibility of getting them back if the appeal succeeds. No suggestion has been made by the defendant that this is the case.

The application for a stay of execution is refused.

Costs in the application to extend time to appeal shall be in the cause.

Costs in the applications to stay fieri facias and execution to the plaintiff.

(F.G.R. Ward)
CHIEF JUSTICE