IN THE COURT OF APPEAL
APPELATE JURISDICTION

CIVIL APPEAL NO. ABU 75 of 2014
(High Court HBC 204 of 2004)

BETWEEN	:	1.	**GARY STEPHENS**
		2.	**HELEN STEPHENS**
		3.	**HORSEHOE BAY INVESTMENT**

Appellants

AND	:	1.	**AREN JOSEPH NUNNINK**
		2.	**KI MAREN (FIJI) LTD.**
		3.	**REGISTRAR OF TITLES**

Respondents

Coram : **Almeida Guneratne JA**

Counsel : **Ms. L. Lagilevu for the Appellants**
Mr. D. Sharma for the 1st and 2nd Respondents
Ms. L. Bali for the 3rd Respondent

Date of Hearing : **10 February 2016**

Date of Ruling : **26 February 2016**

RULING

[1] This is an application by the 1st and 2nd Respondents for an order that, amongst others, the appeal be struck out on the basis that the impugned order/judgment of the High Court is interlocutory as envisaged in Section 12(2)(f) of the Court of Appeal Act and that it is out of time and has been filed without obtaining leave and paying security for costs. The 1st and 2nd Respondents rely on the provisions of Rule 16(1) of the Court of Appeal Rules. As against that, the Appellants argue that, an earlier appeal being abandoned (which was not disputed) the impugned order/judgment of the High Court being final, they are entitled to maintain the appeal on the basis of Rule 17(2)(b). It

would appear that the jurisdiction to hear the application is vested in me as a Single Judge of the Court under Section 20(1)(k) of the Court of Appeal Act.

[2] At the commencement of the hearing Ms. Bali who appeared for the 3rd Respondent submitted that her client had no interest in the matter and wished to have herself excused from the proceedings.

[3] I do not think it is necessary to go into detail in regard to the background facts for the purpose of determining this application. The facts are clearly stated in the judgment of the High Court. Suffice it to say that, in the High Court, a joint application was made by the parties to have certain documents *al beit* plans and registered title documents interpreted as a pre-trial preliminary issue followed by the Appellants filing summons for trial on four preliminary issues. The issues related to the right of 'legal access' to certain easements and/or rights of way. (vide: Paragraphs 2 and 3 of the Judgment of the High Court). The ensuing orders (a) to (f) are at page 8 of the High Court Judgment.

Were the Orders or Judgment of the High Court Interlocutory or final?

[4] This is the central matter for determination.

Order vs. Application Approach

[5] Putting an end to the judicial conflict that existed in England for over a century, the Court of Appeal in **White v. Brunton** [1984] QB 570 stated *"The Court is now clearly committed to the application approach."* (at p.573 per Sir John Donaldson, M.R.) in determining whether an order is interlocutory or final.

[6] In Fiji, the Court of Appeal in **Suresh Charan v. Shah** (1995) 41 FLR 65, followed **White v. Brunton** (supra) and "the application approach" was adapted. (at p.67) It was held that, that approach looks at the application rather than the Order actually made. An Order is treated as final if the entire cause or matter would be finally determined whichever way the Court decided the application. Although at various stages in the judicial development in Fiji the "Order approach" had been followed (vide: **Jetpatch Works (Fiji) Ltd. v. The Permanent Secretary for Works and Energy and Others** [2004] 1 FCA 213, the pre-ponderance of precedents has been in favour of the "Application approach". **Suresh Charan v. Shah** (supra); **Shore Buses Ltd. v. Minister of Labour** [1995] FCA, ABU0055]; **Gounder v. Minister of Health** [2008] FJCA 40, all (full) Court of Appeal decisions. Vide: also the Single Judge ruling in **Fai Insurance Ltd. v. Rajendra Prasad Brothers Ltd**. (Civil Appeal No. ABU 0032 of 2004S, 12 August, 2004) per Scott, J. and **Chief Registrar v. Devanesh Prakash Sharma & R. Patel Lawyers** Civil Appeal ABU 86 of 2014, 27th January, 2016, per Calanchini, P.

[7] In **Gounder v. Minister of Health** (supra) the full Court of Appeal adapting the "Application approach" stated thus:

> "*Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and Judgment and the Judge proceeds to make final orders or declarations, the Judgment and Orders are not interlocutory.*"

(at paragraph 37 of the Judgment). At paragraph 38 the Court gave several examples of interlocutory applications.

[8] To the said examples of interlocutory orders given in **Gounder's case** may be added a Ruling made by the Commission under the Legal Practitioners Decree of 2009 as per the Ruling in **Chief Registrar v. Devanesh Prakash *et al*** (supra) per Calanchini, P.

[9] As against that, in **White v. Brunton** (supra) itself, where the claim had been for re-imbursement by the defendant of moneys expended by the plaintiff on the construction of a private road, the question whether the defendant was under a contractual liability in respect of that expenditure being heard as a preliminary issue, it was held that the ensuing decision on the said preliminary issue was not a decision preliminary to a final order but was to be treated as a final order for which leave to appeal was not required. Likewise in the Single Judge decision of this Court in **Fai Insurances (Fiji) Limited v. Rajendra Prasad Brother Ltd**. (supra), the plaintiff had commenced proceedings by way of originating summons and sought declarations that an exclusion clause in its policy of insurance with the defendant did not apply to loss and damage which it said it had suffered as a result of a riot. It also sought damages. The issues for determination by the Court then being listed, only the penultimate issue as to whether the Court should order payment of an admitted amount of a sum related to damages was determined. The judgment did not include an assessment of damages. On these facts Scott, J sitting as a Single Judge of the Court of Appeal was of the view that the order of the High Court was 'final'. In that case, Scott, J had regard to Order 59 Rule 1A(4) of the English Rules of Procedure which provides that, *"Where the trial of a cause or matter is divided into parts a Judgment or Order made at the end of any part shall be treated as if made at the end of the complete hearing or trial."* It is to be noted that, the said English Rules (generally referred to as "the White Book") are adapted in terms of the provisions of Section 24 of the High Court Act and Rules (Cap. 13A).

[10] The words *"as if made at the end of the complete hearing or trial"* carry significance in the context of the "Application approach" in determining whether an impugned order is to be treated as "interlocutory or final."

[11] Having said that, I must recall at this point Lord Denning's remark on the aforesaid approaches when he said: "This question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point." (vide: **Salter Rex v. Ghosh** [1971] 2 QB 597 at 601).

[12] As revealed in the foregoing exposition, on the basis of the "Application approach" (the established approach in Fiji) as to when an impugned order could be regarded as 'interlocutory' or 'final' would in my view, depend on the nature of the issues raised as preliminary issues and the stage at which they were raised before the Court (the High Court) exercising original jurisdiction. This is the test.

Application of the principles and propositions as judicially expounded to the instant case

[13] To begin with, the jurisdiction of the High Court was invoked to determine a pre-trial preliminary issue, agreed to by both parties, to interpret certain documents (referred to earlier) in regard to the determination of the existence or otherwise of 'legal access' to certain easements and/or the existence or otherwise of alleged rights of way. This was followed by the raising of specific issues under Order 33 Rule 3 of the High Court Rules (hereinafter referred to as the HCR) which reads thus:

> *"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."*

[14] As noted earlier, the impugned Order/Judgment was in consequence of a pre-trial preliminary issue raised by agreement of both parties in terms of an application under Order 33 Rule 3 followed by the filing of summons for trial on four preliminary issues referred to earlier in the Ruling. Thus all interlocutory steps having been completed, the trial Judge made his determination on those issues. That determination was final in so far as the said issues were concerned. That was the entire cause or matter that was presented to Court for determination which the Court determined. This in essence is the interlink between "the application approach" and "final orders" that emerges from the rule stated in **White v. Brunton** (supra) and adapted in Fiji in the cases of **Suresh Charan v. Shah** (supra) and **Gounder v. Minister of Health.** To say, that, the trial Judge has already fixed dates for trial and the entire matter or cause in the case means the determination on all the issues that finally determine the rights

of parties *in toto* or that for those reasons the suit is still alive, would amount to missing the wood for the trees.

[15] For the aforesaid reasons I hold that the impugned Order/Judgment of the High Court was a final Order/Judgment and not interlocutory.

The Concept of Split Trials or Hearings

[16] Learned Counsel for both parties addressed at length on the concept of split trials or hearings. While Mr. Sharma for the 1st and 2nd Respondents submitted that, that concept, which is regarded as the exception to the application approach ought not to apply to the instant case for that concept has been applied in a limited category of cases such as contract, tort and personal injury cases – where liability and damages are heard and determined as split issues. On the contrary, Ms. Lagilevu for the Appellants contended that this was a case that fitted into that concept.

[17] In view of the reasons I have already stated earlier it is not necessary for me to go into those rival contentions save as to say, in the instant case

(a) The trial judge did not order a 'split trial'. Considerations that ought to weigh with a judge when ordering a split trial were referred to in the single judge decision of **Flora Seu Fong-Lee v. Air Fiji Limited** [2003] HBC 320/15, 14 November 2003 per Scott, J.

(b) The pre-conditions decreed in Order 33 Rules 4 and 5 of the (HCR) to order a split trial were not present.

(c) In any event, the impugned order was an order made in pursuance of Order 33 Rule 3 of the (HCR).

Conclusion

[18] In conclusion I hold that, the application by Notice of Motion dated 15 January, 2015 of the 1st and 2nd Respondents to strike out the Notice and Grounds of Appeal dated 11 November, 2014 filed by the Appellants is not entitled to succeed.

[19] Finally, I wish to place on record the valuable assistance given to me by learned Counsel for the 1st and 2nd Respondents and the Appellants in dealing with this matter.

Orders of Court

1. Application to strike out the Notice and Grounds of Appeal is dismissed.

2. The Registrar is directed to list this case on a call over date to enable the President of this Court to fix a date for the hearing of the Appeal.

3. Parties to bear their own costs.

Almeida Guneratne
JUSTICE OF APPEAL