IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CIVIL APPEAL ABU 15 of 2016
(High Court HBC 184 of 2014)

BETWEEN : **DENARAU CORPORATION LIMITED**

Appellant

AND : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED**

Respondent

Coram	:	**Calanchini P**
Counsel	:	**Ms B Narayan for the Appellant** **Mr A K Narayan for the Respondent**
Date of Hearing	:	**30 August 2016**
Date of Ruling	:	**28 October 2016**

RULING

[1] The Respondent (Deo Construction) commenced proceedings in the High Court by Originating Summons dated 10 November and filed on 11 November 2014 in the Lautoka Registry. The principal relief claimed by Deo Construction was:

"1. A declaration that the Defendant's refusal to grant development permission or consent and the withholding thereof to construct a residence on (C/T) 35924 being Lot 6 on (DP) 9135 situate on Denarau Island on the grounds that a shareholder of the Plaintiff, Deo Family Trust, owes levies for its own properties to the Defendant is unreasonable, unjustified, without any legal basis and wrong in law.

2. An order that the Defendant forthwith issue the development consent to the Plaintiff submitted on 8 April 2014."

[2] Deo Construction also claimed damages to be assessed and costs. In a judgment delivered on 24 February 2015 the High Court found in favour of the Plaintiff and ordered:

"a) Enter judgment in favour of the Plaintiff
b) Grant orders in terms of prayers 1, 2, 3 and 5 of the Originating Summons filed by the Plaintiff on 11 November 2014
c) The Plaintiff is entitled to costs to be assessed on the solicitor/client indemnity basis."

[3] In relation to order (b), prayer 1 was the application for the declaration the full text of which has been reproduced earlier in this Ruling. Prayer 2 was the application for a mandatory injunction giving effect to the declaration. Prayer 3 was the application for damages and prayer 5 was the application for costs. There is no express reference to damages in the final orders set out in paragraph 45 of the judgment. The reference to prayer 3 indicates that damages are to be awarded. However in paragraph 40 the learned High Court Judge has stated:

"I feel the Plaintiff is entitled to an award of damages. I would therefore order the defendant to pay damages to the plaintiff to be assessed."

[4] In the orders subsequently sealed by the High Court order No.3 is in terms that:

"The Defendant do pay damages to the Plaintiff to be assessed."

[5] It would appear that there has not yet been any assessment of damages. The Appellant (Denarau) has instead sought to appeal the judgment and orders of the High Court.

[6] An appeal against a judgment or orders of the High Court lies to the Court of Appeal pursuant to section 12 of the Court of Appeal Act Cap 12 (the Act). The effect of section 12 for the present purposes is that an appeal against a final judgment or final orders of the High Court lies as of right whereas an appeal against an interlocutory judgment or interlocutory orders requires leave. Pursuant to section 12(2)(f) leave to appeal may be given by either the Court below or the Court of Appeal. Rule 26(3) of the Court of Appeal Rules provides that whenever an application may be made either to the Court below or to the court of Appeal it shall be made in the first instance to the Court below.

[7] As a result Denarau filed on 17 March 2015 in the High Court a summon seeking leave to appeal on the basis that the Judgment of the High Court pronounced on 24 February 2015 was an interlocutory judgment. It should be noted that Denarau filed its application for leave to appeal just within the 21 days for doing so under Rule 16 of the Court of Appeal Rules (the Rules). In a Ruling delivered on 26 February 2016 the same learned High Court Judge stated that the judgment delivered on 24 February 2015 was a final judgment. The Judge found that the application for leave to appeal was misconceived and dismissed it with costs of $750.00 to be paid by Denarau to Deo Constructions.

[8] Denarau subsequently renewed its application for leave before this Court by summons filed on 4 March 2016. The application was supported by an affidavit sworn on 18 April 2016 by Krushnil Patel. The application was opposed. Deo Construction did not file an answering affidavit. Both parties have filed written submissions.

[9] The application is made pursuant to section 12(2) (f) of the Act and Rule 26(3) of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act a judge of the Court may exercise the jurisdiction of the Court of Appeal to grant leave to appeal.

[10] When the matter came on for hearing the parties requested that I determine first the preliminary issue concerning the nature of the judgment delivered by the High Court on 24 February 2015. The parties specifically sought a Ruling as to whether the said judgment was interlocutory or final.

[11] The position in Fiji was settled by this Court in the decision of **Goundar –v- The Minister for Health** (ABU 75 of 2006; 9 July 2008). The Court stated that the applications approach was the correct approach. Such an approach would promote the orderly development of the law in Fiji and would provide legal certainty. The Court then explained how the applications approach should be applied. In paragraph 37 the Court stated:

> *"This is the position. 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."*

[12] The Court went on to state that every other application to the Court should be considered as an interlocutory application and for which a party being dissatisfied with the ruling, order or declaration requires leave to appeal to the Court of Appeal.

[13] In the present case the proceedings were commenced by originating summons. Pursuant to Order 5 Rule 1 of the High Court Rules civil proceedings may be commenced by, amongst other methods, originating summons. In this case the matter proceeded to a final hearing based on the affidavit material filed by the parties along with written and oral submissions. At the end of the hearing the learned Judge reserved his decision which was subsequently delivered on 24 February 2015. In the judgment he proceeded to make final orders in the form of a declaration, mandatory injunction and to award damages to be assessed. In my judgment the fact that damages remained to be assessed does not convert the final judgment on the originating summons into a decision on an interlocutory application. Sometime after the final hearing the learned Judge delivered a judgment in which he made final orders. They were final orders that were capable of appeal as of right to the Court of Appeal. It may be that, even without any assessment, the order that damages were recoverable by Deo Construction was in itself a final order for which leave was not required.

[14] In my judgment there is no need to consider the issues arising out of proceedings that have been conducted in the High Court as a result of applications made under Order 33 of

the High Court Rules. In my view the present case can be considered by reference to the Goundar decision in **Goundar v The Minister for Health** (supra).

[15] Counsel for Denarau referred to two cases in support of the application for leave. The first was a decision of single justice of appeal in **FAI Insurance (Fiji) Ltd –v- Rajendra Prasad Brothers Limited** (ABU 32 of 2004; 12 August 2004). The Court in that case was required to determine whether there had been a split trial in the Court below. Even if it could be said that the present judgment was delivered at the conclusion of a split trial, which view I do not find to be correct, then the decision supports the conclusion that the judgment given on 24 February 2015 was a final judgment and leave was not required. The second decision was a later decision again of a single judge of the Court in **Denarau Corporation Ltd –v- Slatter and Gutherine Company Limited** (Misc. 10 of 2012; 9 August 2013). I am not entirely satisfied that the decision is on point. However in that case the parties assumed that leave was required. The issue before the Court in the present case was not argued nor determined in the earlier decision.

[16] I find that the decision of the learned High Court Judge was a final judgment. Leave is not required and as a result the summons filed on 4 March 2016 must be dismissed with costs to Deo Construction summarily assessed in the sum of $1800.00 to be paid by Denarau within 14 days from the date of this Ruling.

Orders:

1. *The Judgment delivered on 24 February 2015 was a final judgment.*
2. *The summons for leave to appeal is dismissed.*
3. *Denarau is to pay costs to Deo Construction in the sum of $1800.00 within 14 days from the date of this Ruling.*

COURT OF APPEAL FIJI

W. Calanchini

Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL