IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 405 of 2008

BETWEEN : TOM WYNWARD

1ST PLAINTIFF

A N D : GULF PACIFIC (FIJI) LIMITED

2ND PLAINTIFF

AND : THE TRUSTEES FOR THE COLONY OF FIJI OF THE METHODIST CHURCH IN FIJI

1ST DEFENDANT

AND : MCF HOLDING TRUST

2ND DEFENDANT

Counsel : Mr. P. Knight for the Plaintiffs
Mr. S. Valenitabua for the 2nd Defendant

Dates of Hearing : 30th September, 2014

Date of Decision : 14th October, 2014

DECISION

INTRODUCTION

1. This action proceeded before another judge and was not concluded and *de novo* trial was ordered before me. Before *de novo* trial commenced, 1st Defendant made an application for determination of preliminary issues in terms of the Order 33 of the High Court Rules of 1988. The issues raised are found in summons and relate to legality of option agreement between the parties in terms of the Section 6 of the Land Sales Act (Cap. 137). The court held that said optional agreement entered between the parties did not violate

Section 6 of the Land Sales Act (Cap .137). The 1st Defendant is seeking leave to appeal from the said interlocutory decision.

FACTS

2. The Plaintiff filed action for specific performance of the option agreement and damages in lieu of specific performance and also for damages for breach of contract etc. In the statement of defence the fact of entering in to the option agreement was admitted, and also admitted the receipt of the fees for the exercise of the option in terms of the said option agreement.

3. Though the trial proceeded before a judge the matter was not concluded hence, a *de novo* trial was ordered, but before the *de novo* trial commenced the 1st Defendant filed summons seeking an order of legality of the said options agreement. The summons sought split trial of the action , but at the hearing all the parties consented to the determination of legal issues in the following manner and I have summarized them in my decision as follows

> *'a. Can the Defendant raise the issue of illegality without pleading it in the statement of defence.*
> *b. Whether the alleged Option Agreement entered between the parties on 20th May, 2005 was* ***illegal ab initio*** *considering the Section 6 of the Land Sales Act (Cap 137).*
> *c. Whether a split trial should be ordered for the determination of the said issue.* (emphasis added)

4. The above issue 'a' was held in favour of the 2nd Defendant and issue 'b' was held that the option agreement entered between the parties was not illegal and the request for split trial to determine the illegality of the said option agreement was rejected. 2nd Defendant is seeking leave to appeal from this the said decision.

ANALYSIS

5. The summons in terms of the Order 33 rule 4 was filed when the matter was already fixed for *de novo* hearing and the said decision delivered was an interlocutory decision. In

terms of the Rule 16 of the Court of Appeal Rules notice of appeal should be filed within 21 days from the interlocutory order. (See Order 16 (a) of Court of Appeal Rules).

6. The Section 12(2)(f) of the Court of Appeal Act (Cap 12) states that leave of a judge or of the Court of Appeal is needed from interlocutory order or interlocutory judgment made by a judge of the High Court.

7. The decision of the High Court was delivered on 8th August, 2014 and the said motion seeking leave to appeal and stay was filed on 29th August, 2014 and the said motion was filed within the stipulated time under the Court of Appeal Rule 16(a).

8. The motion filed by the Defendant also seeks a stay of the proceedings apart from the leave to appeal. It is futile to determine the issue of stay without considering the leave to appeal and if the leave is refused there is no need to deal with the stay.

9. In determination of the issue of leave to appeal in ***Niemann v Electronic Industries Ltd*** [1978] VicRp 44; [1978] VR 431 it was held (Murpy J)

> *'It also seems to me important to note that the judge who makes the interlocutory order or judgment may be in a different position, when considering whether to grant leave to appeal from his order or judgment from that in which the Full Court finds itself when considering a similar application.*
>
> *He has tried the case, whatever it may be. He has made the interlocutory order or given the interlocutory judgment. He could not be expected, when considering whether or not to grant an application for leave to appeal, to say that his order or judgment was clearly wrong and that substantial injustice would follow if it went undisturbed. If those criteria had in all cases to be established, leave would never be granted by the primary judge.*
>
> *In practice, he may consider (1)* ***whether the issue raised is one of general importance*** *or whether it simply depends upon the facts of the particular case; (2)* ***whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time*** *or as to which he has been "sorely troubled"; (3) whether the order made has the effect of altering the substantive rights of the parties*

> *or either of them; and (4)* ***that as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party.*** (emphasis added)

10. Application of the said guide lines would indicate that the decision delivered on 8th August, 2014 was not dealing with issue of general importance. The issue of legality of the option agreement under Land Sales Act is a settled law. This is not a difficult question of law as Fiji Court of Appeal had constantly held the same view regarding option agreements. No substantive rights were decided and no facts were considered other than the undisputed fact of entering in to the said option agreement.

11. The above factors in a ***Niemann*** (supra) were not comprehensive but have been followed and in Fiji Court of Appeal, too.

12. The general rule is that if the interlocutory orders did not determine any substantive rights of the parties that such an order would have a strong presumption against leave. In ***Digicel Fiji Ltd v Lateef*** [2010] FJCA 43; ABU0005.2009 (13 August 2010) (unreported) Byrne AP held ,

> *'It seems to be common ground and it is also correct law that orders for leave to appeal interlocutory judgments or orders are rarely given by an appellant court. There must be* ***exceptional circumstances*** *to warrant such orders.'* (emphasis is mine)

13. This is not to state that no leave to appeal should be granted against interlocutory order. That is not the meaning that should be adopted .The resultant position is if it is interlocutory decision there is extra burden on the appellant when seeking leave from the court. The rationale is that trial should not be hindered with plethora of interlocutory applications which result in the delay of trial unless there are substantial grounds for allowing leave. If not the process can be abused by a party causing inordinate delay in litigation.

14. When applying the general rule it is clear the decision delivered on 8th August, 2014 was an interlocutory decision. There is no dispute as to that and it had not substantially

decided rights of the parties when the request for the split trial was refused. By refusing said request no party was prejudiced and trial is not hampered.

15. It has to be borne in mind that the said action was filed in 2008 and had proceeded partially before another judge and when the trial was fixed for hearing, it was postponed due to the summons seeking the said interlocutor decision. The hearing of summons was concluded on 23rd July, 2014 and the decision was delivered on 8th August, 2014. The present summons was filed on the 29th August, 2014 seeking a stay and leave to appeal. Though they are all part of due process, the trial could not proceeded and had to be vacated due to the 2nd Defendant's interlocutory application. The Plaintiff is awaiting for the trial while the 2nd Defendant is making these applications.

16. The issue that was determined in the said decision was whether the option agreement violated Section 6 of the Land Sales Act (Cap 137). This is a trite law and there is no ambiguity that the option agreement entered between the parties did not violate the Section 6 of the Land Sales Act (Cap 137). The contention that the annexed document to the said option agreement which was only a draft would make the option agreement illegal is unfounded and not to be supported by law. The law relating to option agreement and legality in terms of the Section 6 of the Land Sales Act (Cap 137) remained unassailed. So, there is no importance of general question of law to be determined regarding the *ab initio* illegality of the option agreement between the parties. By the same token there are no exceptional circumstances that warrant the leave considering the proposed grounds of appeal.

17. At the hearing of this leave to appeal the counsel for the appellant attempted to argue that **exercise** of the option violated the Section 6 of the Land Sales Act (Cap137), but regrettably that was not an issue raised in the motion in terms of the Order 33 and in any event I have not determined such an issue in abstract. Such an issue will undoubtedly deals with facts and would be unwise to deal as preliminary issue. Even if such matter was intended in the summons the court needs to determine the legal issue properly in

terms of Order 33 of the High Court Rules of 1988. The parties cannot insist the court in terms of Order 33 for preliminary issues the way they want. It is only the court can determine such issues. Since such an issue was not dealt, in my opinion I need not say more on that.

18. Out of the 13 appeal grounds, nos 3, 4, 5, 6, 12 and 13 deals with such wrong premise that the decision dealt with the legality of the **exercise of** the option which was a subsequent event that involve some factual matters that cannot be dealt in abstract. The only issue that I tried as a preliminary issue was the *ab initio* legality of the option agreement. All the parties consented to such determination as a preliminary issue, too. Even the motion of the Defendant in terms of Order 33 sought a determination of the legality of option agreement. It is the court that ultimately decided what issues could be determined as a preliminary issue, and this was stated in my decision. In ***Ashmore v Corp of Lloyd's*** **[**1992] 2 All ER 486 it was held ,

> *'In my opinion, when a judge alive to the possible consequences decides that a particular course should be* followed *in the conduct of the trial in the interests of justice, his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong.*

19. In ***Ashmore v Corp of Lloyd's*** (supra) was applied in Fiji Court of Appeal in the case of ***Kelton Investments Ltd v Civil Aviation Authority of Fiji*** [1995] FJCA 15; Abu 0034d.95s (18 July 1995) (unreported).

20. ***Kelton Investments Ltd v Civil Aviation Authority of Fiji*** (supra) held

> '*I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see* ***Hubball v Everitt and Sons (Limited*** *[1900] 16 TLR 168).*
>
> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example* ***Ashmore v Corp of Lloyd's*** *[1992] 2 All ER 486 where a Judge's*

decision to order trial of a preliminary issue was restored by the House of Lords. '

CONCLUSION

21. The rationale in granting leave to appeal in relation to interlocutory decision is to reduce the appeals unless there are some exceptional circumstances. The Fiji Court of Appeal had laid the rules regarding leave to appeal which I have discussed earlier. The 2nd Defendant failed not establish injustice will result from the decision delivered regarding the preliminary issue or any exceptional circumstances or any important legal issue that warrant the grant of the leave. The legality of the option agreements were held constantly in one way by the Fiji Court of Appeal and that had been dealt in the said decision of 8th August, 2014. I am not convinced any injustice to the 2nd Defendant by refusal of this leave. In contrary the Plaintiff had waited for a considerable time for the trial and this should not be further delayed. The application for leave is refused and by virtue of that refusal there is no need to consider the stay of the judgment. The motion filed on 29thAugust, 2014 is struck off. The cost of this motion is assessed summarily at $1,000.

FINAL ORDERS

a. The application for leave to appeal refused.

b. The motion seeking leave to appeal and stay of the proceedings struck off.

c. The cost of the application is summarily assessed at $1,000.

Dated at **Suva** this **14th** day of **October, 2014**.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva