

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 99 of 2011

BETWEEN

FNPF INVESTMENT LIMITED a limited liability company having its registered office at Level 4, Provident Plaza 2, 33 Ellery Street, Suva, Fiji.

PLAINTIFF

AND

VENTURE CAPITAL PARTNERS (FIJI) LIMITED a limited liability company having its registered office at Kimberly Street, Suva, Fiji.

FIRST DEFENDANT

AND

DINESH SHANKER of 237, Ratu Sukuna Road, Nasese, Suva, Fiji.

SECOND DEFENDANT

Counsel : Ms N. Choo for the Plaintiff
Ms M. Rakai for the 2nd Defendant

Date of Hearing : 14th March, 2011

Date of Ruling : 24th April, 2019

RULING

(On the application for leave to appeal)

- [1] The plaintiff instituted these proceedings to recover damages from the defendants for investing in non-profitable ventures in violation of the Investment Management Agreement between the plaintiff and the defendants.
- [2] The 2nd defendant filed summons pursuant to Order 18 rule 18 of the High Court Rules to have the claim against him struck out which was refused by Justice Amaratunga on 22nd March, 2013. Application for leave to appeal was also refused on the ground that it was made out of time.
- [3] The 2nd defendant then made an application before the learned Master of the High Court seeking leave to join the two directors of the plaintiff company, members of the Investment Committee of the plaintiff and the members of the plaintiff's board who approved the investment by the Investment Committee formed pursuant to the Management Agreement dated 15th April, 2015, as parties.
- [4] The learned Master of the High Court refused to the application of the 2nd defendant for leave to issue and serve third party notice and the present application before me is for leave to appeal decision of the learned Master refusing to issue and serve third party notice.
- [5] The 2nd defendant seeks to have the ruling of the learned Master set aside on the following grounds:
1. The learned Master erred in law and in fact in not applying the principles of Order 16 rule 2 when she refused the application for joining the other two directors of the 2nd respondent to these proceedings.
 2. The learned Master erred in law and in fact in refusing the application to join the five members of the Investment Committee who made investment

decisions from August 2005 to July 2007 which is the basis of the claim against the appellant when the decisions were jointly made.

3. The learned Master erred in law and in fact in refusing the application for the appellant to seek to be indemnified by the proposed third parties by wrongly interpreting the Management Agreement in paragraph 20 of the ruling.
4. The learned Master erred in law and in fact in refusing the application for leave to issue and serve third party notice by substituted service outside the limitation period when this is a case where members of the Investment Committee need to be joined for their involvement in decisions of the members fund and it was just to join them in these proceedings.
5. The learned Master erred in law and in fact in paragraph 29 by analysing that this was not a proper case for leave to join third parties when the principles are clearly set out in the decision of *Dorney v Sunflower Airlines Ltd* [1994] FJHC 176; Hbc04640d.89s (25 November 1994).
6. The learned Master erred in law and in fact when she refuse the application for leave to issue third party notice and also for substituted service when there was enough evidence to allow this application before her.
7. The learned Master erred in law and in fact in awarding costs of \$1500.00 when this was supposed to be an ex-parte application and where there was no affidavit material filed by the 1st respondent.

[6] Order 16 rule 1(1) of the High Court Rules 1988 provides:

Where in any action a defendant who has given notice of intention to defend -

- (a) claims against a person not already a party to the action any contribution or indemnity; or
- (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as

between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action;

then, subject to paragraph (2), the defendant may issue a notice in Form No. 9 in Appendix A, (in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

[7] Order 16 rule 2 of the High Court Rules provides:

- (1) Application for leave to issue a third party notice maybe made ex parte but the Court may direct a summons for leave to be issued.
- (2) An application for leave to issue a third party notice must be supported by an affidavit stating-
 - (a) the nature of the claim made by the plaintiff in the action;
 - (b) the stage which proceedings in the action have reached;
 - (c) the nature of the claim made by the applicant or particulars of the question or issue required to be determined, as the case may be, and the facts on which the proposed third party notice is based; and
 - (d) the name and address of the person against whom the third party notice is to be issued.

[8] The learned Master in this regard relied on the following principles enunciated in the decision of **Housing Authority v Delana & Ors** [2010] FJHC 277; HBC283.2006 (30 April 2010);

The Court has a discretion under Order 16 Rule 2 in all cases whether or not to allow the Defendant to issue a third party notice. Usually, if a prima facie case is established which would bring the matter within any paragraph of Rule 1 (1) leave will be granted to issue the notice and the Court will not in granting leave consider the merits of the claim.

[9] The basis of the 2nd defendant's application is to share his liability, if the court holds him liable, with the parties proposed to be added. The plaintiff has made him a defendant on the basis that he was a director, the agent and principal officer of the 1st

defendant company. At this stage I am not going to consider whether the plaintiff in fact has a cause of action to sue the 2nd defendant since this question has already been considered by Justice Amaratunga. The 2nd defendant filed an application pursuant to Order 18 rule 18 of the High Court Rules 1988 and the said application was struck out by Justice Amaratunga. There was an application for leave to appeal the said order before me and I refused leave to appeal not on its merits but because the application was filed out of time.

[10] I will now consider whether there would be any purpose in adding these parties to the action. 1st defendant is a duly incorporated company which has a separate personality and it can sue and be sued.

[11] A company being a separate legal entity, its rights and duties are separate from the rights and duties of its directors and shareholders. This means the liability of shareholders are limited as the personal assets of the owners cannot be touched to pay the debts of the company. This protection is called “**the corporate veil**”. This fundamental principle of law was established by the House of Lords in **Salomon v Salomon & Co Ltd** [1897] AC 22 / [1896] UKHC 1.

[12] In the statement of claim of the plaintiff no separate cause of action has been averred against the 2nd defendant. Therefore bringing the other directors and the employees or agents of the 1st defendant company is going to be a futile exercise.

[13] The learned Master found that the 2nd defendant has failed to show any good reason for the delay in making this application and therefore, he cannot rely on section 23 of the Limitation Act 1971.

[14] Section 23 of the Limitation Act 1971 provides:

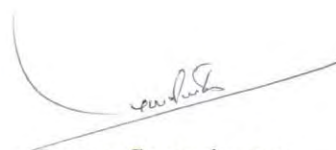
Where an action has been commenced within any period of limitation prescribed by this or any other Act and, after the expiry of such period, it transpires that there has been misjoinder or non-joinder of any party to that action, the court may order that any other party may be joined in the action notwithstanding that the period of limitation has expired against that other party.

- [15] The above provision of the law confers a discretion on the court to order a party to be joined outside the period prescribed by law. However, in my view it cannot be construed as conferring a right on a party to an action to add another party outside the period prescribed by law. Any party who seeks the court to exercise its discretionary power in his favour must satisfy the court that there are sufficient grounds for the court the court to exercise its discretionary power. In the instant case the supporting affidavit has been sworn to by the legal secretary of the law firm and not by the plaintiff. In the said affidavit no reasons have been given for the long delay.
- [16] Another ground of appeal is that the learned Master erred in ordering the 2nd defendant to pay \$1500.00 as costs of the application since an application to issue and serve third party notice is made ex-parte. What Order 16 rule 2(1) provides is that an application for joinder may be made ex-parte and the court is given power to serve such summons of the other party. In this matter the summons was served on the plaintiff and the plaintiff participated at the hearing although it did not file an affidavit in opposition. Therefore, there is nothing wrong in ordering costs.
- [17] For the reasons aforementioned I do not see grounds of appeal which the 2nd defendant can successfully maintain at the hearing of the appeal if leave is granted.

ORDERS

1. The application for leave to appeal is refused.
2. The 2nd defendant is ordered to pay \$1500.00 as costs of this application.




Lyone Seneviratne

JUDGE

24th April, 2019