

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action HBC No. 328 of 2018**

**BETWEEN** : **HOUSING AUTHORITY** a statutory body established under the Housing Act of Fiji [Cap 267] and having its registered office at Housing Authority Building, Saqa Street, Valelevu, Nasinu, Fiji

**PLAINTIFF**

**AND** : **TOP SYMPHONY SDN. BHD [Company No. 802021-X]** a company incorporated in Malaysia registered under the Companies Act 1965 and having its registered office at No. 56, Jalan BU 2/1, Bandar Utama, 47800 Petaling Jaya, Selangor Darul Ehsan, Malaysia.

**DEFENDANT**

**BEFORE** : Justice M. Javed Mansoor

**COUNSEL** : Mr D. Sharma D with Mr S. Deo for the Plaintiff

: Mr J. Apted for the Defendant

**Written Submissions** : 14 June 2019

**Date of Ruling** : 28 June 2019

# RULING

HIGH COURT RULES: Order 33 Rule 1 & 3, Order 32 Rule 14 and Order 41 Rule 11 – further evidence by affidavit – preliminary issue – Plaintiff raising an issue on the validity of the agreement it relies upon – discretion of Court

References:

A. Legislation

High Court Rules Order - 33 Rule 1 & 3, Order 32 Rule 14 and Order 41 Rule 11

B. Cases

- i. Murugesu v Shell (Fiji) Ltd [2003] FJHC 259
- ii. Chand v Chand [2012] FJCA 22
- iii. Ladd v Marshall [1954] 3 All ER 745
- iv. Carl Zeiss Stiftung v Herbert Smith & Co [1968] 2 All E.R 1002
- v. Tilling v Whiteman [1980] A.C 1; [1979] 1 All E.R 737

1. This arises from the Plaintiff's Summons dated 6 May 2019.
2. The Plaintiff instituted this action by Writ of Summons and Statement of Claim filed on 31 October 2018. Thereupon, the Defendant filed Summons for Stay of Court Proceedings on 31 January 2019. The Stay Application pleaded that the Plaintiff and the Defendant entered into a Design-Build Master Agreement (Master Agreement) dated 11 May 2012, and that clause 54.1 of the Master Agreement contained an Arbitration Agreement which bound the Plaintiff and the Defendant. The Plaintiff filed its Affidavit in Response to the Stay Application on 26 March 2019 through its Board Secretary and Legal Counsel, Salimoni Karusi, by his affidavit dated 21 March 2019, and pleaded that the Dispute Resolution Agreement was validly terminated by the Plaintiff. The Defendant filed its Affidavit in Reply on 9 April 2019 through its director, Wong Chung Sing by his affidavit dated 4 April 2019.
3. When the matter was mentioned on 14 April 2019, Counsel for the Plaintiff moved to file an additional affidavit in order to adduce further evidence regarding the

question of registration of a foreign entity to do business in Fiji. This application was not allowed on that day as no formal papers had been filed at that time. Hearing was fixed for 8 May 2019.

4. On 6 May 2019, solicitors for the Plaintiff filed a Summons supported by an affidavit and sought *inter alia* the following Orders:
  - I. *That during the hearing of the Summons to Stay Court Proceedings filed by the Defendant on 31 January 2019 (Stay Application), the Plaintiff be granted leave to file in Court and rely on the further Affidavit of Salimoni Karusi together with the exhibits contained in the said Affidavit attached an annexure "A" in this Affidavit.*
  - II. *The issue of whether the Master Agreement signed between the Plaintiff and the Defendant dated 11 May 2012 was a valid and legal contract be determined as a preliminary issue prior to or at the same time as the hearing of the Stay Application.*

The Plaintiff's Application was made pursuant to Order 33 Rule 1 & 3, Order 32 Rule 14 and Order 41 Rule 11.

5. On the day of the hearing, on 8 May 2019, Counsel for the Plaintiff sought an adjournment on the basis that the further affidavit related to the core issue before Court. The Defendant opposed the reliefs sought by the Plaintiff's Summons dated 6 May 2019. In response to the Plaintiff's Affidavit in Support dated 6 May 2019, the Defendant responded by its Answering Affidavit on 21 May 2019. The Plaintiff filed its Affidavit in Reply on 31 May 2019. The parties tendered written submissions on 14 June 2019.
6. By its Application, the Plaintiff sought to file a further affidavit to supplement its earlier affidavit of 26 March 2019 in order to place before Court, "relevant material that could affect the outcome of both the Defendant's Stay Application and the Plaintiff's Writ in the substantive proceedings".

7. In support of its contention, the Plaintiff relied on Murugesha v Shell (Fiji) Ltd<sup>1</sup>, Chand v Chand<sup>2</sup> and Ladd v Marshall<sup>3</sup>.
8. The Plaintiff contended that the new material was made known to the Plaintiff only after the earlier affidavit dated 26 March 2019 was filed, and that the new material would not cause any prejudice to the Defendant, as the material was within the Defendant's knowledge.
9. The material sought to be adduced are letters dated 15 December 2017 and 16 March 2018 from Squire Patton Boggs (legal advisors of the Plaintiff) to Ranjit Singh & Yeoh Associates (solicitors for the Defendant) and letters dated 14 June 2011 and 15 August 2011 from Fiji Islands Trade and Investment Bureau to Mr. Michael Wong of the Defendant.
10. The Defendant, the Plaintiff contended, which entered into a Master Agreement, had not been issued a Foreign Investment Registration Certificate in order to carry on business in Fiji. The Plaintiff acknowledged that its claim in contract would fail if the Master Agreement was found to be illegal.
11. The facts in Murgessa v Shell (Fiji) Ltd and Chand v Chand are quite different to the circumstances in this case. In Murgessa, a party sought to adduce further evidence while the trial was continuing. In Chand, the matter concerned an application for the introduction of new evidence in appeal, where reference was made to the test laid down in Ladd v Marshall.
12. Court has the discretion to receive new evidence, and it may do so at any stage of the proceedings. This power exists to cope with surprise and matters occurring after the commencement of the hearing or even to allow for slips, accidents or oversights<sup>4</sup>.

---

<sup>1</sup> [2003] FJHC 259

<sup>2</sup> [2012] FJCA 22

<sup>3</sup> [1954] 3 All ER 745

<sup>4</sup> Murgessa v Shell (Fiji) Ltd, quoting from Halsbury Laws of England 4<sup>th</sup> Ed Vol.17

13. The Plaintiff's explanation that it did not have the relevant documents at the time of instituting this action is not entirely convincing. The necessary spade work prior to institution of action could have placed the Plaintiff in possession of the material now sought to be placed before Court.
14. However, in all the circumstances, Court considers it just to accept the further affidavit of Salimoni Karusi together with the exhibits for the hearing of the Summons to Stay Court Proceedings filed by the Defendant. In exercising the Court's discretion, Court has taken cognizance of the early stage of these proceedings and the possible relevance of the new evidence in deciding the issues arising in the Applications before Court. A matter of further pertinence is that the Defendant is not likely to be taken by surprise considering that the contents of the further affidavit and the annexed documents would have been known to the Defendant, and, therefore, there could be no serious prejudice to the Defendant by accepting the Plaintiff's further affidavit for the purpose of the hearing.
15. The next relief sought in terms of the Summons is *whether the Master Agreement signed between the Plaintiff and the Defendant dated 11 May 2012 was a valid and legal contract be determined as a preliminary issue prior to or at the same time as the hearing of the Stay Application*. The issue proposed by the Plaintiff is an interesting one considering that it is the Plaintiff who has come before this Court alleging breach of contract and repudiation of the Master Agreement by the Defendant. The Plaintiff's Application was made in terms of Order 33 Rule.
16. Order 33 Rule 1 states that the place of trial of a cause or matter, or of any question or issue arising therein, shall be determined by the Court. Rule 3 states that 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.
17. The decision to take up a matter as a preliminary issue is at the discretion of the judge, and it is not a decision that will be lightly taken. The Plaintiff's plea to consider the validity of the Master Agreement is premised on the matters averred and the documents annexed to the further affidavit of Salimoni Karusi, which has

now been accepted by the Court. These are matters in contest between the parties, and it cannot be assumed without investigation in a trial that the facts would be in favour of the Plaintiff. The question is whether it is apt at this stage to consider the validity of the Master Agreement as a preliminary issue without a proper finding of facts tested through the rules of evidence in a trial. Such findings are important even to decide questions of law.

18. The burden of proving the matters pleaded in the Statement of Claim is upon the Plaintiff, and the Master Agreement is the basis upon which the Plaintiff has instituted this action. That burden cannot shift at a preliminary stage except for very good reason. The Plaintiff will have to satisfy Court that the question urged to be tried as a preliminary issue is of such a nature that could finally dispose the case without going to trial on the substantive issues.
  
19. It is not possible to set out all the circumstances in which it would be proper for Court to exercise its jurisdiction and take up a matter as a preliminary issue or even have a split trial for the purpose of trying a preliminary issue<sup>5</sup>. Would the exercise of the Court's discretion to allow a preliminary issue to be taken up increase the cost and time of litigation? Will it, overall, serve the interest of justice? Does the court have regard to all the circumstances of the case? These are some of the factors that a Court is likely to consider. If additional costs and delay are likely Court will not be inclined in the exercise of its discretion to allow a preliminary issue as it will not serve the purpose of justice. Great care is needed when exercising the Court's discretion as it is a departure from the norm, and the Court must be persuaded that there are exceptional circumstances that warrant the trying of an issue as a preliminary issue. Mere convenience should not be the guiding criterion. Although, it is not essential the Court would want to be satisfied of a real probability that the hearing would dispose the case one way or the other. These principles have been followed in a number of cases<sup>6</sup>. In *Tilling Whiteman*<sup>7</sup>, the House of Lords stated that "*Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety and expense*".

---

<sup>5</sup> Order 33 (4) (2)

<sup>6</sup> *Carl Zeiss Stiftung v Herbert Smith & Co* [1968] 2 All E.R 1002, *Tilling v Whiteman* [1980] A.C 1; [1979] 1 All E.R 737

<sup>7</sup> *Tilling v Whiteman* [1980] A.C 1; [1979] 1 All E.R 737 at page 744

20. In this case the illegality question is intertwined with questions of fact. What has been proposed as a preliminary issue for determination by Court involves a mixture of fact and law. In order to decide upon the legality of the Master Agreement, evidence would have to be led, tested and assessed during the course of a proper trial. The Plaintiff has not persuaded Court that the circumstances warrant the trying of the issue on the validity of the Master Agreement as a preliminary issue without going through trial; the Court is not persuaded that granting the 2<sup>nd</sup> relief sought the by the Plaintiff by Summons dated 6 May 2019 would serve the interest or purpose of justice. It is also noteworthy that the proposed issue does not arise on the pleadings. The Plaintiff's Summons followed the Defendant's Application for Stay of Proceedings. In these circumstances, the 2<sup>nd</sup> relief is refused.

21. Orders

- A. The Plaintiff is granted leave to file in Court and rely on the further Affidavit of Salimoni Karusi together with the exhibits contained in the said Affidavit during the hearing of the Stay Application filed by the Defendant on 31 January 2019.
- B. The issue of whether the Master Agreement signed between the Plaintiff and the Defendant dated 11 May 2012 was a valid and legal contract will not be taken up for determination as a preliminary issue.
- C. The Plaintiff is ordered to pay the Defendant 2,000 dollars as costs summarily assessed.

Delivered at Suva this 28th day of June , 2019.



  
Justice M. Javed Mansoor  
Judge of the High Court