

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 181 of 2016

BETWEEN : INTER ISLAND FREIGHT SERVICES LIMITED

Plaintiff

AND : MERCHANT FINANCE LIMITED

Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. Kolili, Mr A. Nand with him, for the
Plaintiff/Respondent
Mr N. Lajendra for the Defendant/Applicant

Date of Hearing : 26 July 2017
Date of Judgment : 1 August 2017

DECISION

1. This is the Summons of the Defendant/Applicant (Applicant). At the outset I am constrained to say that the heading of this judgment is as in the heading of the writ of summons and not as the Applicant's solicitors have set it out in the heading of the Summons.

2. The Applicant is seeking the following orders:
 - (1) That leave be granted to appeal the Ruling of the Master (Ruling) delivered on 13 April 2017.
 - (2) Costs
 - (3) Further orders as the court deems just.
3. The hearing commenced with the Counsel for the Applicant stating that the Summons was filed under the provisions of Order 59 rule 11 of the High Court Rules (HCR). He submitted there were no triable issues. The Respondent paid the full deposit but 3 days late. He conceded the Applicant was to prepare the Sale and Purchase Agreement (SPA), but did not prepare the SPA. He concluded by citing 4 authorities.
4. Counsel for the Respondent then submitted. He said this Summons was merely an application for leave where there were nothing of general importance, no difficult issues of law and the rights of the parties were not affected by the Ruling. Moreover there could not be any appeal against an interlocutory order.
5. Counsel for the Applicant did not reply.
6. At the conclusion of the hearing I informed that I would take time to consider my decision. Having done so I now deliver my decision.
7. The law relating to the granting of leave to appeal an interlocutory order is well established and should be well known by all legal practitioners. I can do no better than quote from the majority decision of the Full Court, Supreme Court of Victoria in : *Nieman v. Electronic Industries* [1978] V.R. where at page 431 it was held leave to appeal from an interlocutory order should be granted only where:
 - (a) The decision was wrong, or at least attended with sufficient doubt to justify granting leave; and in addition,
 - (b) Substantial injustice would be done by leaving the decision unreversed.

Leave will be granted more readily if the effect of the order is to change substantive rights or terminate the action, so that substantial injustice would be effected if the order is wrong.

8. That the position is the same in Fiji is made clear by the decision of the Fiji Court of Appeal in *Totis Incorp, Spor (Fiji) Ltd and Richard Evanson v. John Leonard Clark and John Lockwood* (Civil Appeal No ABU 0035 of 1996S). Sir Moti Tikaram P. said "It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. It is for this reason that leave to appeal against such Orders is usually required (see Section 12(2) of the Court of Appeal Act Cap.12).

Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

Conclusion

In my view there are no exceptional circumstances in the present case. The real issue is whether the Applicants will suffer injustice if a longer adjournment were not granted by the Court of Appeal assuming leave were granted. Sadal J's Ruling is not determinative of the Applicants' substantive rights. Nor does it adversely affect their legal rights. There is no serious question of law requiring determination by the Court of Appeal".

9. I hasten to observe that Sir Moti's last line above referred to the appeal before the Court of Appeal and not the issue before the High Court.
10. The Master's Ruling was an interlocutory order. It did not order the Applicant to specifically perform the SPA. It merely restrained the Applicant from disposing of the said land until the final disposal of the action.
11. I am of opinion that the Ruling did not determine the substantive rights of either the Plaintiff or the Defendant. It did not adversely affect the legal rights of the

Defendant/Applicant. All that the Master did by the Ruling was to preserve the status quo until the full hearing of the suit.

12. That the Master was correct to do so is shown clearly by the question I posed to Counsel for the Applicant. Supposing the Master did not grant an interlocutory injunction restraining the Defendant from selling the said land. Then, as it was free to do, it sold the land to an innocent Third Party; after the full hearing of the substantive matter, the Court found in favor of the Plaintiff and ordered specific performance of the SPA; what would happen then when there was no land to convey for the simple reason that it had been validly transferred to the Third Party who has his title by registration? The Court does not recollect receiving even a plausible reply at all from Counsel.
13. Both before this Court and earlier before the Master, the Applicant's Counsel's argument was that there were no serious or triable issues to be tried. If I may say so, nothing could be further from the truth. The very serious issue that merits the full consideration of the trial court is whether a party to an agreement to sell a piece of land who has accepted the deposit and who then has to draft the SPA, can resile from it by not doing anything to have the SPA drafted. The Cambridge English Dictionary defines "resile" as "change a decision you made previously".
14. This is an important legal issue that needs to be canvassed before the trial court and it would be prudent to preserve the status quo. On the contrary, it is the Applicant's sole ground for wanting the Ruling overturned which is devoid of any legal substance.
15. In the result, the Summons is hereby dismissed with costs which I summarily assess at \$1,000 to be paid by the Applicant/Defendant to the Plaintiff/Respondent.

16. Delivered at Suva this 1st day of August 2017.



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David Alfred
Judge
High Court of Fiji