

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

MISCELLANEOUS NO. 10 OF 2012
(High Court HBC 116 OF 2011L)

BETWEEN : **DENARAU CORPORATION LIMITED**

Applicant/Appellant

A N D : **SLATTER AND GUTHERINE COMPANY LIMITED**

Respondent

Coram : **Calanchini AP**

Counsel : **Ms B Narayan for the Applicant**
Ms L Tabuakuro for the Respondent

Date of Hearing : **3 July 2013**

Date of Decision : **9 August 2013**

DECISION

[1] This is a renewed application for leave to appeal the Interlocutory Judgment delivered on 14 September 2011 at the High Court in Lautoka. This application for leave is made pursuant to section 12 of the Court of Appeal Act Cap 12 and comes before me pursuant to section 20 of the Act. In accordance with Rule 26(3) of the Court of

Appeal Rules an initial application for leave to appeal was made in the Court below and was refused on 7 March 2012.

- [2] This application was made by summons filed on 28 March 2012 and was supported by an affidavit sworn on 27 March 2012 by Rupeni Fonmanu. An affidavit in opposition to the application was sworn on 20 May 2013 by Richard Slatter and filed on behalf of the Respondent. A reply affidavit sworn by Rupeni Fonmanu was filed on 6 June 2013 on behalf of the Applicant. The parties appeared before me on 3 July 2013 for the hearing of the application and subsequently filed further written submissions.
- [3] Proceedings were commenced in the High Court at Lautoka by the Respondent claiming damages that it alleged it suffered as a result of injunctions obtained ex parte against it in the Nadi Magistrates Court on an application by the Applicant. The Respondent sought to recover damages pursuant to the undertaking as to damages given by the Applicant as a condition of the granting of the injunctions. The learned High Court Judge found in favour of the Respondent on the question of liability and ordered that the matter be referred to the Master for an assessment of the Respondent's damages, if any, suffered by reason of the order made by the Nadi Magistrates Court on 4 May 2009 granting ex parte the interim injunctions to the Applicant.
- [4] The background facts were stated in the judgment of the High Court. The facts that are relevant to this application are taken from that judgment. The Applicant controls and manages the development of Denarau Island. It performs functions similar to those of a municipal council. Owners and lessees on Denarau Island are bound by a restrictive covenant that requires them to obtain a form of planning approval from the Applicant before undertaking any development or other works on the Island.
- [5] The land on which the Respondent proposed to undertake further development works was State Lease No.16977 registered in the name of Tokomanu Limited. The Respondent is a sublessee of part of the land leased to Tokomanu Limited and on which the Respondent runs a bar and restaurant in an area on the Island known as Port Denarau. In April 2009 the Respondent commenced extension works to its existing

building by adding a verandah. The Applicant complained that the Respondent was in breach of the restrictive covenant by not consulting with it before commencing the work and commenced proceedings in the Nadi Magistrates Court.

[6] On 4 May 2009 the Applicant obtained the following ex parte orders from the Nadi Magistrates Court:

- “1. *The Defendant (the Respondent in this appeal) be restrained whether by its officers, servants, agents otherwise and howsoever from carrying out any development works, construction works, extension works, building works or any other improvements whatsoever on (its sublease) without obtaining the development consent from the Plaintiff (the Applicant in this appeal) until further order of this Honourable Court.*
2. *The Defendant do forthwith remove all plant, equipment, scaffolds, tools and other material whatsoever including any structures, constructions or erections put up in furtherance of its unauthorized development in or around (its sub lease) until the further order of this Honourable Court.”*

[7] The Respondent then filed on 7 May 2009 an inter partes application seeking an order that the injunctions granted ex parte be set aside. The application was heard on 24 May 2009. However the decision of the learned Magistrate was not delivered until 14 April 2010. At the hearing of the application to discharge the injunctions the Respondent raised a preliminary issue based on section 13(1) of the State Lands Act Cap 132. The Respondent submitted that section 13 had not been complied with in that the Applicant had not obtained the consent of the Director of Lands prior to instituting the proceedings in the Nadi Magistrates Court and that the Court had dealt with the lease when it granted the injunctions against the Respondent on 4 May 2009. The learned Magistrate held that although the consent of the Director of Lands need not be obtained before commencing proceedings, it must be obtained before the Court has dealt with the lease. The learned Magistrate then concluded that when the Court granted the ex parte injunctions on 4 May 2009 “*the land had been dealt with.*” Because the consent of the Director had been obtained after that date, section 13 had

not been complied with and as a result the learned Magistrate not only discharged the ex parte injunctions he also dismissed the action commenced by the Applicant.

- [8] The Applicant did not appeal the written judgment dated 14 April 2010 of the learned Magistrate, apparently on the basis that the parties had by then settled their differences so far as planning and development applications were concerned. For the same reason the Applicant did not commence fresh proceedings.
- [9] However the Respondent claimed to have suffered loss as a result of the granting of the ex parte injunctions and sought to recover damages on the basis that the injunctions should not have been granted by the Magistrate on 4 May 2009. It was not disputed that an undertaking as to damages had been given by the Applicant at the time when the ex parte application came before the learned Magistrate on 4 May 2009.
- [10] The learned High Court Judge, relying on the decision of **Ushers Brewery –v- King and Co** [1972] Ch. 148 concluded that an inquiry into damages could be ordered either at the end of a hearing on the merits or before such a hearing where it is established that the injunction ought not to have been granted in the first instance. However, it should be noted that in the **Ushers Brewery** (supra) decision Plowman J considered it inappropriate to order an inquiry before the final hearing of the action, even though he dissolved the injunction, because it had not been established that the injunction ought not to have been granted in the first instance.
- [11] In this case the learned High Court judge concluded that the injunction ought not to have been granted in the first place on the grounds that the consent of the Director of Lands had not been obtained before the Court dealt with the lease. It was therefore appropriate for the Court in this case to grant the application and order an assessment of damages, if any, to be awarded to the Respondent as a result of the injunctions having been granted by the Magistrates Court.
- [12] It is against that decision that the Applicant now seeks leave to appeal to the Court of Appeal. The grounds of appeal are set out in some detail in the summons for leave. The Applicant claims that the learned trial Judge erred in not considering the nature

and purpose of the undertaking as to damages and the reasons why the injunctions were dissolved and the action struck out. The Applicant also claims that the learned trial Judge failed to properly apply the applicable principles in equity and to consider the relevant facts that gave rise to the proceedings being commenced in the Magistrates Court. The Applicant also challenges the findings of fact and the application of Section 13 of the State Lands Act by the learned trial Judge.

[13] Leave to appeal is required because the judgment delivered on 14 September 2011 was an interlocutory judgment. Generally the courts are reluctant to interfere with interlocutory decisions. However leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused. [See **In re the Will of F.B. Gilbert (deceased)** (1946) 46 S.R. N.S.W. 318 at 323 and **Kelton Investments Limited and Tappoo Limited –v- Civil Aviation Authority of Fiji and Another** (ABU 34 of 1995; 18 July 1995)]

[14] In this case the injunction was dissolved as a result of the alleged failure of the Applicant to comply with the requirements of section 13 of the State Lands Act. It was on this basis that the learned High Court Judge has concluded that the injunction should not have been granted in the first place. It would appear that the learned High Court Judge has concluded that the Applicant's failure to obtain the Director's consent thereby resulting in the dissolution of the ex parte injunctions activated the undertaking as to damages in the same way as a conclusion on the merits that the injunctions should not have been granted in the first place. In my view it is arguable that the undertaking as to damages is activated only when it becomes clear on the merits that the injunction should not have been granted in the first place. Such a conclusion may become evident at the end of the substantive hearing or before such a hearing. It is only then, it may be argued, that an inquiry as to damages should be ordered.

[15] The appeal also raises issues under section 13 of the State Lands Act which should be considered by the Court of Appeal. In particular the meaning of being dealt with by the Court and whether the consent of the Director for commencing the proceedings can be obtained after the interlocutory ruling as long as the consent is obtained before

the final determination. It is also of some interest to determine whether the proceedings related to a dealing with the lease.

[16] In my judgment the appeal raises a number of important issues and legal questions which warrant the consideration of the Court of Appeal and leave to appeal is granted.

[17] As a result I order:

1. *Leave to appeal is granted.*
2. *Appellant is to file and serve notice and grounds of appeal within 14 days.*
3. *Thereafter the appeal is to take its normal course in accordance with Rules 17 and 18 of the Court of Appeal Rules.*
4. *Costs in the appeal.*

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HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT