

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

**CIVIL ACTION NO. HBC 17 of 2013**

**BETWEEN** : **DENARAU INVESTMENTS LIMITED**  
*Appellant/Defendant*

**A N D** : **ADRENALIN (FIJI) PROPRIETARY LIMITED**  
*Respondent/Plaintiff*

**Counsel** : Mr. S. Saumatua for the Appellant/Defendant  
Mr. V. Singh for the Respondent/Plaintiff

**Date of Hearing** : 20<sup>th</sup> June, 2014

**Date of Decision** : 27<sup>th</sup> February, 2015

---

**DECISION**

---

[1] The application before me is a summons pursuant to Order 59 Rule 10 and 11 and the inherent jurisdiction of court. The reliefs prayed:-

1. Leave be granted to the Appellant/Defendant to appeal the interlocutory decision of the Master of the High Court delivered on 13 December 2013 to a Judge of the High Court.
2. Alternatively, the time for appealing be enlarged and leave be granted to the Appellant/ Defendant to appeal the interlocutory decision of the Master of the High Court delivered on 13 December 2013 to a Judge of the High Court.

**3. The costs of this application be costs in cause.**

[2] **Background**

The plaintiff had entered into four contracts with the defendant to purchase four villas. The plaintiff was required to deposit 10% of the sale price with a stake holder nominated by the defendant. The sale failed to take effect. It is alleged that the stakeholder released the money to the plaintiff after wrongfully deducting an amount as withholding tax and a further deduction of 50% interest earned on the deposit as commission. The plaintiff filed action against the defendant. Subsequently the defendant made an application before the Master to strike out the statement of claim. It was submitted that the appellant/defendant had filed the summons to strike out on the basis that the plaintiff in his pleadings had not pleaded any duty of care owed by the defendant/appellant to the plaintiff and that the defendant did not owe any duty of care towards the plaintiff. The plaintiff has no cause of action to recover cost of litigation and settlements in a separate action.

[3] The learned Master delivered his ruling and held that in the statement of claim the plaintiff has a claim on tortuous negligence. Since evidence is not pleaded the learned Master was satisfied that there was sufficient disclosure of a cause of action against the defendant. The court then proceeded to refuse and dismiss the defendants summons to strike out.

[4] Further the learned Master awarded cost to the plaintiff.

[5] Being aggrieved by the said Order the plaintiff has filed this application seeking leave to appeal the interlocutory decision of the Master.

- [6] Both parties have filed their affidavits in support and opposing and the reply. The parties filed their written submissions and both parties supplemented it by oral submissions as well.

### **Appellant/ Defendants Affidavit**

- [7] In the appellant/defendants affidavit in support the deponent had deposed among other things his purported grounds of appeal.

### **The Plaintiff/Respondents Response**

- [8] The plaintiff has filed an affidavit by one Zdenka Cook in opposition and deposed that the question of law involved in the statement of claim cannot be summarily dealt with and that the defendant by this application was trying either to delay or was trying to dismiss the plaintiff's claim without going into evidence by short circuiting the normal court process.

### **Determination**

- [9] The Respondent/Plaintiff who will be called the plaintiff hereinafter had annexed the sealed Master's order. The defendant/appellant in this proceeding would be called the defendant.
- [10] The principles the court should be guided in a leave to appeal application was laid down in **Niemann –v-Electronic Industries Ltd. 1978 VR 431**
- [11] The defendant at the outset took a halfhearted preliminary opposition for non-compliance with Order 41 Rule 9(2) of the High Court Rules to which the plaintiff sought leave to use the affidavit.

[12] As per **Niemann –v- Electronic Industries** case among other grounds the plaintiff has to satisfy court that:-

- a). **The impugned decision was wrong, or at least attended with sufficient doubt as to justify granting leave.**
- b). **Substantial injustice would be done if it is not reversed.**

[13] The defendant in his submission attacked the order of the learned master on the basis that the entire statement of claim was based on tort. The plaintiffs pleadings has failed to establish a duty of care by the defendant towards the plaintiff, and that such duty was breached.

[14] The defendant has extensively relied on the decided authority of **Christopher Alislair Gibbon –v- Christophor Anthony Latton and Latton Dunford [2001] EWOA Cir 1956** to establish that the stakeholder acts as a separate entity and the relationship between the plaintiff and the stakeholder as well as the stake holder and the defendant is contractual. Therefore it is the contention of the defendant that the plaintiff's cause of action should be against the stakeholder and not him.

[15] The plaintiff has further alleged that the learned Master erred by relying on **Smith and Others-v-Litteworks Organisation Ltd [1987] 1 ALL ER 711** where it had been held that the defendant owed a duty of care in respect of the conduct of an independent person and submitted that the stakeholder was not an independent person but a person who had a contractual relationship with both parties. Therefore the defendant submitted that the Master's order was wrong.

[16] The learned Master in his Ruling has not only based his decision on tort. As per the facts that have been submitted the learned Master has come to the

conclusion that there is sufficient disclosure in the pleadings of a cause of action on tortious negligence of the defendant.

[17] The plaintiff cannot plead evidence in the statement of claim. As per the pleadings the learned Master has come to the conclusion that the duty in contracts or the duty in tort has to be seen in the nature of the relationship and not in the nature of its origin. Under the circumstances the issue of whether a duty of care was owed by the defendant towards the stakeholder's dealings with the plaintiff or not was an issue that had to be established by evidence. On this reasoning the learned Master has come to the conclusion that there was sufficient material pleaded for a claim grounded on tortious negligence against the defendant in the statement of claim. This court is inclined to agree with the reasoning of the learned Master.

[18] In this application the plaintiffs' main submission was that the Master's order was erroneous. However to obtain leave to appeal, error itself is not sufficient as stated in **Darrel Lea –v- Union Assurance 169 VR 401** where the court held **"error of law in the order does not in itself constitute substantial injustice but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result"**.

[19] In **Nimann –v- Electronic Industries Ltd** (*supra*) it was held **"If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown in addition, to effect a substantial injustice by its operation."**

### **Substantial Injustice**

[20] The defendant submits that he will have to go through the process of litigation and incur cost and that amounts to substantial injustice being caused to him. The defendant relied on **Singh –VS- Housing Authority [2-11] FJHC 656**

case to substantiate his submission. I find the circumstances of that case is different to the case before me. Accordingly I decline to follow the said case. The plaintiff submitted that the defendant has failed to disclose any evidence by way of affidavits to substantiate the allegation that he will suffer grave injustice or the nature of the injustice. It was further submitted that even if leave is refused, there is no prejudice caused to the defendant as then the defendant has the right to put forward his case before the trial Judge. This court is inclined to accept this submission. If the defendant is successful he will be entitled to costs. Accordingly in this application the defendant has failed to satisfy court on the ground of substantial injustice. With the material submitted the defendant has failed to satisfy this court the probability of success on the grounds of appeal submitted.

- [21] It is also pertinent to note that this is an interlocutory application from the learned Master. The court would be extremely cautious to grant leave to appeal unless there are cogent reasons to do so. It was held in **Mohammed Anwar Khan –v- Suva City Council. HBC 406/2008.** **“It is trite law that leave will not generally be granted from an interlocutory order unless the court sees that substantial injustice will be done to the defendant appellant”.**

**“Further it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding”.**

- [22] In **Kevilton Investments Ltd & Tappoo Ltd –v- Civil Aviation Authority & Motibhai Co. ABU 00034 of 95** it was held “The courts have thrown their weight against appeals from interlocutory orders and decisions for very good reasons and hence leave to appeal are not readily granted”.

- [23] In **Tortis INC spot(Fiji) Ltd & Another –vs- John Leonard Clark & Anr. FCA NO. 35 of 1996** the court held **“it has been long settled law and**

**practice that interlocutory orders and decisions will seldom be amenable to appeal.”**

[24] I find the defendant/appellant has failed to adduce any evidence to show that there are exceptional circumstances in this application for this court to grant leave as per the summons.

**Conclusion**

[25] For the above stated reasons the defendant has failed to satisfy this court that the impugned order of the learned Master is wrong and by allowing it to stand he is going to suffer substantial injustice.

[26] The defendant has failed to satisfy this court to obtain the relief sought in the summons dated 24.1.14.

[27] Accordingly I refuse to grant leave to appeal pursuant to summons dated 24.1.14 and the said summons is dismissed with a cost of \$1000 in favour of the plaintiff/respondent.



*Mayadunne Corea*

Mayadunne Corea

**JUDGE**

27.02.2015