IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 214 OF 2012

BETWEEN : **COSTERFIELD LIMITED** as trustee for Costerfield Unit Trust a duty incorporated limited liability company having its registered office at Level 4, Plaza 1, FNPF Boulevard, 33 Ellery Street, Suva.

APPELLANT (ORIGINAL PLAINTIFF)

And other plaintiffs as set out in the schedule of Statement of Claim

AND : **DENARAU INTERNATIONAL LTD** a duly incorporated limited liability company, having its registered office at C/- Munro Leys, Level 3, Pacific House, Butt Street, P. O. Box 149, Suva, Fiji.

FIRST RESPONDENT (ORIGINAL FIRST DEFENDANT)

AND : **DENARAU INVESTMENTS LTD** a duly incorporated limited liability company, having its registered office at C/- Munro Leys, Level 3, Pacific House, Butt Street, P. O. Box 149, Suva, Fiji.

SECOND RESPONDENT (ORIGINAL SECOND DEFENDANT)

Before : Hon. Mr. Justice Sunil Sharma

Counsels : Mr. R. Kumar for the Appellant/Plaintiff

Mr. V. Singh for both the Respondents/Defendants

Date of Hearing : 23 November, 2016

Date of Ruling : 02 December, 2016

R U L I N G

[PRELIMINARY ISSUE – Appeal – Application to strike out claim]

BACKGROUND INFORMATION

[1] By ruling delivered on 8th July 2016 the learned Master of the High Court ordered as follows:

> *"1. The proceedings against the Second Defendant is summarily dismissed.*
>
> *2. The Statement of Claim filed against the First Defendant framed as a class/representative action is struck out and be re-pleaded under general contract action.*
>
> *3. I make no order as to costs."*

[2] On 22 July 2016 the Appellant (Plaintiff) filed a Notice and Grounds of Appeal as follows:-

1. *That the Learned Master erred in law and in fact in incorrectly applying Order 15 Rule 14 (1) of the High Court Rules 1988 and the precedent in Duke of Bedford –v- Ellis' (1901) AC 1.*

2. *That the Learned Master erred in law and in fact when he held that there is no commonality of interest or same interest between the Plaintiffs within the meaning of Order 15 Rule 14 (1) of the High Court Rules 1988 when the same interest between the Plaintiffs was clearly pleaded and argued as follows:-*

   i) Terms of Villa Owners Management Agreement (VOMA)

   ii) Terms of VOMA breached by the First and Second Defendant

   iii) Time of the breach

iv) Circumstances of the breach

v) Nature of loss in the form of villa revenue payable to villa owners by the defendants in accordance with the terms of the VOMA

3. *That the Learned Master erred in law and in fact when he held that the cause of action needs to arise out of same transaction in order to bring a representative action when there is no such requirement under Order 15 Rule 14 (1) and as per legal precedents: Carnie –v- Esanda Finance Corporation Ltd (1995)* HCA 9; (1995) 127 ALR76; *Gavidi –v- Native Land Trust Board (2008) FJHC 23; HCB 222.2007 (29 February, 2008).*

4. *That the Learned Master erred in law and in fact by holding that damages for the Plaintiffs cannot be assessed under representative action when separate assessment of damages can be done if necessary once liability is established.*

5. *That the Learned Master erred in law and in fact in rigidly applying the rule as to representative actions when case law precedents hold that the rule is to be treated as a "flexible tool of convenience in the administration of justice" (John –v- Rees [1970] 1 Ch 345 at 369).*

6. *That the Learned Master erred in law and in fact in holding that the 52 (fifty two) people who are represented by the Plaintiff should file separate actions to have their claim with "commonality of interest" be separately determined by our judiciary at wasted cost to the taxpayers and 52 (fifty two) Plaintiffs.*

7. *That the Appellant reserves their rights to file and amend their Grounds of Appeal.*

PRELIMINARY ISSUE

[3] On 23 August 2016 the Summons for Appeal Directions filed by the Appellant (Plaintiff) was called before the Court. On this day learned counsel for the Respondents raised a preliminary issue that the order of the learned Master of the High Court was an interlocutory order hence leave was required before the appeal could be heard and that the Appellant (Plaintiff) had not followed the correct procedure under the High Court Rules.

[4] Both counsel filed helpful written submissions and also made oral submissions during the hearing of the preliminary issue for which the court is grateful.

SUBMISSIONS ON BEHALF OF BOTH THE RESPONDENTS

[5] Mr. Singh learned counsel for the Respondents in support of the preliminary issue raised argued that the decision of the learned Master of the High Court was a result of a striking out application made by the Respondents under Order 18 rule 18 of the High Court Rules.

[6] Mr. Singh further submitted that in accordance with Order 59 rule 11 of the High Court Rules the Applicant ought to have obtained leave. Learned counsel relies on the Court of Appeal decision in *Goundar –vs- Minister for Health,* Civil Appeal No. ABU0075 of 2006 (9 July 2008) as the current authority which states that an application to strike out a pleading was an interlocutory application.

[7] Finally Mr. Singh seeks costs from the Appellant (Plaintiff), he submits that after receipt of the Notice of Appeal his office had informed the Appellant's solicitors about the objections they were taking which was prior to any appearance made in court.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[8] Mr. Kumar learned counsel for the Appellant (Plaintiff) in opposing the preliminary issue raised submits that the order of the learned Master of the High Court was a final order which led to an appeal been filed under Order 59 rule 8 (1) of the High Court Rules.

[9] Mr. Kumar further argues that Goundar's case did not establish the test to determine what was an interlocutory order or a final order. Mr. Kumar relied on the recent case of *Stephens –vs- Nunnink*, Civil Appeal No. ABU 75 of 2014 (26 February, 2016) in particular paragraph 12 of the ruling which states:

"As revealed in the foregoing exposition, on the basis of the "Application approach" (the established approach in Fiji) as to when an impugned order could be regarded as 'interlocutory' or 'final' would in my view, depend on the nature of the issues raised as preliminary issues and the stage at which they were raised before the Court (the High Court) exercising original jurisdiction. This is the test."

[10] Mr. Kumar submits that the learned Master of the High Court had taken into account the merits of the issue raised before him and then made a finding which determined the rights of the Appellant (Plaintiff) under representative action.

[11] In respect of costs Mr. Kumar admits that they had received correspondence from the solicitors of the Respondents, however, by this time they were well out of time to file any further application.

ANALYSIS AND DETERMINATION

INTERLOCUTORY ORDER –vs- FINAL ORDER

[12] Before a litigant or a solicitor on behalf of a litigant embarks into filing an appeal it is important for that litigant or the solicitor on behalf of the litigant to undertake a research on whether the order or judgment appealed was interlocutory or final and the procedure that applied. The distinction between an interlocutory order or a final order is not an easy one, however, the Court of Appeal in *Goundar –vs- Minister for Health* (supra) has in my view given legal certainty to the law in Fiji in this regard.

[13] The Court of Appeal in *Goundar's case* went further to state that the "application approach" was the correct approach when it came to determining whether an order was interlocutory or final depended on the nature of the application filed in court and not on the nature of the order made. At paragraph 38 of the Judgment the Court of Appeal gave some common examples of interlocutory applications as follows:

"Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:

1. *An application to stay proceedings;*

2. *An application to strike out a pleading;*

3. *An application for an extension of time in which to commence proceedings;*

4. *An application for leave to appeal;*

5. *The refusal of an application to set aside a default judgment;*

6. *An application for leave to apply for judicial review.*

[14] Bearing in mind the decision of the Full Court of Appeal in *Goundar's* case it is now possible to say with certainty that the test whether an order or judgment was interlocutory or final is a legal test rather than a practical one. This appears to be the approach also taken by the Court of Appeal of Vanuatu in *John Dick Miller –vs- National Bank of Vanuatu and The Asset Management Unit,* Civil Appeal No. 33 of 2005 (26 May, 2006) where the Full Court of Appeal stated as follows:

> *"In our opinion, where an order is made striking out proceedings, even if that order has the practical effect of bringing the proceedings to an end, it is nonetheless an interlocutory order. It follows that leave to appeal is required."*

[15] When coming to a decision that the "application approach" was the correct position of the law in Goundar's case the Court of Appeal had taken into account the test in England at paragraph 28 of the Judgment:

> *"In England the test whether an order is interlocutory or final depends on the nature of the application (White v Brunton*

(1984) QB 570) and not on the nature of the order as eventually made."

[16] The Court of Appeal in *White –vs- Brunton* [1984] 1QB 570 in regards to the test mentioned above had taken into account *Salaman vs. Warner* [1891] 1QB 734 where the test was stated in the following words:

"... Thus the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself. I refer to this as the "application approach"."

[17] Learned counsel for the Appellant (Plaintiff) argues that this court should rely on the test stated in *Stephens –vs- Nunnink* (supra) as the test to determine whether the order made by the learned Master of the High Court was interlocutory or final. Counsel relies on paragraph 12 of the Ruling. The Ruling delivered by a single Justice of Appeal in *Stephen's* case adopted and/or accepted the "application approach" stated in *Goundar's* case which includes the test that gives rise to the "application approach" hence I do not see how reliance on *Stephen's* case will make any difference to the decision arrived at by the Full Court of Appeal in *Goundar's* case, accordingly I reject this argument by the learned counsel for the Appellant as misconceived.

[18] It is now important to see what the High Court Rules state about the procedure that should be followed when it comes to appeals from the decision of the learned Master of the High Court. Order 59 Rule 9 provides:

"9. An appeal from an order or judgment of the Master shall be filed and served within the following period –

(a) 21 days from the date of the delivery of an order or judgment; or

(b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal."

Order 59 Rule 10 provides:

"10. (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit."

Order 59 Rule 11 provides:

"11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment."

[19] I accept that the current law in Fiji in respect of whether an order or judgment is interlocutory or final is the "application approach" and I am satisfied that the order made by the learned Master in response to the striking out application filed by the Respondents was an interlocutory order.

[20] The learned Master delivered his Ruling on 8 July, 2016 and as such the Appellant (Plaintiff) was required under the High Court Rules to file and serve an application for leave to appeal by 22 July, 2016.

[21] The Appellant, however, filed Notice and Grounds of Appeal on 22 July, 2016. It is glaringly obvious that the Appellant has not obtained leave to appeal the interlocutory order of the learned Master which is a requirement under the High Court Rules and as such this court cannot determine the substantive appeal until leave has been obtained by the Appellant.

[22] This court has no powers to deal with this matter any further but to uphold the preliminary issue raised and strike out the Notice and Grounds of Appeal as incompetent for want of leave to appeal.

COSTS

[23] The learned counsel for the Respondents informed the court that the Appellant's solicitors were already put on notice about the requirement of leave to appeal been first obtained after service of documents. This aspect has not been denied by the Appellant's solicitors which no doubt supports the application for costs in favour of the Respondents.

[24] I note from the Ruling of the learned Master of the High Court that before the pronouncement of orders he used the heading "Final Orders". I do not think that this would have in any way influenced the decision of the Appellant's solicitors in view of the very clear and concise decision and examples given by the Court of Appeal in Goundar's case. Further I note that the learned Master at page 2 of his Ruling had mentioned that the

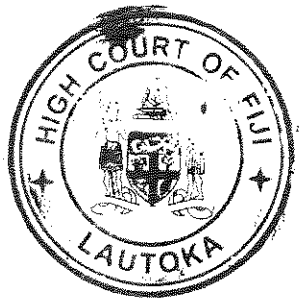
Respondents (Defendants) Summons dated 12th October 2015 was seeking the grant of interlocutory reliefs and he goes ahead to detail the interlocutory relief sought. This ought to have alerted the Appellant (Plaintiff) that any orders made by the learned Master would be interlocutory in nature.

ORDERS

(1) The Notice of Appeal and Grounds of Appeal dated 21 July, 2016 filed on 22 July, 2016 is hereby struck out as incompetent for want of leave to appeal.

(2) The Appellant (Plaintiff) is at liberty to file an application for extension of time to seek leave to appeal and file Notice of Appeal and Grounds of Appeal.

(3) The Appellant (Plaintiff) is to pay costs to both the Respondents summarily assessed at $500.00 each.



.....

Sunil Sharma

JUDGE

At Lautoka

02 December, 2016

Solicitors

M/s. Faiz Khan Lawyers for the Appellant (Plaintiff).

M/s. Parshotam Lawyers for the Respondents (Defendants).