IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 61 of 2013

BETWEEN : **ROTOMOULD (FIJI LIMITED** of Aliz Pacific, 8th Floor, BSP Life Centre, 3 Scott Street, Suva, in the Republic of Fiji.

Plaintiff

AND : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** of Industrial sub division, Denarau Island, Nadi, in the Republic of Fiji.

Defendant

Solicitors : Lateef & Lateef for the Plaintiff
A. K. Lawyers for the Defendant

RULING

INTRODUCTION

1. Before me is a Summon for Leave to Appeal filed on 18 December 2015 pursuant to section 20 (1) (a) of the Court of Appeal Act and Rule 26 (3) of the Court of Appeal Rules and the inherent jurisdiction of this Court seeking the following orders:

    1. the Learned Judge erred in law and in fact in failing to set aside the whole of the Award of the Arbitrator resulting from his misconduct and breach of natural justice and in failing to properly hold that the irregularity caused a substantial miscarriage of justice to the Plaintiff when the Award clearly is bad on its face involving apparent errors in fact and law and does not comply with the requirements of finality and certainty in that it is equivocal and incapable of supporting the amounts and/or total loss awarded.
    2. the Learned Judge whilst correctly applying the principles of law that considerations of breach of contract and consequential damages are not applicable where the agreement has been mutually terminated nevertheless erred in law by not holding that the Arbitrator's Award of loss of profit to the Defendant was clearly unsupported by his finding of fact of mutual termination of the building contract ("agreement").
    3. the Learned Judge erred in fact and in law by holding against the Arbitrator's finding of fact of mutual termination of the agreement when no contrary finding of a breach of contract was made by the Arbitrator against either party.
    4. the Learned Judge erred in fact and in law by failing to make any determination or assessment as to whether the amounts awarded against the Plaintiff are reasonable when there is clearly no reasons provided or any logical analysis contained in the Arbitrator's Award to show as to how the Arbitrator determined liability against the Plaintiff and assessed and/or calculated the amounts awarded against the Plaintiff.
    5. the Learned Judge erred in law in holding that there was nothing before him to suggest that the Arbitrator improperly procured the Award or that the amounts awarded to the Defendant has unjustly enriched the Defendant when there is ample evidence on the face of the record and the Award to suggest otherwise.

6. the Learned Judge erred in fact and in law in his finding that the Arbitrator was correct in considering and determining breach of agreement as well as consequential damages when the Arbitrator has clearly made no such finding of a breach of agreement against the Plaintiff and thereby no finding of consequential damages should have been made against the Plaintiff.

2. A preliminary issue was raised by counsel for the respondent regarding the use of some affidavits which are filed for and on behalf of the applicant.

> The Defendant objects to the use of the Affidavit in Support of Rakesh Prasad sworn on 8th December, 2015 on the grounds that the deponent lacks authority to give evidence on behalf of the Plaintiff. This Honourable Court would no doubt note that the deponent has not been involved in these proceedings at any stage. The deponent has not given any evidence before this Honourable Court.
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> We opt not to regurgitate the principles enunciated by Justice Ajmeer in **Denarau Corporation Limited v Deo Construction Development Company Limited** [2015] FJHC 112; HBC 32.2013 save to submit that a similar issue arose in that matter. The Affidavits were not read into evidence on the basis that it lacked authority and that it was sworn before an agent of the Plaintiff solicitors.
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> We also object to the use of the Affidavit in Response of Prakash Chand sworn "allegedly" on 18th February, 2016. We say allegedly because the Affidavit has not been properly sworn. The jurat crucially fails to record where the affidavit was sworn. A jurat must state before whom and where the contents were sworn. Accordingly, this affidavit cannot be read into evidence.
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> The Affidavit in Response of Rakesh Prasad also falls foul of the issue in 3.3 above. In addition to this the affidavit is in contravention of Order 41 Rule 7. The person who the affidavit was sworn before has not authorised the alterations made to the affidavit.
>
> Notwithstanding our objections above, we will now deal with the principles of leave to appeal and in particular whether the order of 17th November, 2015 was interlocutory or final in nature.

3. The affidavit of Rakesh Chand merely deposes to the various advice of the applicant's solicitors pertaining to the relative strength of their appeal and I do not see any real prejudice against the respondents if I grant leave to the use of this affidavit. In any event, Chand is a director of the applicant company and his authority to depose to the affidavit was confirmed in a latter affidavit of Prakash Chand (see below). Prakash Chand's affidavit confirms the authority in Rakesh Chand to swear the first affidavit and also regurgitates the solicitors advice. I am prepared to overlook these relatively minor flaws and I do so accordingly.

OBSERVATIONS

4. Section 20(1)(a) of the Court of Appeal Act provides as follows:

> *Powers of a single judge of appeal*
>
> **20.** The powers of the Court under this Part-
> *(a)* to give leave to appeal;

5. Rule 26(3) of the Court of Appeal Rules provide as follows:

> *Applications to Court of Appeal*
>
> ***26.**-(1) Every application to a judge of the Court of Appeal shall be by summons in chambers, and the provisions of the Supreme Court Rules shall apply thereto.
>
> (2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.
>
> (3) Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.

ISSUES

6. The basic issue is whether or not the decision of this court handed down on 17 November 2015 was an interlocutory decision or whether it was a final decision. The respondent's counsel argues that the decision was a final one and accordingly, this application is misguided in seeking the leave of this court.

THE LAW

7. Section 12(2) (f) of the Court of Appeal Act (Cap 12) provides that in civil cases:

> (2) No appeal shall lie-
> *(f)* without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court...

8. However, an appeal against a final judgment is by way of right.
9. Pursuant to section 20 (1) (a) of the Court of Appeal Act, a single judge of the Court of Appeal has jurisdiction to exercise the powers of the Court to, *inter-alia*, give leave to appeal.

10. Rule 26 (3) provides that where there is concurrent jurisdiction exercisable by both the Court of Appeal and the court below, any application that is subject to that concurrent jurisdiction must first be made in the court below.

11. The Rule states:

> 26 (3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.

12. The President of the Fiji Court of Appeal, Mr Justice Calanchini, in **Skerlec v Tompkins** explained section 12(2)(f) of the Court of Appeal Act as follows:

> [13] The effect of the section is clear. There is no right to appeal to the Court of Appeal an interlocutory judgment of the High Court without leave having first been granted by either the judge in the Court below or by the Court of Appeal.
> [14] The applicants submitted that the decision of the learned High Court delivered on 30 April 2014 was an interlocutory judgment and that since the Appellants had filed a notice of appeal without first having obtained leave, the Court of Appeal had no jurisdiction to hear the appeal which should be struck out as being incompetent.
> [15].....
> [16] Amongst the authorities relied upon by the applicants was the decision of this Court in **Goundar –v- Minister for Health** (AAU 75 of 2006; 9 July 2008). That decision remains undisturbed and is binding on me.
> [17] The position is clearly stated in paragraph 37 and 38 of the unreported version of that judgment:
> 37....
> 38. 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 that ruling, order or declaration."

INTERLOCUTORY OR FINAL?

13. The decision for which the applicant is seeking leave to appeal was one in which I had declined an application by the applicant under section 12(2) of the Arbitration Act to set aside an arbitral award on the ground of misconduct.

14. In that decision, I had also remitted to the Arbitrator for reconsideration a part of (not all) the award:

> 78. Rotomould is also aggrieved about that part of the award wherein DCDCL was being compensated for some building materials it had bought for the project, but which are still in DCDCL's possession. It submits that this amounts to an unjust enrichment because there was no Order for DCDCL to give up the materials to Rotomould.

79. This part of the award can be remitted to the Arbitrator under section 11 of the Arbitration Act.

> *Power to remit award*
> 11.-(1) In all cases of reference to arbitration, the court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
> (2) Where an award is remitted the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

80. Section 11 obviously gives power to this court to remit part only of the matters referred as opposed to remitting the entire award. For the avoidance of doubt, I direct that the Arbitrator is to deal only with this particular matter on remission (i.e. the release of the materials and fabricated steel by DCDCL to Rotomould). Once the materials have been released to Rotomould, DCDCL may then apply to this Court for the release to it of the award sum which is deposited in this Court.

15. The applicant cites some very interesting English and Australian decisions which have dealt with the issue of whether the decision of a Court dealing with an arbitral award is final or interlocutory (see **In re Croasdell and Cammell, Laird Co. Ltd.** [1906] 2 K.B. 569; **Moran v Lloyd's** [1983] 2 All ER 200; **Monash University v Berg** [1984] VicRp 30; [1984] VR 383 (30 November 1983); **Applicants A1 & A2 v Brouwer & Anor** [2007] VSCA 139).

16. In the oft cited **Goundar v Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008) the Fiji Court of Appeal favoured the English approach over the Australian approach that the test for determining whether a judgement is final or interlocutory depend on the nature of the application rather than the nature of the order.

> 27. All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision.
> 28. 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.
> 29. In Australia the courts have taken an "*order approach*", so that the order appealed from, not the nature of the application before the trial judge, is determinative. So in Australia for example, an order refusing to grant a declaration is interlocutory but the grant of a declaration is a final order.
> 30. In Fiji the Court of Appeal in ***Suresh Charan v Shah*** (1995) 41 FLR 65 [Kapi, Thompson, Hillyer JJA] held that refusal by the High Court to grant leave for Judicial Review is an interlocutory order. The Court of Appeal further held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts

unless there were strong reasons for not doing so and accordingly adopted the "*application approach*".

31. That decision was followed in ***Shore Buses Ltd v Minister for Labour*** FCA ABU0055 of 1995, a case of dismissal of proceedings for want of prosecution.
32. In ***Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors*** [2004] Vol 1 Fiji CA 213, [Ward P, Eichelbaum, Gallen JJA] the appellant filed an application for judicial review of a decision of the Major Tenders Board. The appellant appealed to the Court of Appeal. The respondent took the preliminary objection that the appeal was not properly instituted because it required leave.
33. The Court of Appeal overruled ***Suresh Charan v Shah*** (supra) and **Shore Buses** (supra) and held that the "*order approach*" was the correct approach in Fiji. The Court sought to distinguish the earlier cases on the facts (in both **Suresh Charan** & **Shore Buses** the appellants had other remedies) but the Court's reasoning is not clear.
34. The vice in the "*order approach*" is that where leave to appeal has not been obtained the parties may not know whether or not it was required until the case comes on for hearing before the Court of Appeal and a close examination of the order and its effect can be argued.
35. It seems to this Court that the "*application approach*" is the correct approach for the reasons stated in ***Suresh Charan v Shah*** and for the additional reason of legal certainty.
36. As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in **Jetpacker** (supra) did. In overruling **Jetpacker** supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by practitioners. Practitioners and litigants need to know with certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave.
37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.
38. 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.

17. The headnotes to the English Court of Appeal decision in **Moran v Lloyd's** [1983] 2 All ER 200, the English Court of Appeal (as per Sir John Donaldson MR, Dillon LJ and Sir George Baker) which cited by the applicant's solicitors cite reads:

> **Held** – (1) The question whether an order was interlocutory or final was to be determined by the nature of the application and not by the nature of the order which the court eventually made. Since an order made on an application to set aside an award was interlocutory it followed that an order made on an application to remit an award was also interlocutory. Accordingly, since the applications under s 22 and s 23 of the 1950 Act were both interlocutory, leave to appeal was required (see p 203 *c* to *f*, post); *Re Croasdell200 and Cammell Laird & Co Ltd* [1906] 2 KB 569 followed; *Salter Rex & Co v Ghosh* [1971] 2 All ER 865 considered.
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> (2) Leave to appeal would not be granted, however, for the following reasons—
>
> (a) the applicant had failed to make out an arguable case of misconduct under s 23 of the 1950 Act. It was doubtful whether inconsistency between one part of an award and another could ever constitute or evidence misconduct by an arbitrator or umpire and the overwhelming likelihood was that it would merely show error of law or of fact, or both, which in themselves did not amount to misconduct (see p 204 *f g* and p 205 *c*, post);
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> (b) when considering a claim for remitting an award under s 22 of the 1950 Act on the ground of inconsistency, a distinction was to be drawn between the operative parts of the award and the reasoning for it. While inconsistency of reasoning would at most give rise to a right of appeal if it showed an error of law, inconsistency or ambiguity in the operative parts of an award might require remission to the arbitrator or umpire to enable him to resolve such inconsistency, since it would not be right to enforce an award in an ambiguous or inconsistent form. However, the applicant had shown no arguable ground for remission either on the basis of any internal inconsistency or for inconsistency in the reasoning (see p 204 *h* to p 205 *c*, post); *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496 considered;
>
> (c) failure by an arbitrator or umpire to allow a party a reasonable or proper opportunity to put forward his case could constitute misconduct for the purposes of setting aside an award or for exercising discretion to remit it, but on the facts there were no arguable grounds for alleging that there had been such misconduct (see p 205 *b c*, post).
>
> .....
>
> (2) The terminology of s 23 of the 1950 Act, which provides remedies where an arbitrator or umpire has 'misconducted himself or the proceedings', can give rise to a wholly misleading impression of the complaint made against the arbitrator or umpire since s 23 is not confined to dishonesty or breach of business morality, which the terminology more usually implies, but can also apply to procedural errors (see p 203 *f* to *j*, post).

18. The above case, for which I am grateful to Ms Narayan's research, is applicable in Fiji for two principal reasons. Firstly, because the approach favours the English "applications-approach" which the Fiji Court of Appeal has endorsed in **Goundar**. Secondly, because sections 22 and 23 of the English Arbitration Act of 1950 which the English Court of Appeal relied on as determinative of the interlocutory nature

of the application[1], are similar to sections 11 and 12 (respectively) of the Fiji Arbitration Act (Cap 38).

Section 22 (UK) 1950 Act

22.-(1) In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.
(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Section 23 (UK) 1850 Act

23.-(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.
(3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Section 11 Fiji

Power to remit award

11.-(1) In all cases of reference to arbitration, the court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Section 12 Fiji

Power to set aside award

12.-(1) Where an arbitrator or umpire has misconducted himself, the court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

MERITS IN THE PROPOSED GROUNDS OF APPEAL

19. In dealing with an application for leave to appeal, it is not necessary to delve into the merits of the appeal. All that is necessary is to see if the appeal is wholly unmeritorious or unlikely to succeed. The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious (see **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** [2010] FJCA 3(3 February 2010); **Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji** [1991] FJCA 4; Abu0067d.90s).

20. In **The Fiji Public Service Commission v Manunivavalagi Dalituicama Korovulavula** FCA Civil Appeal No. 11 of 1989 at 5 the Court stated:

> It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not.

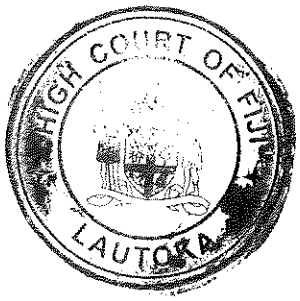
[1] The court said:
Since an order made on an application to set aside an award was interlocutory it followed that an order made on an application to remit an award was also interlocutory. Accordingly, since the applications under s 22 and s 23 of the 1950 Act were both interlocutory, leave to appeal was required

However as the matter stands I am clearly of the opinion that the Appellant has raised a number of arguable legal issues of some importance which call for further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal."

21. I have considered the six proposed grounds of appeal (see above) advanced by the applicant and I agree there is there is a serious question for adjudication. I did make a finding that the Arbitrator did misconduct himself by failing to give both parties an opportunity to make verbal submissions in the arbitration proceedings. However, I refused to set the award aside on that score as I was of the view, which views I still hold, that there was no prejudice to the plaintiff (now applicant) before me. The applicant contends that whilst the law was correctly identified, it was incorrectly applied in many respects. I am indeed of the view that there are some serious issues to be considered by the Fiji Court of Appeal. As the Fiji Court of Appeal said in **FPSC v Manunivavalagi** (supra), these issues deserve further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal which we will all benefit from.

ORDER

22. Leave to appeal granted to the applicant. Parties to bear their own costs.



Anare Tuilevuka
JUDGE
29 September 2016.