IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 57 of 2011

BETWEEN

BULILEKA HIRE SERVICES LIMITED

Plaintiff/Respondent

AND

THE HOUSING AUTHORITY

1st Defendant/Appellant

AND

MIKAELE TUPUA

2nd Defendant/Appellant

Counsel	:	Mr. A. Pal for the Plaintiff/Respondent. Mr. V. Maharaj for the Defendants/Appellants.
Date of Hearing	:	07th November, 2015
Date of Order	:	23rd January, 2017

ORDER

[1] This is an application for leave to appeal and the stay of all proceedings and the operation of the order dated 19th January, 2016 wherein the court refused the application of the defendant to stay the proceedings and to refer the matter for arbitration.

[2] This application for leave to appeal and stay was made pursuant to Section 12(2)(f) of the Fiji Court of Appeal Act and rule 34(1) of the Court of Appeal Rules which provides as follows;

> 12(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal-
>
> (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 Supreme Court, except in the following cases, namely:-
>
> (i) where the liberty of the subject or the custody of infants is concerned;
>
> (ii) where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise;
>
> (iv) in the case of a decree nisi in a matrimonial cause or judgment or order in an Admiralty action determining liability;
>
> (v) in such other cases as may be prescribed by rules of Court.

34(1) Except so far as the court below or the Court of Appeal may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.

[3] Both counsel cited various authorities on the question of granting leave to appeal from interlocutory orders and stay of proceedings pending appeal.

[4] In the case of **Bank of Hawaii v Reynolds** [1998] FJHC 226 the court referred to the following passage from **Ex parte Bucknell** [1936] HCA 67; (1936) 56 C.L.R. 221 at 225 which are pertinent:-

> "At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under s 5(1)(a) should be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an inter interlocutory judgment."

[5] In **Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr** [1995] FJCA 15; Abu0034d.95s (18 July 1995) it was held:

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

[6] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.
>
> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

[7] In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> 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 applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

[8] Before proceeding to consider whether the defendants/appellants have a good arguable case with realistic prospect of success I will briefly state the history of this case.

[9] The plaintiff instituted these proceedings on 02nd March, 2011. The trial of the action was fixed for 04th to 15th May, 2015. On 08th October, 2015 the learned counsel for the defendant filed summons seeking an order on the question whether the matter should be referred for arbitration prior to the trial proper. In the meantime the parties sought time to appoint an independent engineer to consider the reports filed

of record and to obtain his opinion. The matter was mentioned on four occasions but the parties could not agree on an engineer.

[10] Section 5 of the Arbitration Act provides:

> If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, **at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings**, apply to the court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. [Emphasis is added].

[11] The learned counsel for the defendants/appellants cited the decision in **Consort Shipping Line Ltd v FAI Insurance (Fiji) Ltd** [1998] FJHC 205; Hbc038.97s (29 October 1998). In that case it was held;

> Having closely examined section 5 of the Act I concluded that an appearance having been entered and no pleadings having been delivered the Court had jurisdiction to stay the legal proceedings commenced by the Plaintiff and to refer the matter to arbitration providing it was satisfied that:
>
> (a) there was no sufficient reason not to refer the matter to arbitration; and
>
> (b) the Plaintiff was first, when the writ was issued and secondly, now ready and willing to "do all things necessary to the proper conduct on the arbitration".

[12] The facts of the case cited above are different to that of the case before this court. In *Consort Shipping Line Ltd v FAI Insurance (Fiji) Ltd* (*supra*) when the application was

made for the stay no pleadings had been delivered. In the instant case the application to refer the dispute was made long after the matter was fixed for trial.

[13] The learned counsel for the defendants/appellants relied on the decision in **Roadworx Fiji Ltd v Fletcher Construction (Fiji) Ltd** [2016] FJHC 952; HBC108.2016 (20 October 2016) and submitted that this decision re-affirms approach consistently taken by courts in Fiji over the years based on the principle where the defendant was at the time where the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration and the court is satisfied there is no sufficient reason why the matter should not be referred to arbitration and the dispute is one which eminently suited to be resolved by way of arbitration then the court will not hesitate to grant a stay of proceedings and refer the matter to arbitration.

[14] In Roadworx Fiji Ltd v Fletcher Construction (Fiji) Ltd (*supra*) the question as to what point of time the court is entitled to stay the proceedings and refer the dispute for arbitration has not been raised. The parties to a contract cannot by agreement override the specific provisions of the statute.

[15] The decision in the case of Roadworx Fiji Ltd v Fletcher Construction (Fiji) Ltd (*supra*) has no application to the case at hand because in this case although the defendants were willing to refer the dispute for arbitration at the commencement of the proceedings the application was made to refer the matter to arbitration after more than 4½ years from the institution of the proceedings. If they were genuinely interested in resolving the dispute by way of arbitration the defendants would not have waited for such a long time and especially till such time the case is fixed for trial.

[16] The learned counsel also cited the decision in **Sambhu Lal Construction (Fiji) Ltd v Warren** [2011] FJHC 63; Action 44.2008 (11 February 2011). In that case the learned Master referred the dispute for arbitration despite the objection of the defendant. In deciding to stay the proceedings and to refer the dispute for arbitration the learned Master has made the following observations;

> The phrase "at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings" seems to be the determining

phrase in respect as to when an application for arbitration can be made. However, in FAI Insurance (Fiji) Ltd -v- Consort Shipping Line Ltd (1999) FJCA 10; Abu 0075u.98s the Court of Appeal ruled that a party's readiness and willingness to go to arbitration was the more relevant consideration.

[17] In **FAI Insurance (Fiji) Ltd -v- Consort Shipping Line Ltd** (*supra*) the Court of Appeal made the following observations;

> In my view the applicant's attempt to rely on section 5 of the Arbitration Act is misconceived. That section requires a party seeking to have an action stayed to show that he "was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration." It is difficult to see why the commencement of the action by the respondent's solicitors before they became aware of the requirement of arbitration in the applicant's standard policy should be regarded as preventing the respondent from showing that it was not in breach of the requirement of section 5, that is to say that at all relevant times it was "ready and willing to do all things necessary for the conduct of the arbitration". The commencement of an action in a court of law will often indicate a lack of such readiness and willingness but I agree with Scott J. that it will not necessarily do so and, more particularly, that in the circumstances of the present case it did not do so.

[18] Whether the parties were willing to refer the dispute for arbitration is not an issue in this case. The issue here is that in terms of the provisions of the Arbitration Act at what stage of the case the court is empowered to stay the proceedings and refer the dispute for arbitration. Therefore, the observation of the learned Master in **Sambhu Lal Construction (Fiji) Ltd v Warren** (*supra*) is of no relevance to the matter before the court.

[19] As I stated in my order refusing to refer the matter for arbitration, arbitration is a speedy and less expensive mode of settlement of disputes. The parties to a contract where there is a requirement to refer the dispute for arbitration before instituting proceedings in a Court of law must without any delay comply with such requirement. If the parties wait for years like in this case without making an attempt to refer the dispute for arbitration and after taking all the pre-trial steps in the matter

move court to refer the dispute for arbitration it would defeat the very purpose of referring a dispute for arbitration.

[20] The arbitration clause contained in the New Zealand Standard Conditions of Contract for Building and Civil Engineering Construction, which was adopted by the parties to this contract, does not make provisions to refer a dispute between the principal and the contractor directly for arbitration. In that clause there are certain prerequisites that should be satisfied by the parties to the contract before referring any dispute for arbitration.

[21] Section 13.4.1 of the agreement provides as follows;

> If either:
>
> (a) The Principal or the contractor is dissatisfied with the engineer's decision under 13.2.4; or
>
> (b) No decision is given by the Engineer within the time prescribed by 13.2.4;
>
> then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

[22] Section 13.2.4 provides that:

> Unless the dispute or any question arising in connection with it has been referred under 13.2.3 and in awaiting a recommendation from the agreed expert, the Engineer may, at any time, in respect of any dispute a difference under 13.2.1 give a decision (in this Section called a "formal decision") which states expressly that it is given under sub-clause 13.2.4. The Engineer shall give a formal decision on the matter within 20 Working Days of receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to this sub-clause 13.2.4. Upon making a formal decision the Engineer shall forth with send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject 13.3 and 13.4 or any adjudicating proceedings, be final and binding.

[23] On a careful reading of the above conditions of the contract it is absolutely clear that there is no provision for the parties to directly refer the disputes arising out of the contract for arbitration. They must first obtain what is called "formal certificate" from the engineer. The parties have not yet obtained such a certificate.

[24] In the circumstances it cannot be said that the defendants/appellants have a good arguable appeal with realistic prospect of success.

[25] I accordingly, make the following orders;

1. The application of the defendants/appellants for leave to appeal and stay of proceedings is refused.

2. The defendants/appellants shall pay the plaintiff/respondent $2000.00 as costs of this application within fourteen (14) days from today.

Lyone Seneviratne

JUDGE

23rd January, 2017.