

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 235 of 2009

BETWEEN

:

ASHIK HUSSEIN

Plaintiff

AND

:

PACIFIC GENERAL BUILDERS

Defendant

AND

:

DOMINION INSURANCE LIMITED

Third Party

Coram

:

The Hon. Mr Justice David Alfred

Counsel

:

Mr D. Singh for the Plaintiff
Mr R. Vananalagi for the Defendant
Ms S. Narayan for the Third Party

Date of Hearing
Date of Decision

:

8 September 2017
30 October 2017

DECISION

1. This is the Third Party's Summons for leave to appeal an Interlocutory Decision, (the decision) made by me on 7 August 2017, for the decision to be stayed pending determination of the appeal and for the trial date of the substantive matter to be vacated.
2. The Summons is supported by the affidavit of Joeli Seniuci Radio, the claims manager of the Third Party. In it he depones that the Plaintiff sustained injuries at work on or about 10 February 2008 while working for the Defendant. The Plaintiff filed the instant action on 17 September 2009. The Third Party engaged private investigators to investigate the circumstances surrounding the injury and their report is dated 17 November 2011. On 26 March 2013, the Third Party informed the Defendant that it was denying liability and indemnity because of the Defendant's breach of condition 8 of the Workmen's Compensation Policy (Insured to take all reasonable precautions to prevent accident and to comply with all statutory obligations).
3. The decision was delivered on a Summons (summons) filed by the Plaintiff seeking the determination of the following questions: whether the Third Party is entitled to repudiate liability pursuant to condition 8 of the Policy and is thereby not obliged to indemnify the Defendant against the Plaintiff's claim. It was supported by the affidavit of the Plaintiff in which he deposes that in order to curtail time and expense it is in the interest of justice to decide whether the Third Party is liable under the Policy.
4. At the hearing of the instant Summons for leave, Counsel for the Third Party confirmed her colleague who appeared at the hearing of the summons did not oppose the application. She also confirmed that the word "separate" does not

appear in Order 33 rule 3 of the High Court Rules (HCR). She said that the Defendant's Counsel misled the court that no investigation was carried out. She also said the Plaintiff's Counsel misled the court that the Third Party did not repudiate liability under condition 8 of the policy. She asked for a stay to allow all their witnesses to be present at the trial.

5. Counsel for the Plaintiff said the application flies in the face of the relevant authorities cited.
6. Counsel for the Defendant supported the Plaintiff's Counsel's submission.
7. At the conclusion of the arguments I said I would take time to consider my decision. Having done so I now deliver my decision.
8. O.33 r 3 of the HCR provides that the court may order any question or issue arising in a matter to be tried before at or after the trial. In my view this does not connote that there has to be a separate trial of the question or issue.
9. Accordingly the decision made by me on 7 August 2017 was that the Third Party was not entitled to repudiate liability to the Defendant. This was based on three grounds. The first was the Policy did not provide that the Third Party could repudiate liability for a breach of Condition 8. The second was the Third Party's Counsel's admission he had no government department documents to substantiate their allegations of the Defendant's breaches of statutory regulations. The third was the Policy was to cover the contingency that had occurred and for which cover the Defendant had paid a premium to the Third Party.

10. In these circumstances, I am of opinion that any appeal against the Interlocutory Decision is unlikely to succeed. Moreover it is trite law that the appellate court is not inclined to allow an appeal against an interlocutory decision.
11. It is also trite law that an appellant has to show that if no stay is granted, the appeal will be nugatory.
12. With regard to the decision, the Third Party and its Counsel are labouring under a misapprehension that the decision disallows their witnesses from attending the trial. It does no such thing. The Third Party is entitled to cross-examine the Plaintiff's and the Defendant's witnesses and call its own witnesses at the trial and to take a full and unfettered part in the hearing. The issue of liability is open and the damages are at large. The burden is on the Plaintiff to prove his claim against the Defendant and only if he succeeds in doing so can the Defendant's claim against the Third Party commence. It should therefore be clear there is nothing to stay, as the court did not after the decision resort to O.33 r 7 and give any judgment as may be just.
13. In any event these proceedings arise from an accident which occurred more than 9 ½ years ago, and is in the first place an action by the Plaintiff against the Defendant and thus in the interests of justice a stay could not be granted.
14. In fine, I make the following orders:-
 - (a) The application for leave to appeal is denied.
 - (b) The application for a stay of the Interlocutory Decision is declined.
 - (c) The application for the trial dates to be vacated is not granted.
 - (d) The Third Party is to pay the costs of this Summons summarily assessed at \$250 to the Plaintiff and \$250 to the Defendant.

15. In conclusion, I confirm the hearing of the substantive action will proceed at 9am on 29 and 30 November 2017 when all the parties and their witnesses will attend and have their evidence heard.

Delivered at Suva this 30th day of October 2017.



David Alfred

David Alfred
JUDGE of the High Court of Fiji