

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 duly 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)

Appearances : Ms S. Devi for the appellant/original plaintiff
Mr R. Newton for the respondent/original defendants
Date of Hearing : 3 May 2018
Date of Judgment : 31 August 2018

J U D G M E N T

Introduction

- [01] This appeal is brought by Costerfield Limited (*'the appellant'*), following the leave to appeal out of time being granted by Tuilevuka J on 7 February 2018, against the orders dated 8 July 2016 of the Learned Master (*'the Master'*), dismissing the representative claim commenced by the appellant on its behalf and on behalf of other 52 plaintiffs for damages arising from unpaid Villa Revenue (*'the decision'*).
- [02] When granting the leave to appeal, Tuilevuka, J observed (at para 31 of his ruling dated 7 February 2018) that:

"I am inclined to follow the approach of Amaratunga J in Veilave v Naicker. I think the proposed grounds of appeal have merits and raises issues of law that should be tested on appeal. I grant leave to the applicant to apply out of time to seek leave to appeal out of time. Since I have already opined that there are good grounds of appeal shown, I see no reason why I cannot now grant leave to the applicant to appeal the decision of the Master and I so now order also."

- [03] The substantive appeal hearing was argued before me. I heard the oral argument advanced by both parties. I have also the benefit of their respective written submissions. I am grateful to counsel for their assistance.

The Background to the Appeal

- [04] The backgrounds to the appeal briefly are as follows.
- [05] Costerfield Limited, the plaintiff (in these proceedings *'the appellant'*) brought a representative claim against Denarau International Ltd, the first defendant (in these proceedings *'the respondent'*) and Denarau Investments Ltd, the second defendant (in these proceedings *'the second respondent'*) for, among other things, damages to the extent of unpaid Villa Revenue in the sum of FJ\$95,000.00 to the plaintiff and FJ\$3,800,000.00 to the Schedule A Villa Owners (52 other plaintiffs).
- [06] On 13 October 2015, the respondents filed a summons and sought relief among other things that the statement of claim be struck out under the HCR, O 18, R 18 and the plaintiff not to be permitted to continue the proceedings as representative proceedings under the HCR, O 15, R 14 (1). The Master heard the

summons and delivered his ruling on 8 July 2016. The Master ordered that: 1. *The proceedings against the Second Defendant is summarily dismissed and 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 ('the decision').* The appellant appeals the Master's second decision to this court.

The decision in the court below

[07] The Master, having astutely analysed the law and a number of case authorities on the issue of representative claim, reached a conclusion that he should strike out the appellant's representative action against the respondent and order that the appellant should re-plead under general contract action. The basis for his decision is at paras (14) and (15) of his ruling, which is reproduced as follows:

“(14) Action for damages

The relief claimed in the action before me is not confined to a declaration. The representative Plaintiff claims;

- A. *Damages to the extent of unpaid Villa Revenue in the sum of i. FJ\$95,000 to the Plaintiff ii. FJ\$3,800,000 to the Schedule A Villa Owners.*
- B. *Damages to the extent of misappropriation of revenue by LPML.*
- C. *Damages to the extent of the Plaintiffs' indebtedness to FRCA in the Sums owing to the Schedule A Villa Owners.*

In my view, not all villa owners have the same right of income as income from each villa is dependant[sic] on factors such as the size of the villa, quality of the villa and the revenue stream for each villa. Therefore, the damages of the case do require personal assessment. They have to be proved separately in the case of each Plaintiff. Therefore, the possibility of representation ceases.

The differing measure of damages together with the varying defences combine to destroy the commonality of interest requisite in founding a representative action.

To suggest that 'the damages are specific amounts that arose from the breach of contract' stretches the judicial imagination quite unreasonably.

As I said earlier, the damages have to be separately assessed and it would be unjust to permit them to be claimed in a class action because the Defendants would be deprived of individual discoveries and in the event of success, would have recourse for costs only against the named Plaintiff although its costs were increased by multiple separate claims.

(15) Before I take leave of the matter, I ought to mention one thing. It is unfortunate that this application reaches this Court some four (04) years after the filing of Writ of Summons and the Statement of Claim. The proceedings have taken on a marathon character for the last four (04) years.

The Plaintiffs have been put to considerable expense in the meantime. Their rights under this type of action or under general contract action have no doubt decayed and even gave out of existence in some instances by operation of limitation legislation. All of these circumstances, however unfortunate, do not relieve me of the duty of determining the correct meaning of Order 15, rule 14 and its proper application in these circumstances.

I would conclude that the action may not be framed as a class/representative action under Order 15, rule 14 (1) of the High Court Rules, 1988.

In light of the long history of this litigation and the marathon character, there will be no Order as to costs.

Essentially that is all I have to say !!!

(E) FINAL ORDERS

- 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."*

[08] As for common interest, the Master found that the class sought to be represented cannot be joined as plaintiffs, nor could their respective causes of action be joined in the same proceedings. At para 13 of his ruling, the Master states:

"... Returning back to the case before me, the representative Plaintiff in the instant case brings these proceedings on behalf of itself and all other persons listed in the schedule "A" to the Statement of Claim who had entered into

contracts with the first Defendant under which the first Defendant manages their respective Villas on their behalf.

In my view, the class sought to be represented cannot be joined as Plaintiffs, nor could their respective causes of action be joined in the same proceedings, because there is no community of interest or same interest between the Plaintiffs within the meaning of Order 15, r.14 (1) due to the followings;

- ❖ The causes of action here did not arise out of the same transaction. They arose out of entirely distinct transactions, creating entirely distinct legal liabilities.*
- ❖ The claims for recovery of alleged unpaid villa revenue involved quite distinct issues which would involve the investigation of different set of facts in respect of each Plaintiff, viz, size of the villa, quality of the villa and the revenue stream for each villa.*
- ❖ The relief claimed is in respect of, or arises out of several distinct transactions when the participation of each individual Plaintiff is limited to participation in one transaction the other Plaintiffs not participating in the series.*
- ❖ No Plaintiff has any interest in the claim for alleged unpaid villa revenue of any other Plaintiff. A right to recover the alleged unpaid villa revenue is individual to each Plaintiff.*
- ❖ There is clearly no transaction to which all the Plaintiffs are party.*
- ❖ Each Plaintiff has a separate cause of action against the Defendant to recover the alleged unpaid villa revenue and no other Plaintiff having an interest in that cause of action or in its subject matter.*
- ❖ The claim for alleged unpaid villa revenue depends on multiple representations to different Plaintiffs at different times.*
- ❖ The claim for alleged unpaid villa revenue depends on act of reliance by different Plaintiffs at different times.*
- ❖ There is nothing on the Writ to show that each of the persons/Plaintiffs listed in schedule 'A' to the Statement of Claim did in fact enter into identical contractual agreements with the first Defendant.*

- ❖ *There is no bond or contract uniting the persons whom the Plaintiff affects to represent. They are in no way connected.*

Therefore, I refuse to permit the action to be brought as a representative action because the common or general interest among the Plaintiffs to be wanting.

I further rely and I am inclined to be guided by the decision of the English Court of Appeal in "Markt & Co. Ltd. v Knight Steamship Co. Ltd (1910) 1 KB 1021 as the correct approach to the application before this court."

Grounds of Appeal

[09] The appellant appeals the decision on the following six grounds of appeal:

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 agreed as follows:*
 - i. *Terms of Villa Owners Management Agreement (VOMA).*
 - ii. *Terms of Villa Owners Management Agreement (VOMA) breached by 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) 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 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) represented Plaintiffs.*

The Issue

[10] The appeal involves an issue whether the appellant can bring and maintain a representative claim under the High Court Rules 1988 (as amended) ('HCR'), Order 15, Rule 14 (1), despite the relief sought is one of damages for unpaid Villa Revenue under the Villa Owners Management Agreement ('VOMA').

The Legal Framework

[11] The applicable law to representative proceedings is the HCR, O 15, R 14 (1) which provides:

“Representative proceedings (O 15, R 14 (1))

14.-(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 15, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

The Governing Principles

[12] The Master correctly identified the conditions precedent for bringing a class action as established by *Duke of Bedford v Ellis* (1901) AC 1. According to *Duke*, a representative suit must satisfy 3 requirements:

- i. Sharing a common interest;
- ii. Having a common grievance;
- iii. The relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[13] Halsbury's Laws of England (37th Ed) deals with representative proceedings. It under paras 232 and 233 succinctly explains the essential pre-requisite for bringing a representative action:

"232. Representative proceedings generally. Where numerous persons have the same interest in any proceedings, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. This provision applies to all causes and matters and is not confined to persons who have or claim some beneficial proprietary right which they are asserting or defending, but the mere existence of a common "wrong" will not necessarily suffice if there is no common "right" or common purpose.

A representative action cannot be brought unless the whole of the claim is inappropriate to that form of action. Every person represented is a party, even though not named as such, and he may be added or substituted as a party as at the date of the issue of the original writ."

Para 233 explains the same interest in the same proceedings:

"233. Same interest in same proceedings. It is an essential pre-requisite of a representative action that the persons to be represented and the person or persons representing them should have the same interest in the same proceedings. In order that a representative action should be properly constituted the conditions that must be satisfied are (1) that all members of the alleged class should have a common interest; (2) that all should have a common grievance; and (3) that the relief is in its nature beneficial to each of them. Nevertheless, the court retains a discretion whether to refuse to allow proceedings to continue as a representative action. (Emphasis supplied)

A representative action will not lie to establish the right of numerous persons to recover damages, each in his own several right, where the only relief claimed is to recover such damages, but a minority or derivative shareholders' actions may be brought to recover damages on behalf of a company alleged to have suffered damage by fraud where the board of the company is under the control of the fraudsters.

Although it has been said that the rule relating to representative actions should be treated as a flexible tool of convenience in the administration of justice, and should not be applied in a strict or rigorous sense, it has nevertheless to be applied in a somewhat restrictive manner, and its potential as an instrument of justice where a common wrongdoer has caused a common, although not an identical, wrong to numerous persons has not been fully developed.” [Emphasis supplied]

The submissions

Appellant

[14] The appellant contends that: the Learned Master erred in law by misinterpreting the rationale of both the cases (Bedford and Prudential Assurance Co. Ltd) which allows for the matter to stand as a class action where there is a commonality of interest even when the contract so entered by the plaintiff are separate with different quantum of damages while entering with the same defendants. It is further argued that the Learned Master ought to have considered that this was the second application by the respondent to strike out the appellant’s claim: on being unsuccessful, the respondents filed the striking out application dated 11 October 2015, by relying on O 15, Rule 14, when the same could have been sought on its first application of striking out or even before filing of its Statement of Defence in 2012. It took the respondent nearly 4 years to realize that they wanted to file a second strike-out application. Finally, the appellant submits that the Master erred in law by not considering that the overriding principle in striking out applications are only granted in the clearest of cases so that an appellant is not deprived of its cause of action or relief without proper and full hearing at trial when it gets the chance to adduce its evidence.

Respondent

[15] The respondent, on the other hand, argues that the only substantive issue agitated by the appellant is whether there is sufficient commonality between the claims of the appellant and the “other plaintiffs” to satisfy the same interest test in O 15, R 14 (1). The respondent submits that the Learned Master took all relevant consideration into account in concluding that the test was not satisfied. It is also submitted on behalf of the respondent that the Learned Master recognised the

statement of claim was so poorly pleaded (see pp.17-18) that it is impossible to properly plead a defence to it or conduct a trial in a fair manner, and that it is likewise difficult to see on the face of the statement of claim how the requirement of “same interest” under O 15, R 14 (1) is made out. The respondent further submits that even if that test could be satisfied, and it is submitted that is not the case, the statement of claim would have to be redrawn to properly plead a representative action.

The decision

- [16] The Master struck out the appellant’s representative action on the ground that there was no commonality between the claim of the appellant and the other 52 plaintiffs. He concluded that the claims for recovery of alleged unpaid villa revenue involved quite distinct issues which would involve the investigation of different set of facts in respect of each plaintiff, viz, size of the villa, quality of the villa and the revenue stream for each villa.
- [17] The appeal concentrated an issue whether the appellant could bring a representative claim on its behalf and on behalf of the other 52 plaintiffs in circumstances where the relief sought includes damages for unpaid Villa Revenue under the Villa Owners Management Agreement (‘VOMA’).
- [18] The Master heavily relied on the decision of *Markt* case, above.
- [19] The grounds of appeal are interrelated. I would, therefore, consider them together.
- [20] Proceedings may be begun, and unless the Court otherwise orders continued by or against any one or more of them as representing all or as representing all except one or more of them where numerous persons have the same interest in the proceedings. It is provided in the HCR, R 14 (1), that:

Where more than one person has the same interest in a claim-

- (a) The claim may be begun; or
- (b) The Court may order the claim be continued, by or against one or more of the persons who have the same interest as representative of any other persons who have that interest.

[21] The Court must take account of the overriding objective. In *National Bank of Greece SA v R. M. Outhwaite 317 Syndicate at Lloyd's* [2001] Lloyd's Rep 1R 652 Andrew Smith J said that the phrase 'same interest in a claim' in r. 19.6 (equivalent to our R 14 (1)) is to be interpreted in a way that makes representative proceedings available in cases where they would save expense and enable a matter to be dealt with expeditiously.

Condition precedent for bringing representative action

[22] *Duke* case sets out the conditions for bringing a representative action where the representative of the other persons must show between him/her and the class members:

- i. Sharing a common interest;
- ii. Having a common grievance;
- iii. Would all be served by a representative suit in that relief could be secured in its nature be beneficial to all.

[23] The Master correctly identified the above requirements and had followed the decision of *Markt* and applied to the application that was before him (see page 24 of his ruling).

Sharing a common interest

[24] In order to determine whether the representative and the persons to be represented (the other 52 plaintiffs) are sharing a common interest, it is important to look at the statement of claim. In paras 5 and 6 of the statement of claim, the appellant pleads:

"5. During 2006, the First Plaintiff executed a number of agreements titled:

- a) Agreement for Grants of a Title Lease;*
- b) Agreement for Construction of a Villa;*
- c) Agreement for Sale or Fittings, Furnishings and Equipment (together the "Agreement") in relation to a villa described as Villa Number 22B (the "Villa").*

Particulars

The Agreement comprised the Management Agreement and terms of sale referred to herein as the Purchase Agreement.

*6. The First and Further Plaintiffs executed agreements **identical to** those referred to in the previous paragraph on the dates set out in the schedule of particulars annexed hereto." (Emphasis added)*

[25] The claim of the appellant stems from agreements with the respondent affecting Villas. Not only the appellant itself but also other plaintiffs have based their claim on breach of the agreements which are identical. The appellant alleges that the respondent had breached the agreements by failing to pay the income generated from the Villas. The relief sought is one of damages for breach of the agreements. In my judgment, the appellant as reprehensive and other plaintiffs as persons to be represented share common interest.

[26] The appellant further pleads in the statement of claim at paras 7 to 9 that:

"7. Pursuant to the Agreement, the First Plaintiff:

- a) purchased the Villa for NZ\$946,000.00;*
- b) appointed the First Defendant as the manager of the Villa and all furniture, furnishings and equipment comprised in the Villa;*
- c) granted to the first Defendant of the non-exclusive rights to use the common property in the course of the First Defendant perform its obligation and exercising its rights under the Agreement; and;*
- d) the First Defendant accepted the appointment as manager of the Villa.*

8. The Further Plaintiffs purchased villas for the respective sums set out in the schedule of particulars annexed hereto and also: (Emphasis supplied)

- a) appointed the First Defendant as manager of their respective villas;*
- b) granted the First defendant non-exclusive rights in the manner set out in 7 (c) herein; and*
- c) the First Defendant accepted the respective appointments as manager for the respective villas.*

9. Pursuant to the agreements, the First Defendant is to use and manage the Villa as part of the fully integrated hotel facilities situated on Denarau Island, Nadi, Fiji on

a site comprised in the Native Lease Number 434874 dated 30 December 1997, issued by the Native Land Trust Board in respect of that land which is part of Denarau Island, Tikina of Nadi, Province of Ba, Fiji, identified as Lot 4 S.O. 3706 and comprising an area of 12.7902 hectares."

- [27] The phrase 'the Further Plaintiffs purchased villas for the respective sums set out in the schedule of particulars annexed hereto' suggests that the further plaintiffs had also entered into identical agreements with the respondent with identical terms.

Common grievance

- [28] This point was not much disputed. Clearly, there has been a common purpose. The common purpose of the appellant and the other plaintiffs is to claim damages for unpaid villa revenue against the same defendant, the respondent.
- [29] It is true that the mere existence of a common "wrong" will not necessarily suffice if there is no common "right" or common purpose to bring a representative action.
- [30] In my judgment, there is a common purpose in this instance enabling the appellant to commence a representative action.
- [31] A representative action cannot be brought unless the whole of the claim is inappropriate to that form of action. Every person represented is a party, even though not named as such (see para 13 above). The question of unnamed party does not arise in the present matter, for all other plaintiffs have been named. The respondent did not challenge that the whole of the claim was inappropriate for a class action.

Were representative proceedings permissible in this case?

- [32] The Master struck out the appellant's representative suit on the basis that there is no commonality of interest or same interest between the appellant and the further plaintiffs within the meaning of O 15, R 14 (1). He concluded among other things that the claims for recovery of alleged unpaid villa revenue involved

quite distinct issues which would involve the investigation of different set of facts in respect of each plaintiff, viz, size of the villa, quality of the villa and the revenue stream for each villa.

[33] I should say that it is not a requirement that the claim should arise on the same transaction to form a representative claim. The HCR, O 15, R 14 (1), does not envisage such a condition.

[34] In *Carnie*, above it was stated (at para 31) that although each contract will be different in the details of the amounts involved, this will not eliminate the convenience of finding a right to release which is common to all of them.

[35] Lord Macnaghten in *Bedford v Ellis* (1901) AC 1 was of the view (at 47) that:

"In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members."

[36] The High Court of Australia in *Carnie v Esanda Financial Corporation Ltd* (1994-1995) 182 CLR 398 (Mason CJ, Deane and Dawson JJ held (at 403) :

"The term "class action" is used in various senses. Sometimes it is employed as a generic term to comprehend any procedure which allows the claims of many individuals against the same defendant to be brought or conducted by a single representative. At other times, when the "same interest" stipulation was thought to preclude the application of the representative action procedure to actions for damages on the ground that each individual's entitlement to damages would have to be independently assessed, the term "class action" was employed to refer to an extension of the representative action to cover such actions".

[37] In *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) Fletcher Moulton LJ at 1039 stated the difference between a representative action and an action by multiple plaintiffs", viz:

"In ... [multiple plaintiff cases]... all the parties have the status and responsibilities of ordinary litigants, and the plaintiffs are such by their own consent. In representative actions, it is wholly different. The plaintiff is the

self-elected representative of the others. He has not to obtain their consent. It is true that consequently, they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those in whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery, & c."

[38] In *Prudential Assurance v Newman Industries* [1981] 1 Ch 229 at 254-255, Vinelott J said:

"... a representative action can be brought by a plaintiff, suing on behalf of himself and all other members of a class, each member of which, including the plaintiff, is alleged to have a separate cause of action in tort, provided that three conditions are satisfied. The first...No order can properly be made in such a representative action if the effect might in any circumstances be to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise have been available to the defendant in such a separate action. Normally, therefore, if not invariably the only relief that will be capable of being obtained by the plaintiff in his representative capacity will be declaratory relief, though, of course he may join with it a personal claim for damages...."

The second condition is that there must be an "interest" shared by all members of the class. In relation to a representative action in which it is claimed every member of the class has a separate cause of action in tort ... there must be a common ingredient in the cause of action of each member of the class... The third and related condition is that the court must, therefore, be satisfied that the issues common to every member of the class will be decided after full discovery and in light of all the evidence capable of being adduced in favour of the claim. For unless this condition is satisfied it would be wrong – as Fletcher Moton LJ remarked in the Markt case ..." to permit this representative plaintiff "to conduct litigation on behalf of another without his leave, and yet so to bind him." (Emphasis added).

[39] The appellant refers to me the *Sydney Law Review* 1993 Volume 15 which carries an article "Before the High Court – Representative Actions: Continued Evolution or a Classless Society? By David Kell (at page 527) where he discusses the proper scope

of the representative action in a modern litigious, consumer oriented, society. At page 528, David Kell explains:

"If given a liberal application, the representative action can promote a more efficient use of judicial resources by avoiding a multiplicity of actions dealing with common issues, thus resulting in savings, both in time and cost, for the parties and the court. Additionally, the representative action may enhance access to justice, by allowing the costs of litigating numerous small claims to be spread among a large group, in circumstances in which it would be economically senseless to proceed individually. Yet, in 1910, the Court of Appeal in Markt & Co Ltd v Knight Steamship Co Ltd ([1910] 2 KB 1021), disregarding previous decisions which had manifested a benevolent attitude to representative actions, set about ensuring that this unruly child of equity would not corrupt the orderly procedures of the common law.

Markt was interpreted as imposing two main restrictions on the availability of the representative action. First, it would not be utilized when the relief claimed was damages, since damages were personal, requiring separate proof, and of no benefit to a class as a whole. Secondly, outside the narrow categories of cases where representative actions had traditionally been permitted (such as a derivative action by shareholders, or dispute about common property, or a common fund, by the creditors of a defendant), a representative action will usually be inapplicable in cases involving separate and individual contracts between claimants and defendant, largely because of the court's readiness to assume, without evidence, the likelihood of separate defences being advanced if each claim were to be prosecuted individually."

Under the sub-heading "*Evolution of Representative Actions: Eroding the Restrictions of Markt*" the article goes on to say:

"With only the occasional setback, the 80 years since Markt have been characterized by a gradual, but determined, undermining of these two restrictions. Damages may now be claimed in a representative action, at least where a global figure can be arrived at without the need for protracted proceedings to determine the quantum for each claimant (EMI Records Ltd v Riley [1981] 2 ALL ER 838); or which each defendant is liable – as for instance, where proportionate liability is already specified by contract; or where individual damages can easily be determined by simple mathematical calculation (Cobbold v TIME Canada Ltd (1976) 71 DLR (3d) 629 (Ont HC)).

In cases involving claims arising from separate and individual contracts, courts in most Commonwealth jurisdictions, including England, have

taken up the task of removing the constraints imposed by Markt. No longer will the court simply assume, without evidence, that a representative action is inappropriate. Rather, the court will be inclined to allow the action to proceed, particularly where the contracts are substantially similar (Cobbold v TIME Canada Ltd, above) A pragmatic approach is to be adopted and the court will look for a realistic, rather than theoretical, possibility of separate defences being raised were individual proceedings to be prosecuted (Irish Shipping Ltd v Commonwealth Union Assurance Co Plc (The Irish Rowan) [1991] 2 QB 206). Furthermore, if later it become apparent that the defendant may indeed have different defences as against different contracting class members, then the proceedings can be reshaped, rather than having to abandon the representative nature of the litigation and its attendant benefits – for example by adding further named plaintiffs so as to properly evaluate the newly ascertained defences (R J Flowers Ltd v Burns [1987] NZLR 260 at 273). However, in the context of claims arising from separate and individual contracts, the New South Wales Court of Appeal decision in Carnie has been the process of evolving reform, from the nadir of Markt, brought to an abrupt halt, at least in New South Wales. The High Court’s decision will determine whether that halt represents merely a temporary, rather than sustained, curtailment of the development of potentially one of the law’s most useful procedural mechanisms. “ (Emphasis added)

- [40] We can see developing trends in the principles governing representative proceedings. The courts in the Commonwealth jurisdiction including England have gradually removed the constraints imposed by *Markt* in 1910 on the availability of representative proceedings that: (1) *it would not be utilized when the relief claimed was damages and (2) a representative action will usually be inapplicable in cases involving separate and individual contracts between claimants and defendant.*
- [41] We should not harm developments of the law. I would like to accept David Kell’s opinion that the representative action may enhance access to justice, by allowing the costs of litigating numerous small claims to be spread among a large group, in circumstances in which it would be economically senseless to proceed individually and that damages may now be claimed in a representative action, at least where a global figure can be arrived at without the need for protracted proceedings to determine the quantum for each claimant.

[42] I would, therefore, answer the issue raised in this appeal affirmatively. The appellant and other 52 plaintiffs share the same interest in the proceedings and they have the common purpose of claiming damages against the respondent in the sum of FJ\$95,000.00 to the appellant and in the sum of FJ\$ 3,800,000.00 to the Schedule A villa owners (52 other plaintiffs) for alleged unpaid villa revenue in breach of the agreements. The quantum of damages for each plaintiff can be determined without any difficulty after liability issue is decided. Quantum for each plaintiff may differ. However, that does not preclude the appellant from bringing a representative claim. I am inclined to follow the liberal interpretation approach in the representative proceedings. The appellant could bring representative proceedings under O 15, R 14 (1) even though the relief sought is one of damages. I accordingly hold that the appellant may continue the proceedings against the first respondent (first defendant) as representing all other 52 plaintiffs.

The previous application to strike-out

[43] The Master had struck out the appellant's representative claim on the ground that there was no commonality of interest considering the second application filed by the respondent some 4 years after filing the statement of defence. Initially, in November 2012, the respondent filed its first application to strike out the appellant's claim on the ground among other things that there is no jurisdiction for the plaintiff (appellant) to make a claim for other parties when they not have the same interest in the proceedings. That application was dismissed by Tuilevuka J. In the second application, the respondent had attempted to have the second bite on the same cherry. In my opinion, the Master should have dismissed the second application for striking-out made some 4 years after filing the defence. The respondent had the opportunity to challenge the representative claim before filing their defence and after filing the acknowledgement of service. It was unconscionable on the part of the respondent to file a second application to strike-out the appellant's representative claim after 4 years of filing the statement of defence and after the unsuccessful first application for striking out almost on the same ground agitated in the previous application.

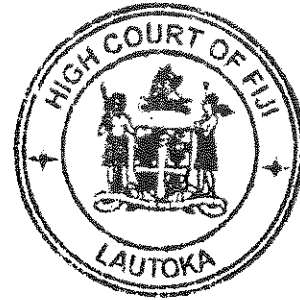
Conclusion

- [44] For the foregoing reasons, I conclude that representative proceedings would be available even where the relief claimed is one of damages provided that other conditions are satisfied. In the present case, I find that the appellant and the represented parties share the same interest and have the common purpose of claiming damages against the respondent for the alleged breach of contracts.
- [45] I have embraced the liberal approach in interpreting the High Court Rules, O 15, R 14 (1) and decided that damages may now be claimed in representative proceedings where the quantum for each claimant can be determined without the need for protracted proceedings.
- [46] I am satisfied that the appellant succeeds on the ground 6 of the grounds of appeal 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 the judiciary at wasted cost to the taxpayers and 52 (fifty-two) represented plaintiffs.
- [47] It follows that I should set aside the Master's second order dated 8 July 2016, which ordered that 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.
- [48] I would accordingly reinstate the appellant's claim back to the cause list and allow the appellant to continue the action against the respondent as representing all the other 52 plaintiffs.
- [49] The rest of the Master's order dated 8 July 2016 was not challenged. Therefore, I do not intend to disturb those orders, the first and third orders.
- [50] In all the circumstances, I would make no order as to costs.

The outcome

1. Appeal allowed.
2. Master's order of 8 July 2016 that 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 be set aside.
3. The action shall be reinstated back to the cause list.
4. The appellant is to continue the action against the first respondent as representing all the other 52 plaintiffs.
5. There will be no order as to costs.
6. The matter will take its normal course.

M. H. Mohamed. Ajmeer
31/8/18
.....
M. H. Mohamed. Ajmeer
JUDGE



At Lautoka
31 August 2018

Solicitors:

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For the respondent/original defendants; M/s Parshotam Lawyers, Barristers & Solicitors