

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 324 of 2016**

**BETWEEN**

**STANTEC NEW ZEALAND LIMITED** (NZBN 9429040356297) a company incorporated in  
New Zealand and having its place of business as Kadavu House Level 2, 414  
Victoria Parade, Suva and having a local agent MWH.

**PLAINTIFF**

**AND**

**FIJI ROADS AUTHORITY** a statutory body established under the  
Fiji Roads Authority Decree No.2 of 2012 as amended of  
Fiji Development Bank Building Level 4, 360  
Victoria Parade, Suva.

**DEFENDANT**

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**Civil Action No. HBC 227 of 2017**

**BETWEEN**

**FIJI ROADS AUTHORITY** a statutory body established under the  
Fiji Roads Authority Decree No.2 of 2012 as amended of  
Fiji Development Bank Building Level 4, 360  
Victoria Parade, Suva.

**PLAINTIFF**

AND

**STANTEC NEW ZEALAND LIMITED** (NZBN 9429040356297) a company incorporated in  
New Zealand and having its place of business as Kadavu House Level 2, 414  
Victoria Parade, Suva and having a local agent MWH.

**FIRST DEFENDANT**

AND

**MICHAEL STWPHEN RUDGE** of B41/10 Ebor St. Te Aro, Wellington,  
New Zealand.

**SECOND DEFENDANT**

AND

**BRUCE BUXTON** of 324 Brighton Road, Waldronville, Dunedin 9018,  
New Zealand.

**THIRD DEFENDANT**

AND

**ANDREW MACNIVEN CASELEY** of Apartment li, Montreaux Apartments,  
164 The terrace, Wellington, New Zealand.

**FOURTH DEFENDANT**

**COUNSEL** : Mr R. Craig with Mr K. Skiba and Mr D. Bullock for the  
Plaintiff in HBC 324 of 2017 and for the Defendants in HBC  
227 of 2017.

Mr D. Sharma for the Defendant in HBC 324 of 2016 and  
For the Plaintiff in HBC 227 of 2017.

**DATE OF HEARING** : 02<sup>nd</sup> August, 2018

**DATE OF RULING** : 14<sup>th</sup> September, 2018

**RULING**

[1] The court heard simultaneously the following applications of the parties to the above two connected matters;

1. Application of the defendant in HBC 324 of 2016 for an order that the Originating Summons filed on 23rd December, 2016 be heard partly on oral evidence and partly on affidavit evidence and for leave to cross-examine the 2nd and 4th defendants in HBC 227 of 2017.

2. Application for leave to amend the summons for stay application of the defendants in HBC 227 of 2017 filed on 08<sup>th</sup> December, 2017.
3. Application of the plaintiff in HBC 324 of 2016 to cross-examine the defendant's witnesses, John Hutchinson and Rodney Bridges at the hearing on 9<sup>th</sup> and 10<sup>th</sup> April, 2018.
4. Application for leave to adduce evidence of the 2<sup>nd</sup> and the 4<sup>th</sup> defendants in HBC 227 of 2017 on 09<sup>th</sup> and 10<sup>th</sup> April, 2018, required for cross-examination.

[2] The defendant in HBC 324 of 2016 filed summons on 23<sup>rd</sup> February, 2016 pursuant to Order 28 Rule 5(3) of the High Court Rules 1988, seeking *inter alia*, the following orders:

An order that the plaintiff's originating summons filed on 23 December 2016 be heard partly on oral evidence and partly on affidavit evidence.

An order that the plaintiff's witnesses, Mr Andrew Macniven Caseley and Mr Micheal Stephen Rudge, who have sworn and/or affirmed affidavits in these proceedings in support of the Originating Summons be required for cross-examination at the hearing of the originating summons.

[3] The plaintiff in HBC 324 of 2016 filed a notice of motion pursuant to Order 39 Rule 1(1) of the High Court Rules 1988, on 14<sup>th</sup> March, 2018 seeking the following order:

That, in the event that this Honourable Court requires the plaintiff's witnesses Andrew Nacniven Caseley and Michael Stephen Rudge for cross-examination (as per Order (b) of the defendant's Summons dated 23 February 2018) leave be granted to Michael Stephen Rudge and Andrew Macniven Caseley to adduce evidence required for cross-examination by the defendant to be given by Skype mode for and on behalf of the plaintiff during the hearing of the Originating Summons filed on 23 December 2016 scheduled for 09 and 10 April 2018.

[4] The plaintiff in HBC 324 of 2016 filed Originating Summons seeking *inter alia*, the following reliefs:

The plaintiff instituted these proceedings by originating summons seeking the following:

- (a) A declaration that clause 10 of the agreement for the provision of road management services in Fiji between the Plaintiff and the Defendant dated 27<sup>th</sup> January, 2012 (Agreement):
  - i. continued in effect after termination of that Agreement; and
  - ii. continues to bind the defendant.
- (b) A declaration that the Plaintiff is entitled to submit the dispute (as defined in the Affidavit in support of the Originating Summons) for mediation as required by clause 10.2 of the Agreement;
- (c) By reason of the matters referred to in (a) and (b) above an order for specific performance of clause 10.2 of the Agreement, namely, the selection of a mediator of the Dispute by Chief Justice of Fiji; and
- (d) Costs.

[5] The question for determination here is whether the court needs oral testimony of the witnesses who have affirmed the affidavits filed in this this application. For that the court must look carefully at clause 10 of the agreement between the parties. The construction or interpretation of the agreement has to be done at the hearing of the substantive matter because the reliefs prayed for by the plaintiff in HBC 324 of 2016 depend, as I have already said in my ruling delivered on 26<sup>th</sup> April, 2017, on the application for striking out, entirely on the construction of the relevant clauses of the agreement. However, to arrive at a finding whether it is required for the parties to cross-examine the persons who have affirmed the affidavits, the court must to a certain extent, consider what the parties are expected to do once the agreement is terminated.

Clause 10.1, 10.2 and 10.4 provide as follows:

- 10.1 In the event that any dispute or difference of any kind between the parties in connection with or arising out of this agreement arises ("Dispute"), the parties will attempt in good faith to settle such dispute by mutual discussion between the chief executive officers of each party held within 20 business days (or 10 business days if the Dispute relates

to an invoice) after the date that the disputing party gives notice of the dispute to the other party identifying the dispute in reasonable detail and requesting consultations between the parties to resolve the Dispute.

10.2 If, at the end of such 20 business day (or, 10 business day) period, the Dispute is not resolved, either party may submit the Dispute for mediation. If the parties cannot agree a mediator within 5 business days of the submission of the dispute for mediation, a mediator will be chosen by the Chief Justice of Fiji. The mediator shall fix the time, place and procedure for mediation but in any event, the mediation shall commence within 10 business days of appointment of the mediator.

10.4 If the dispute cannot be resolved within 15 business days of the commencement of mediation (or within any extended time agreed to in writing between the parties), the mediation shall cease and either party may submit the Dispute for Arbitration in accordance with the then existing rules and regulations of the Rules of conciliation and the Arbitration of the International Chamber of Commerce. Judgment upon the Arbitrator's award shall be final and binding and may be enforced by any court of competent jurisdiction. The prevailing party in any action arising under this Contract shall be entitled to its costs of litigation, including reasonable legal fees.

[6] The main issue for determination at the hearing of the substantive matter is whether the above clause survives after the termination of the agreement and if so whether the court has power under said clause 10 of the to compel the parties to refer their dispute for mediation.

[7] The learned counsel for the defendant in HBC 324 of 2016 submitted that the witnesses sought to be cross-examined have not acted in good faith and they have to be cross-examined to ascertain whether there is sufficient compliance clause 10.1.

[8] However, in my ruling dated 26<sup>th</sup> April, 2017, I have already decided that oral testimony is not required to determine the issues raised in the Originating Summons. Paragraph 7 of my ruling reads as follows:

In my view the reliefs prayed for by the plaintiff in its originating summons depend entirely on the interpretation of the terms of the agreement. The entire matter revolves around the question whether Clause 10 of the agreement continues to be in force and continues to bind the defendant even after the termination of the agreement. I do not see any reason why the court needs oral testimony of the witnesses to make finding on that question.

- [9] The defendant sought leave to appeal against the ruling which was refused by me. There is no reason for me to deviate from my earlier finding on the same question. If I go any further I will be making findings on the substantive issues of the matter. For these reasons refused the application of the defendant to cross-examine Mr Andrew Macniven Caseley and Mr Micheal Stephen Rudge at the hearing of the substantive matter. Since the court has decided to refuse the application of the defendant to cross-examine the persons who affirmed the affidavits relied on by the plaintiffs the question whether the plaintiffs should be given leave to cross-examine the persons who affirmed the affidavits relied on by the defendant does not arise for consideration since the defendant sought leave to cross-examine them only in the event the court grants leave to the defendant to cross-examine the persons affirmed the affidavit relied on by the plaintiff.
- [10] The Defendants in HBC 227 of 2017 filed summons on 12<sup>th</sup> September, 2017 seeking leave to stay the proceedings pursuant to section 5 of the Arbitration Act 1965. On 08<sup>th</sup> December, 2017 the defendants filed summons seeking leave to amend the above application for stay, with an affidavit in support of the summons. On 09<sup>th</sup> March, 2018 on behalf of the defendants further affidavit was filed with amended summons for stay. In that the defendants are seeking to rely alternatively, on the provisions of the International Arbitration Act 2017.
- [11] It is at this stage important to consider the purpose for which this Act has been enacted. An act to make provision for the conduct of international arbitrations based on the model law adopted by the United Nations Commission on International Trade Law on international commercial arbitration and to give effect to the New York convention on the recognition and enforcement of foreign arbitral awards and for related matters.
- [12] Section 57 of the International Arbitration Act 2017 provides:

The Arbitration Act 1965 is amended after section 1 by inserting the following new section—


1A. This Act applies to any arbitration where the place of arbitration is Fiji and to the extent that the International Arbitration Act 2017 does not apply.”

[13] The legislature has very clearly identified the matters which should be governed by the provisions of the International Arbitration Act 2017. It is common ground that the dispute between the parties to this action is in relation to an agreement entered into locally. Therefore, the dispute, which the defendants are seeking to refer to an arbitration, is governed by the provision of the Arbitration Act 1965 and therefore, the International Arbitration Act 2017 has no application to the matter before this court. The amendment sought by the defendants is, for these reasons, liable to be refused.

[14] For the reasons aforementioned the court makes the following orders:

1. The application made by summons filed on 08<sup>th</sup> December, 2017 is refused.
2. The application made by summons filed on 12<sup>th</sup> March, 2013 is refused.
3. The application made by summons filed on 23<sup>rd</sup> February, 2018 is refused.
4. The application made by summons filed on 14<sup>th</sup> March, 2018 is refused.
5. Parties to bear their own costs of these applications.



  
Lyone Seneviratne

**JUDGE**

22<sup>nd</sup> September, 2018