

IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 0040 of 2020
(HBC No. 295 of 2011)

BETWEEN : TEMPLETEC (FIJI) LTD AND SHANGHAI URBAN
CONSTRUCTION (GROUP) CORPORATION

Appellants

AND : ATTORNEY GENERAL OF FIJI

Respondent

Coram : Almeida Guneratne, JA

Counsel : Ms. M. Rakai for the Appellants
: Ms. S. Ali with Ms. N. Ali for the Respondent

Date of Hearing : 18 August 2020

Date of Ruling : 25 September 2020

RULING

- [1] This is a renewed application for leave to appeal the Ruling of the High Court dated 22 November, 2019. By that ruling the High Court struck out and dismissed the Appellants application to enter Judgment by notice of motion in terms of an adjudication decision.

The Background

- [2] In September, 2009 parties entered into an agreement for the construction of the Yasawa-i-Ra jetty, (the agreement). Following the termination of the agreement by the Ministry of Works, Transport and Public Utilities the Appellants filed originating summons alleging that the said termination was unlawful and for *inter alia* an Order that the dispute be resolved by adjudication under Clause 15 of the agreement; alternatively claiming what the Appellants alleged to be the unpaid balance on the Agreement and damages for the alleged breach of contract.
- [3] While the said action was pending parties appointed one Mr. Chand as Adjudicator to resolve the dispute.
- [4] The Adjudicator delivered his decision on 5 March, 2015 for the Respondent to pay a sum of \$651,304.41 to the Appellants.
- [5] On the same day the matter was called before the High Court and in consequence of the Respondent's Counsel expressing his dissatisfaction at the manner in which Mr. Chand had conducted the proceedings, Court had directed the substantive matter (that is the originating summons matter) to proceed to hearing.
- [6] Thereafter, the Appellants filed a notice of motion to enter Judgment based on Mr. Chand's decision (referred to in paragraph [4] above) which was heard by Court that resulted in the impugned ruling of the Court dated 22 November, 2019 against which the present renewed application for leave to appeal has been filed.

[7] “The Agreement” lies at the core of the matter which stipulated thus:

“ **Resolution of Disputes - Clause 15**

15.1

Adjudication

Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decision of the Employer, shall be referred by either Party to adjudication in accordance with the attached Rules for Adjudication (“The Rules”). The adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed in accordance with the Rules.

15.2

Notice of Dissatisfaction

If a Party is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring to this Sub-Clause within 28 days of receipt of the decision or the expiry of the time for the decision. If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the Parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator.

15.3

Arbitration

A dispute which has been the subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the rules specified in the Appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and in the language referred to in Sub-Clause 1.5”.

My Reflections thereon

- [8] It is not disputed that, parties had agreed to “adjudication” and even appointed one (Mr.) Robert J. Poole for that purpose.
- [9] However, it is also not in dispute that (Mr.) Poole had passed away and one Mr. Chand thereafter had been agreed upon by the parties to “take possession of the dispute” (I use that expression studiedly and with purpose) in as much as in paragraph 2 of the originating summons the Appellants had prayed that:-

“...the dispute in this matter be resolved by Adjudication under Clause 15 ... and Robert J. Poole be appointed as Adjudicator.”

- [10] In that regard, His Lordship in the High Court noted at paragraphs 3.5 to 3.12 of his ruling thus:

“3.5 No such Order has been made by the Court.

3.6 On 16 May 2014, Counsel for the Applicants informed Court that the adjudicator who is named in the Originating Summons had passed away and they appointed new adjudicator.

3.7 No application has been made by the Applicant for an order appointing Abhinesh Chand as adjudicator and for stay of this proceedings.

3.8 It can be seen that from the Court records and letters exchanged between the parties that words mediation and adjudication were used interchangeably.

3.9 On 5 December 2013, Counsel for the Respondent informed the Court that they need to mediate the matter; parties have agreed for Abhinesh Chand to adjudicate; needed time to liaise with Abhinesh Chand to see if he was willing to adjudicate; needed time to liaise with Abhinesh Chand to see if he was willing to adjudicate between the parties.

3.10 *In letters exchanged between the parties words mediation and adjudication have been used with word adjudication used more than mediation.*

3.11 *After analyzing the Affidavit evidence, Court records and what is stated hereinafter this Court is of the view that parties intended to settle the dispute through mediation process with the assistance of an expert in the construction industry.*

3.12 *Even though Abhinesh Chand was called adjudicator his role was to mediate between the parties and facilitate discussion for parties to reach a settlement amongst themselves”.*

[11] In that background, having looked at the proposed grounds of appeal I had no hesitation in agreeing with His Lordship’s conclusion that (Mr.) Chand’s role (though called adjudicator) was that of a Mediator and therefore (Mr.) Chand could not have made his impugned decision in making the award he made in favour of the Appellants as such.

[12] I go further and add my own reason and/ or comments for saying so as follows:

- (A) After the passing away of Mr. Poole (as agreed and appointed Adjudicator in pursuance of “the Agreement”) the terms of the agreement lost their efficacy;
- (B) Anyone having even a nodding acquaintance with the core Alternative Dispute Resolution (AQB) process must know the hybrid nature of them as occasioned by the circumstances of a particular case. This is how His Lordship, to my mind, used the terms (Adjudicator and Mediator) interchangeably.
- (C) The matter having fallen outside Clause 15 of “the agreement”, whether it was through “mediation or adjudication”, the same being (in effect) voluntary in nature, what was the Court to do? Could the Court have ordered through judicial compulsion to employ the concept of adjudication? Which would have infringed Article 6 of the European convention Human Rights?
- (D) The Appellants complain that the matter in dispute has taken 4 years to resolve. Do the Appellants need a further several years of delay?

- (E) Indeed, the parties have shown an intention to explore the possibility of reaching some settlement both in and out of Court.
- (F) If one were to draw a distinction between “Mediation and Adjudication”, mediation is for parties to share information with the mediator through negotiation and discussions, “the Mediator” being in the role of a facilitator. In contrast, “an adjudicator” would be in a quasi-judicial capacity, even to the extent that, parties would be in a position to withhold privileged (confidential) information that such would not be shared with ‘the adjudicator’ conducting the hearing.
- (G) In the instant case, whether through “the Mediator or the Adjudicator” as they have been labelled, those considerations though referred to even in the High Court Ruling, the essential difference lies in the fact that, an adjudicator’s decision would result in a legal right (being a prototype of a Court) but, in the instant case that is not shown to be the case for, as I have said already, the so called adjudicator’s decision was not that of “an adjudicator”(but that of (in effect) a decision of “a mediator”)
- (H) Both (a mediator and an adjudicator) *prima facie* adopt a non-binding approach, the successful outcome of which is an agreement to settle a dispute.”

Determination

- [13] In articulating what I have said in paragraph (12) above I looked at such celebrated works by M. Schapiro (1981) Courts: A Comparative and Political analysis, Chicago and London, University of Chicago Press and Blake, Browne and Sime: A practical approach to alternative dispute resolution (Oxford University Review, 2018, 5th ed)
- [14] In the result whether “Mediation or Adjudication” either having failed, in my view, the High Court in its Ruling adopted a pragmatic approach in having not merely striking out the Appellant’s motion to enter judgment in terms of the mediator or adjudicator’s

decision but leaving it open for the Appellants to proceed with the substantive (originating summons) matter in the High Court.

- [15] Consequently, I could not see any merit in the proposed grounds of appeal urged by the Appellants having prospects of success in appeal if leave to appeal was to be granted.

Conclusion and Orders of Court

- [16] For the aforesaid reasons I could not see a basis to grant the Appellants application for leave to appeal against the impugned High Court ruling of 22 November 2019 and accordingly proceed to make my orders as follows:

Orders of Court:

1. *The Appellants' application is refused and accordingly dismissed.*
2. *The Appellants are ordered to pay in sum of \$3,000.00 to the Respondent within 21 days of this Ruling.*



Almeida Guneratne

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Almeida Guneratne
JUSTICE OF APPEAL