IN THE COURT OF APPEAL, FIJI

[APPELLATE JURISDICTION]

Civil Appeal No. ABU 017 of 2018

(HBC No.249 of 2016)

BETWEEN : FIJI ROADS AUTHORITY

Appellant

AND : STANTEC NEW ZEALAND

(Formerly known as MWH New Zealand Limited)

Respondent

And

Civil Appeal No. ABU 074 of 2019

(HBC No.227 of 2017)

BETWEEN : STANTEC NEW ZEALAND

(Formerly known as MWH New Zealand Limited)

First Appellant

: MICHAEL STEPHEN RUDGE

Second Appellant

: BRUCE BUXTON

Third Appellant

: ANDREW MACNIVEN CASELEY

Fourth Appellant

AND : FIJI ROADS AUTHORITY

Respondent

Coram : Almeida Guneratne, JA

Counsel : Ms. N. Choo for the Appellant in ABU 017/2018 and Respondent in ABU 074/2019

: Ms. P. Low for the Respondent in ABU 017/2018 and the Appellants in ABU 074/2019

Date of Hearing : **22 April 2020**

Date of Ruling : **12 June 2020**

RULING

[1] Both these matters (listed together) were initially heard by Chandra, JA who passed away having reserved his Ruling. When the said matters came before me for hearing, respective counsel moved that I make a ruling on the basis of the written submissions filed on behalf of the parties. Accordingly, I proceed to make my Ruling.

Background to the said two matters

[2] Both matters relate to "an agreement dated 27 January, 2012" parties had entered into and several clauses contained therein requiring interpretation.

[3] In ABU 017/2018, the Appellant, Fiji Roads Authority (FRA) is seeking leave to appeal against the order dated 26 April, 2017 the High Court in HBC 249/2018 refusing to construe "time sheets" as being "confidential information" and "Intellectual Property" as contemplated by the said agreement.

[4] In ABU 074/2019, the Appellants (formerly MWH with some more changes in the persona) are seeking leave to appeal against the Judgment dated 1 March, 2019 of the High Court. By that judgment, the High Court struck out the originating summons of the Appellants in proceedings bearing No. HBC 324/2016 and the orders sought in proceedings bearing No. HBC 227/2017 in which a stay was refused. Those are the subjects of the present Appeal No. 074/2019.

[5] In HBC 227/2017, the Respondent (in HBC 074/2019) instituted proceedings against the Appellants (in 074/2019) seeking *inter alia* a declaration that they (MWH) unlawfully terminated "the agreement" on 23 September, 2012.

[6] The said Respondents had filed summons praying that (a) the proceedings be stayed pursuant to Section 5 of the Arbitration Act, alternatively pursuant to the inherent jurisdiction of the High Court; and (b) as an alternative to (a), the proceedings (that is in HBC 227/17) be stayed until the determination of action No. 324/2016.

[7] In that background history of the disputes between the parties I shall proceed to deal with and determine the two applications before me, namely, first, ABU 017/2018 and then ABU 074/2019 in that order.

[8] At this point, I hasten to say that, I, *suo sponte* examined the Record and the Judgment of the Full Court in ABU 24/2019 decided in February 2020, to see whether it had a bearing on the present matters under consideration.

ABU No. 017/2018 (HBC 249/2016)

[9] On 29 September, 2016 the Appellant (original Plaintiff) filed writ of summons seeking an order for certain information from the original defendant (MWH (New Zealand) Ltd. (presently Stantec NZ Ltd and Respondent to this Appeal) in pursuance of a written agreement dated 27 January, 2012 ("the Agreement") the parties had entered into. This was followed by an ex parte summons filed on the same day seeking certain orders of an interim nature out of which the High Court ordered:

> *"...that the defendant, its servants and agents preserve and not deal with any document and other information created or received by the defendant between 1 January, 2012 to date in relation to the contract in writing dated 27 January, 2012 between the plaintiff and the defendant until further order of the Court."*

[10] The defendant (MWH) supplied most of the "information" sought in the writ of summons save for "the time sheets".

[11] This had resulted in the Appellant making an application seeking orders that the Respondent provide the said time sheets.

[12] By its ruling dated 26 April 2017, the High Court refused the said application of the Appellant and by its ruling dated 31 August 2017, the High Court dismissed the Appellant's application for leave to appeal the 26 April ruling.

[13] Thereafter, the Appellant having withdrawn a leave to appeal application to this Court against the said ruling of 26 April, made a renewed application for leave to appeal against the said ruling. It is that renewed application for leave to appeal that is presently under consideration before me.

[14] I must say at this point that the learned Counsel for both the appellant as well as the respondent have filed extensive written submissions capturing the relevant principles as reflected in past precedents. Before considering and evaluating the relative merits contained in those submissions, I shall begin by first examining the basis of the learned High Court Judge's ruling of 26 April, 2017.

The Basis of the High Court Judge's Ruling dated 26 April, 2017

[15] Pivotal to that ruling was the written agreement dated 27 January, 2012 the parties had entered into. Consequently, "the information" created and received in pursuance of that agreement, "time sheets" being the Appellant's complaint that they were not furnished by the Respondent, was the matter before the learned High Court Judge for determination.

[16] In his determination, the learned Judge looked at the relevant clauses of "the Agreement" which are as follows:-

"8. Confidentiality

8.1 Client Obligations

The Client must:

- Identify Confidential Information at the time it is supplied to the Consultant; and
- Keep all Confidential Information relating to the Consultant without the Consultant's written approval, unless it is necessary for the purposes of the Services or the Works to disclose it to any appropriate third party, or as required by law.
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8.2 Consultant Obligations

The Consultant must:

- identify Confidential Information at the time it is supplied to the Client; and
- keep all Confidential Information relating to the Client or the Client's project or the Works without the Client's written approval, unless it is necessary for the purposes of the Services or Works to disclose it to any appropriate third party, or as required by law.

8.3 Exclusions

Information shall cease to be Confidential Information when the information is publicly available through no unauthorized at of either Party.
If either Party is legally bound to disclose Confidential information, that Party must first advise the other Party what information will be provided and limit the information to that required by the law.

8.4 Return of Confidential Information

Upon request, and except as in clause 11.3, the Consultant must promptly return to the Client or destroy all Confidential Information which is in the Consultant's possession or control.

11.3 Return of the Property Equipment

At the end of the Services, the Consultant must return to the Client any property including the Clients intellectual Property, including the Client's Intellectual

Property, or equipment of the Client which is in the Consultant's possession or control.
Notwithstanding any other provisions in this Agreement the Consultant shall be entitled to retain a copy of all documentation including Confidential Information, drawings, specifications, reports, correspondence, computer files and records of every description for its record keeping purposes only. Such documentation shall include all relevant New, Pre-existing and Client's Intellectual Property. The Consultant shall treat all such documentation as Confidential Information and shall mark it confidential.

11.14 Transfer of New Intellectual Property

In the event of termination by the Client, the Consultant shall provide reasonable assistance to the Client in the transfer of the Services (including delivering copies of any New Intellectual Property in the Consultant's control) to the new consultant provided that the Client has made all payments due and owing under the Agreement."

An Interim Reflection before I proceed to make my determination on this matter

[17] I shall first look at the material factors or terms of "the Agreement" that were in the contemplation of parties and look at how the learned Judge interpreted them bearing in mind that the dispute under consideration had arisen in a commercial environment.

The Material factors or terms of the "Agreement" that were in the Contemplation of parties

[18] The two material factors or terms discernable from "the Agreement" are:-

(a) the reference to "Confidential information" and the question whether "time sheets" amount to "confidential information".

(b) the reference to "intellectual property" and the question whether "time sheets" amount to "intellectual property".

The Clauses in "the Agreement" in that regard

[19] (a) Re: "Confidential Information"

"8. Confidentiality

8.1 to 8.4....." (Supra)

(b) Re: Intellectual Property

"11.3 Return of Property Equipment

11.4 ....." (Supra)

How the Learned High Court Judge viewed and interpreted the said clauses

[20] The learned Judge in his ruling held thus:

*"**[8]** In the statement of claim the plaintiff has averred that the defendant, in breach of clause 11.3 of the agreement, has failed and/or neglected return the information. It is thus clear that the plaintiff while seeking to have the information provided to the defendant, returned pursuant clause 11.3 of the agreement, in the ex-parte summons seeks certain information in excess of what it is not in fact entitled to under the agreement.*

***[9]** Clause 8.4 of the contract provides as follows:*

Upon request, and except as in clause 11.3, the Consultant must promptly return to the Client or destroy all Confidential Information which is in the Consultant's possession or control.

***[10]** Clause 11.3 of the contract reads thus:*

At the end of the Services, the Consultant must return to the Client any property, including Client's Intellectual Property, including the Client's Intellectual property, or equipment of the Client which is in the consultant's possession or control.

Notwithstanding any other provision in this Agreement the consultant shall be entitled to retain a copy of all documentation Including confidential Information, drawings, drawings, specifications, reports, correspondence, computer files and records of every description for its record keeping purposes only. Such

documentation shall include all relevant New, Pre-existing and client's Intellectual Property. The consultant shall treat all such documentation as Confidential Information and shall mark it confidential.

[11] *Clause 12.8 of the agreement provides that the provisions of clauses 2.11, 5, 6, 8, 9, and 10 shall continue in effect after its termination.*

[12] *I do not see any ambiguity in clause 8.4 of the agreement. It clearly says that the plaintiff is only entitled to what has been given to the defendant. The learned counsel for the plaintiff submitted that according to the letter written by Howards Lawyers on 28th March, 2017 not only what has been provided by the plaintiff to the defendant, certain other materials outside clause 8.4 of the agreement has also been provided to the plaintiff. For the reason that the defendant has given any information which they are not legally bound to give the plaintiff cannot be heard to say that such an act of the defendant has the effect of altering the terms of the agreement. If the defendant so desires, it can provide the plaintiff with whatever the material that is in its custody. The question is whether the court can compel the defendant to provide the plaintiff with such material which it is not liable to part with in terms of the agreement. In my view it cannot.*

[13] *The learned counsel submitted that the word "relevant" must mean relevant to the application made in the summons and not to some arbitrary and as yet unknown standard determined by the defendant.*

[14] *When parties informed court the terms of the understanding between them none of them informed court what was meant by "relevant". Whatever the meaning given to it, the parties cannot retract from the terms of the agreement and they are bound by clause 8.4 of the agreement even after its termination.*

[15] *It is common ground that "timesheets" are not something that was provided by the plaintiff to the defendant. The only dispute is that the defendant failed to provide the plaintiff with the "timesheets". In view of the above the court is of the view that the "timesheets" are not documents relevant to the applications of the plaintiff and therefore, the plaintiff's application for an order on the defendant to handover the "timesheets" (or copies thereof) is without merit.*

[16] *The learned counsel for the plaintiff also submitted that in the event the defendant makes a claim the plaintiff will not be able to assess the claim without "timesheets". If the defendant makes a claim it is up to them to provide all the materials relied on by them in arriving at the amount claimed. The court cannot and in fact, not entitled to make orders based on assumptions. If such a claim is made and if the matter is brought before the court, it can make necessary orders facilitating the parties to have necessary information relevant to the matter before it.*

[17] *For the reasons aforementioned the court makes the following orders:*

1. *The application for an order on the defendant to handover the "timesheets" (or copies thereof) to the plaintiff is refused.*
2. *The plaintiff is order to pay the defendant $1000.00 as costs within 14 days from today."*

Written Submissions dated 8th June and 15th June 2018 tendered on behalf of the Appellant

[21] Both parties have treated the impugned ruling of the High Court as an interlocutory matter. I shall not express any views on the matter.

Summary of the Principal Points urged by the Appellant

[22] The Appellant has urged that:

(a) "Confidential Information" and "Intellectual Property" being factors or terms contemplated in "the Agreement", "time sheets" were relevant because they constituted information and intellectual property created or received by MWH. They were not only auditable under 'Annexure A' of the "the Agreement" for the purpose of auditing all payments made to MWH under 'Annexure B' of "the Agreement" but also would document the charges made by MWH in respect of work carried out by MWH personnel under "the Agreement".

(b) Accordingly, MWH had a clear and unambiguous obligation to return the said "time sheets" upon request under Clause 8.4, read with Clause 1.1 of "the Agreement" which defines "Confidential Information" very broadly thereon and extends to "any information", however stored, falling into the categories of "sensitive nature" or any information about:

(A) MWH or FRA

(B) Their business

(C) Their clients, gained - during the life of "the Agreement".

[23] I have also given my mind to the submissions made in paragraph 26(d) (i) to (iii) and paragraphs 27 and 28 and the Ground of Appeal urged in Paragraph 29(l), in particular, of the written submissions dated 8th June, 2018 as well as the supplementary submissions dated 15 June, 2018.

[24] Those submissions have addressed a plethora of concepts such as "about MWH's business", interpretations to be placed on the phrase "gained during the life of Agreement", the term "any property" (whether it included "New Intellectual Property" or not, being the Respondent's contention which I shall now come to.

Summary of Respondent's Submission in Opposition dated 12 June, 2018 with my interim reflections

[25] The Respondent has submitted on:

(a) The factors that ought to weigh with this Court (in the exercise of a single Judge's Ruling) in determining whether or not to grant leave to appeal in a Renewed Application for such leave" (which is the present case). This the Respondent has endeavored to do with reference to past precedents and applicable principles.

(b) In paragraph 16 of the submission the Respondent has relied on the following observation made by the learned Judge in his impugned Ruling viz:

> *"The learned counsel for the plaintiff also submitted that in the event the defendant makes a claim the plaintiff will not be able to assess the claim without "time sheets". If the defendant makes a claim it is up to them to provide all the materials relied on by them in arriving at the amount claimed. The court cannot and in fact...entitled to make orders based on assumptions. If such a claim is made and the matter is brought before the Court, it can make necessary orders facilitating the parties to have necessary information relevant to the matter before it."*

(c) From paragraphs 18 to 31 of its submissions the Respondent has contended strongly against the Appellant's case in regard to the Grounds of Appeal urged by the Appellant.

Determination

[26] I have given my best consideration to the submissions tendered on behalf of the respective parties.

[27] While at the outset I was struck by what I have re-capped at paragraphs 18(b) above which would stand in favour of the Respondent's contention, on the other side of the coin, I saw that, the learned Judge has not made any reference to Clauses 1.1 and 9.1 contained in "the Agreement".

Principles of Interpretation of Contractual documents

[28] It is an inveterate principle of interpretation of contractual documents that, the same must be viewed and interpreted in their totality. Here, as I have said, Clauses 1.1 and 9.1 have not been referred to by the learned Judge in his ruling. Had he considered those clauses was there room for him to change or qualify his observation which I have recapped in paragraph [18] (b)?

Reflections on some further adjunct aspects

The Unidroit Principles of International Commercial Contracts (2016)

[29] Those principles describe "confidential information" as:

> *"All material having commercial value or utility. That would include scheduling, shifts, dispatching jobs, track hours and* ***Management of time sheets****, invoicing, payments..."*

[30] Furthermore, close co-operation between the parties **would include time sheets and disclosure of the same**.

Intellectual Property

[31] It is intangible property that includes patents, trademarks, copyright, and registered and unregistered design rights (Oxford Dictionary of Law, 9th ed. 358) **Time sheets** contain information labelled as personnel (such as perform evaluation, leave time, social security members. **Time sheets are considered confidential**. (Wikipedia)

[32] No doubt, "the Agreement" does not expressly make reference to the "Unidroit Principles" (supra) but, in my view, the terms of "the Agreement" capture their spirit.

Discovery of Information v Disclosure of Information

[33] The Respondent appears to have submitted that if "time sheets" were required, there should have been an application for the same through the mechanism of "discovery". This would have resulted in further protracted proceedings whereas seeking "disclosure of information" as was pursued by the Appellant in the instant case would have circumvented such protracted proceedings.

Matters for the Full Court to determine

[34] The aforesaid matters would be for the full Court to look into, in as much as, as far as the present application is concerned, I am inclined to grant leave to appeal on the decisive and/or overriding criterion that there is an arguable case involved encompassing several matters of law as articulated above in this Ruling and I dare say, on the grounds of appeal urged. (Vide: **Engineer Procure Construct (Fiji) Ltd v Sigatoka Electric Ltd**; Civil Appeal No. ABU 105/2016).

Orders of Court:

1. Leave to Appeal against the Ruling dated 26 April, 2017 is granted.
2. The Appellant may advise itself in regard to consequential steps prescribed by law.
3. I shall reserve making an order for costs until I determine ABU 074/2019 (the connected matter).

ABU 0074/2019

[35] The background facts relating to this application I have referred to at paragraphs [4] to [6] above.

[36] Thus, the subject of this appeal (0074/19) being the orders made by the High Court on 1st March, 2019 (touching HBC 324/2016 and HBC 227/2017) while they were pending (and in fact still pending) was when the full Court in ABU 024/2019 in its Judgment (per Lecamwasam, JA with Guneratne JA and Jameel JAs' agreeing) decreed thus: (apparently directly against HBC 324/2016 and indirectly as I read the events impacting on HBC 227/2016.

[37] The Full Court in response to the reliefs sought by the Appellants in this Appeal made certain orders. The reliefs sought were:

> *"(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 27th January, 2012 (Agreement):*
>
> *(iii) continued in effect after termination of that Agreement; and*
>
> *(iv) 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."

[38] The order having a bearing on this Appeal was:

"... i) Appeal allowed in regard to prayers (a) and (b)..."

[39] In that backdrop I looked at the Renewed Inter Parte summons dated 20 September, 2019 filed on 29 August, 2019 and the written submissions tendered on behalf of the parties.

In re: The Application for Leave to Appeal

[40] At the risk of some oversimplification, the principal points urged by the Appellants may be construed and summarized as follows:

(1) Whether, because a number of claims made by the FRA are based on provisions of the Commerce Commission Act 2010 and the interpretation of the Agreement, these claims could only be addressed by the High Court.

(2) Whether, in order to make a deduction as referred to in (1) above, the relevant clauses in "the Agreement" (particularly 10.1 to 10.4) had to be considered as a whole.

(3) Whether, the 1st Appellant's (Stantec's) employees were to be regarded as its agents and if so, claims by and against them came within the arbitration and dispute resolution provisions in "the Agreement" read in the light of Section 5 of the Arbitration Act.

(4) Whether, in general, the matter on which parties are at variance, (on mediation and arbitration) needed to be viewed in the light of the rules of the International Chamber of Commerce as well.

Determination

[41] Sitting as a Single Judge in terms of the power conferred on me under Section 20(1)(a) of the Court of Appeal Act (Cap.12), I am not required to find any error, misdirection of fact or law in the impugned judgment of the High Court. As the precedents have established, it would suffice if an applicant (the appellants) has demonstrated a prima facie case, that is "arguable and/or with a reasonable prospect of success".

[42] That, the Appellants have demonstrated and accordingly, I make my determination of granting leave to appeal against the impugned Judgment of the High Court.

Re: the Application for a Stay

[43] I gave my mind to the numerous precedents and legal principles emanating therefrom succinctly addressed on behalf of the Appellants on their written submissions dated 28 November, 2019 particularly at paragraphs 80 to 84 thereof.

[44] However, in that regard, the following factors weighed with me viz:

(i) The impugned judgment of the High Court is of an interlocutory nature and no execution of the same is involved stricto sensu and "the stay" sought is in the nature of an "interim order".

(ii) If I were to grant such an order it would amount to the prejudice of the Respondent in whose favour I have granted leave to appeal in ABU/0017/2018.

(iii) Then, there is the overriding mater that still remains to be determined viz: the main appeal as to the legality or otherwise of the termination of "the Agreement" which will also take a considerable time to be disposed of.

(iv) Thus, at this juncture, I am unable to subscribe to the Appellants' lament that there would be "substantial injustice" caused to them if "the stay" sought is refused.

[45] It is often said that "justice hurried is justice denied". At the same time it is said "justice delayed is justice denied".

[46] Accordingly, on a balance of what I have taken cognizance of at paragraph [44] above, I decline to grant "a stay" as sought by the Appellants.

[47] In view of the fact that, the main dispute is still on foot (that is, the legality or otherwise of the termination of "the Agreement" vide: paragraphs [5] and 44(iii) of this Ruling), the Registrar is directed to have these two Appeals listed for hearing by the Full Court on the earliest possible date. The Registrar is also directed to submit the Record in ABU 024/2019 along with ABU 017/2018 and ABU 0074/2019 at the Full Court hearing.

Final (Cumulative) Orders in ABU 017/2018 and ABU 074/2019

1. Leave to Appeal application by the Appellant in ABU 017/2018 against the High Court Judgment dated 26 April 2017 is allowed.
2. Leave to appeal the High Court Judgment dated 1 March, 2019 by the Appellants in ABU 074/2019 is allowed.
3. Application for "a stay" by the Appellants in 074/2019 is refused.
4. There shall be no costs in the said two Applications.
5. Parties are directed to take steps as requisite by law to prosecute their respective appeals.
6. The Registrar is directed to take steps as stated in paragraph [47] above.

.....

Almeida Guneratne

Justice of Appeal