IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 579 OF 2007

BETWEEN: **SHIREEN LATEEF & OTHERS**

Plaintiff

A N D: **DIGICEL FIJI LIMITED & OTHERS**

Defendant

Mr. S. Lateef for Plaintiffs
Ms A. Neelta for First Defendant
Ms S. Saumatua for Second Defendant
Ms M. Rakuita for Third and Fourth Defendants

Date of Hearing: **22nd January 2008**
Date of Ruling: **7th March 2008**

DECISION

The plaintiff seeks an injunction to restrain the defendants from erecting a telecommunications tower on Flagstaff Park Reserve, as it is affecting the plaintiff's residential properties and no consent was obtained from the plaintiffs to do so.

The motion before me seeks that the tower currently being erected be immediately stopped and forthwith removed. This motion was filed on 14th December 2008 and since there was no undertaking as to damages given, I could not have granted an injunction pending hearing of the matter.

The matter was heard on 22nd January 2008. I had before me following affidavits :

1) Sharan Lateef sworn on 14th December 2007
2) Sharan Lateef sworn on 31st December 2007
3) Luke Rokomokoti, Director of Lands sworn on 8th January 2008
4) Matthew Pritchard Roll-out Manager of first defendant sworn on 8th January 2008
5) Maraia Ubitau, Director of Town and Country Planning sworn on 10th January 2008
6) Jagdish Singh, Director Engineering Services of Suva City Council sworn on 18th January 2008.

The affidavits and annexures show that the Director of Lands had issued a special licence to Digicel Fiji Limited over 156 square meters of land for proposed transmitter site. This licence was for a period of one year from 1st July 2006 and extended for one more year from 1st July 2007.

Digicel has built the tower for its mobile telephony services. The third defendant says that the tower site is a recreation reserve but this zoning allows for installation of telecommunication towers as a conditional approval. The third defendant granted consent for conditional approval on 5th December 2007 and the application was returned to the Suva City Council for its approval. The tower is 25 meters high.

The Suva City Council affidavit says that the plans submitted by Digicel show a six-meter gap between the existing fence and tower fence but in actual fact it is two meters on one side and one meter on the other. It also says that no building permit was issued by the Council. As far as the Council is concerned it is an illegal structure and a removal notice was issued on 3rd January 2008 by the Council to Digicel. Whether Digicel complies with the notice remains to be seen.

This is an application for interlocutory injunction. As such the principles laid in American Cynamid v. Ethicon Ltd. (1975) AC 396 apply. These are :

(a) the plaintiff must establish that there is a serious question to be tried
(b) that damages is not an adequate remedy
(c) If the plaintiff satisfies the tests then the grant of injunction is a matter for the exercise of the court's discretion in the balance of convenience.

The American Cynamid principles are not an inflexible tests and in the end the question is where overall justice lies: Klissers Farmhouse Bakeries Ltd. v. Harvest Bakeries Ltd. (1985) 2 NZLR 110; Air Pacific Ltd. & Others v. Air Fiji Limited – ABU 66 of 2006.

The first serious issue on basis of submissions is the procedure. The first, third and fourth defendants state that the plaintiff should have brought the proceedings by way of judicial review because in granting approval the Director of Town & Country was carrying out statutory duties. Relying on the authority of O'Reilly v. Mackman (1982) 2 ALL ER 1124 they submit that it is an abuse of process to commence and proceed with a public law matter by way of writ of summons.

The issue is whether judicial review is the sole and exclusive means of raising public law issues before the High Court. Some assistance on this issue can be found from Order 53 Rule 9(5) which provides that where a declaration, an injunction or damages is the relief sought and the court considers that the judicial review was not the proper procedure, the court instead of dismissing the application may order the proceedings to continue as if begun by a writ of summons. However there is no provision in the High Court Rules for the converse of the above to enable the court to treat an action begun by writ of summons or originating summons as if begun by judicial review if the court finds that the writ or originating summons was not the proper procedure.

The House of Lords considered the exclusive use of judicial review in O'Reilly v. Mackman (1983) 2 AC 237. Lord Diplock at page 285 stated that it was ***"contrary to public policy, and as such an abuse of the process of court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by ordinary action ....."***. On the same day that O'Reilly v. Mackman was decided. The House of Lords delivered another milestone judgment in Cocks v. Thanet District Council 1983 2 AC 286. It further extended the O'Reilly principles. It decided that where private law rights are affected and which depended on prior public law decision, they must also ordinarily be brought by judicial review, O'Reilly has been considered and applied by the Court of Appeal – Ram Prasad v. Attorney General of Fiji – ABU 58 of 1997. It too says that an applicant must use judicial review in case where he/she seeks to enforce a public right for proper performance by a respondent of public duty.

The plaintiff says that the Town Planning Act gives a local authority power to modify or amend or suspend a town planning scheme. However, Section 26(2) of the Town Planning (Amendment) Act 1995 requires that every owner or occupier of land within the area has a right of objection.

Mr. Lateef submitted that no notification of amendment was given nor residents of the area given an opportunity to raise objections. His submission comes down to failure of the third defendant to comply with his statutory duties. This would therefore become a public law matter and a proper matter for judicial review and not a writ action.

The third defendant states that the tower is built on a civic zone where such towers can be built. There is no need to obtain consent of the plaintiffs. The licence issued by the Lands Department also shows a reservoir in the area and the Public works Department has the first right over the site. The question therefore remains whether this area is an exclusive recreation reserve. The Suva City Council states that no building permit was issued to Digicel to erect the tower and therefore it is, as far as it is concerned, is an illegal structure. The

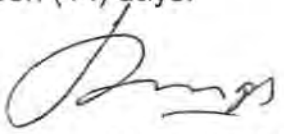
Council has issued a notice asking Digicel to pull the structure down. If the council believes that the tower must be pulled down, then it should take some form of action to see that the tower is pulled down. Mere giving of the notice is not enough. The enforcement is a matter for the Suva City Council not the plaintiff.

Mr. Lateef submits that damages are not an adequate remedy as he feels the presence of tower so close to the plaintiff's property devaluing their property. He says these properties have a sentimental value to the occupiers and there is also radiation hazard.

I am not too sure of these allegations. I suppose valuers could easily value the property without the presence of tower and with the presence of the tower. Difficulty in proving damages does not mean that damages are not an adequate remedy.

The balance of convenience favours the third defendant. It has built a tower. It has a licence over a small piece of land for this purpose. Further third parties that is potential clients of the Digicel might suffer if the tower is ordered to be brought down now without full hearing.

Accordingly I dismiss the application with costs summarily fixed in the sum of $300.00 for first and second defendant and a sum of $300.00 for third and fourth defendants collectively as both were represented by one counsel. This is to be paid in fourteen (14) days. I also order the plaintiff to file and serve a statement of claim in fourteen (14) days.



[Jiten Singh]
JUDGE

At Suva
7th March 2008