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

**CIVIL NO. HBC 05 of 2010**

**BETWEEN** : Gregory Clark

**PLAINTIFF**

**AND** : Zip Fiji

**DEFENDANT**

**COUNSEL** : Mr. D. Singh for the Plaintiff
Mr. G. O'driscoll for the Defendant

**Date of Judgment** : 6 November 2013

# JUDGMENT

1. There are two applications before me for determination, one for Stay Order and the other for Leave to Appeal from the Decision of the Master dated 10 July 2012.

2. The issue of whether the leave is required against the decision of the Master needs to addressed first in my judgment as an objection has been raised by the Defendant that the Decision of the Master is a final order and direct Appeal should have been filed against the order.

3. The Plaintiff filed an affidavit of Jagadish Prasad, a law clerk of Plaintiff's solicitors, sworn on 20 July 2012, in support of both applications.

**Fact Briefly**

4. The Plaintiff by his Writ of Summons and Statement of Claim sought damages for injuries allegedly received by him while taking a zip ride through the rainforest of Wainadoi, Navua, alleging that the injuries were as a result the negligence of the Defendant and or its servants and agents.

5. The Defendant in its Statement of Defence denied the negligence and took up the position that any injuries sustained was due to the negligence of the Plaintiff or failure to follows instructions given to him by the Defendant and its agents.

6. The Defendant further took up the position in its Statement of Defence that the Plaintiff before embarking on the tour signed a release and waiver in favour of the Defendant and agreed to accept full responsibility for himself and anyone else in his care for bodily injury, death or damages incurred as a result of participation in the activity and to defend indemnity and hold the Defendant and its agents employees, officers and owner harmless from any liability whatsoever, and thereby the Plaintiff was not entitled maintain the instant case against the Defendant.

7. The Defendant by its summons dated 31 October 2011 made an application to strike out pursuant to order 18 rule 8 read with order 33 rule 7 and dismiss the Plaintiff's action on the grounds of that no reasonable cause of action is disclosed, action is frivolous and vexatious, and abuse of process.

8. The Defendant also sought trial on preliminary issue that the Plaintiff by duly executing and giving a written release and waiver to accept the burden and risk of the Zipline tour activity and agree to indemnity and hold, harmless the Defendant and its agents is estopped from making such a claim against the Defendant in respect of injuries allegedly sustained by him.

9. The learned Master in his decision dated 10 July 2012 struck out the Plaintiff's action and granted a cost of $1000.00 in favour of the Defendant. The Plaintiff now seeks leave to appeal from the said decision.

**The Determination of the Issue of Leave**

10. The issue before the court is whether the Plaintiff should have filed an appeal in the High Court instead of leave of appeal from the decision of the Master. The Defendant argues that when the matter is struck out and formally determines the dispute between parties, the leave of the court is not required. However, the Plaintiff argues that the decision is an interlocutory in nature and a decision was to strike out pleading and thus the leave of the High Court is required before the court can proceed to hear the appeal.

11. **The Rules**

The High Court Rules (Amended) Rules 2006 [Legal Notice No. 39], Part II, Order 59 Rule 8 states:

> 8.(1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.
>
> 8.(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the high Court which may be granted or refused upon papers filed.
>
> The question now before the Court is to decide whether an application for Strike-Out falls within the ambit of Order 59 rule 8.

**The Law**

In the Court of Appeal decision, in the case of **Goundar v Minister for Health [2008] FCA 40: AB00075.20065** (9 July 2008), the Court of Appeal stated at paragraph 38 as follows:

*Every application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling, order or declaration. The following are examples of interlocutory applications:*

1. *An application to stay proceedings;*
2. *An application to strike out a pleading;*
3. *An application for an extension of time in which to commence proceedings;*
4. *An application for leave to appeal;*
5. *The refusal of an application to set aside a default judgment;*
6. *An application for leave to apply for judicial review.*

**Application**

*The Court of Appeal has set out clear guidelines to lower courts in matters where leave to appeal is needed before court can proceed to hear the Appeal application. Thus an application for strike out a pleading falls within the ambit of Order 59 rule 8, as per the Court of Appeal.*

12. The Defendant relied on the judgment of the High Court of Appeal, in **Kelton Investments Limited v Civil Aviation Authority of Fiji [1995]** FJCA15, to support his assertion.

The said judgment states as follows:

> *"However, before I commence to deal with the leave application it is necessary for me to refer to the contention of Mr Inoke (Counsel for the first respondent) that no leave is necessary because Judge Sadal's order of 10 May 1995 was not interlocutory in nature.*
>
> *In my view there is no merit in Mr Inoke's contention. The order made by Sadal J. was clearly an interlocutory one because it did not finally determine the cause, matter, application or proceeding in hand, i.e whether there was a breach of his injunction at a time when it was force.*
>
> *The matter in hand could be regarded as a new proceeding or application albeit initiated by the Judge himself. The learned Judge's order was but a preliminary step in finding out whether there was a breach and if so whether there were grounds for initiating contempt proceedings. Upon receipt of the information sought he may well decide that there was no need for any further action and thus finally dispose of the matter. Whether one takes the "order approach" or the "application approach" in my view the order of 10 May was an interlocutory one (see **White v Brunton [1984]** Q.B. 570)."*

13. Having considered the underlying guidelines in the above authorities, I am inclined to accept the more recent authority on this issue which clearly sets out that the striking out pleading is an interlocutory in nature and leave is required prior to an approval. However it is noted the authorities on this point are not in

harmony and requires further clarity. In my view, statutory assistance is required to avoid the ambiguity in this area of procedural law. In England an amendment was made in 1988 to order 59 to clear the uncertainly prevailed over a period of time in identification of the order made by the court is interlocutory or final.

14. Since in my judgment, I have already opined that the Master's decision was an interlocutory, I now consider whether facts and circumstances deposed in the affidavit in support warrants that this is a proper case for leave to be applied.

15. The Defendant has raised a preliminary objection to the affidavit of Jagadish Prasad, Law Clerk of Plaintiff solicitors, filed in support of the leave to appeal application.

16. It was contended by the Defendant that the deponent is neither competent nor familiar to the pleading of this case, to be able to swear an affidavit deposing to matters which he purports to do.

17. Upon perusal of the affidavit, it is observed that the deponent swears on contentious legal matters. The deponent deposed in his affidavit that the learned Master has not applied the principles laid down in **Loychuk v Couger Mountain Adventure Limited** correctly in the instant case and attempts to analyze the principles of **Canada Steamship Lines DL v King** case to apprise the court to establish that learned Master has erred in law in analyzing the principles of the said case. He further relied on matters that the Plaintiff has not pleaded in his Statement of Claims as a ground to establish that he has a meritorious case for consideration of leave.

18. In my view, law clerks of solicitors are neither litigants nor competent legal persons to raise such objections to challenge the decision of the Master on the

premise that Master has erred in law in applying the underlying principles laid down in the relevant case authorities. The litigants are entitled to take up such assertion only on advice of their solicitors. The law clerks, as stated earlier are not in either category.

19. The law clerk deposed in the first paragraph as follows:

> *"That I am employed as a Law Clerk by D.Singh Lawyer, Suva and I am dully authorized to swear this affidavit on behalf of the Plaintiff in this action."*

20. He does not annex any authority given to him by the Plaintiff and does not even depose that he has been advised by the Plaintiff's solicitors on the matters he deposed. In the case **Dr. Ramon Fermin Angco v Dr. Sachida Mudaliar & Others** Lautoka High Court Civil Action No. 26 of 1997, the Court on page 3 stated:

> *"The court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles."*

21. I have no hesitation whatsoever in relying on the above authority in the instant matter before me. In every sense, the affidavit of the deponent filed in support of the application for leave is defective and unacceptable.

22. The onus is on the Plaintiff to establish that he has an arguable case for the purpose of obtaining leave to appeal. The court is not required at the leave stage to delve into merits of the Plaintiff's case but obliged to demonstrate that there is an arguable case. In the case of **New India Assurance Company**

**Limited v Footwear Manufacturers Ltd (1999)** ABU 0062, d of 98/S where Pathik J said:

> *"In the proposed Grounds of Appeal the Appellant has raised a number of issues of far-reaching importance. It says that the amount claimed is in dispute and should have been referred to arbitration under the* ***Scott v Avery*** *clause in the insurance policy. It is one of the grounds that the appellant was not allowed 'further time to respond to the issue of Summary Judgment when it was patently clear that the Appellant had not responded to the same.*

The following passage from the case of The **Fiji Public Service Commission v Manunivavalagi Dalituicama Korovulavula** FCA Civil Appeal No. 11 of 1989 at 5 is pertinent to the issues before me:

> *"Whilst I am inclined to agree that Air Canada's case appears to be distinguishable, I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not."*

23. The Plaintiff's main contention is that the Master erred in evaluating the release and waiver adequately or the Master did not consider the Loychuk case, in detail in his decision.

24. Upon perusal of the decision of the Master I find that the learned Master has dealt with the above case, sufficiently and adequately in his decision specifically in paragraph 10 to 18. In the Loychuk's case the Plaintiffs were injured due to

the negligence of the employees and the issue was enforceability of the release where the Plaintiffs argued that the release was unenforceable. In the instant application, there is no such issue. The Plaintiff in this case has signed the release and waiver. Having examined the decision of the Master, it is to be noted that the learned Master has evaluated the release and waiver sufficiently in consideration of all relevant authorities to come to conclusion that this release and waiver encompass or wide through to cover the negligence of the Defendant and that of its servants and agents. The release and waiver absolved the Defendants of liabilities and a complete defence to the Plaintiff's case.

25. In view of the above reasoning, I conclude that the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Plaintiff will not suffer an irreparable harm if stay is not granted.

**Order**

26. Therefore I make the following orders:

i. Application for leave to appeal refused.

ii. Application for stay order pending appeal dismissed.

iii. Costs summarily assessed $1,000.00 be paid to the Defendant within 14 days from this judgment.

Susantha N. Balapatabendi
**JUDGE**