IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 351 of 2009

BETWEEN	:	SAKIUSA SOLI (Senior) & SAKIUSA SOLI (Junior)
		PLAINTIFFS
AND	:	RAIWAQA BUS LIMITED
		1ST DEFENDANT
AND	:	KAMINIEL TUIMAVANA
		2ND DEFENDANT
AND	:	NEW INDIA ASSURANCE COMPANY LIMITED
		1st NAMED THIRD PARTY
AND	:	LAND TRANSPORT AUTHORITY
		2nd NAMED THIRD PARTY
COUNSEL	:	Mr. D. Singh for the Plaintiffs. Mr. A. Sudhakar for the 1st Named Third Party
Date of Hearing	:	6th August, 2015
Date of Ruling	:	20th August, 2015

RULING.

[1] The plaintiffs instituted these proceedings against the 1st and 2nd defendants claiming damages for the injuries caused to them due to the negligent driving of the 2nd defendant. The plaintiff made the 1st defendant a party to this action on the basis that at the time of the accident the 2nd defendant was driving the vehicle under the employment of the 1st defendant.

[2] The 1st defendant in terms of Order 16 Rule 1 of the High Court Rules served Third Party Notice on New India Assurance Company Limited [***1st named 3rd Party***] and the Land Transport Authority [***2nd named 3rd party***].

[3] The 1st named 3rd party filed its statement of defence on 26th January 2010 wherein it averred that the passenger extension cover it issued to the 1st defendant was for a total aggregate sum of $ 100,000.00 for all the accidents arising out of one event.

[4] On 07th September 2010 the plaintiffs filed an affidavit requesting the Court to determine the issue whether the insurance cover of $ 100,000.00 is for all the claimants or each claimant is entitled to recover damages up to $ 100,000.00.

[5] The learned Master in his ruling dated 26th March 2012 made the order which I reproduce below;

> **The interpretation of this Court is that the 1st Named Third Party in terms of the Motor Comprehensive Policy No. 922623/3104/286256 is liable for passenger risk cover of $ 100,000 applied to each claimant. (AND NOT THE AGGREGATE SUM OF ALL CLAIMS OF PASSENGERS).**

[6] The learned Master arrived at the above finding by applying the rule of ***contra proferentum***. This is a rule in contract law which states that any clause considered to be ambiguous should be interpreted against the interest of the party that requested that the clause be included. In case of most insurance contracts, the ***contra proferentum*** rule would direct the Court to rule against the insurer if a clause within the contract is vague.

[7] The 1st named 3rd party being aggrieved by the said ruling of the learned Master sought leave to appeal. The High Court by its decision dated 11th June 2014 refused the application for leave to appeal and the 1st named 3rd party by this application seeks leave to appeal to the Court of Appeal from the decision of this Court.

[8] In the case of ***Hefferman v Byrne***[1] the High Court after considering the previous decisions on the question of leave to appeal made the following observations;

> It has long been settled law and practice that the interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.
>
> Even if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation.
>
> Granting of leave to appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised "either for improper motives or as a result of a particular misconception of the law".

[9] In ***Ali v Radruita***[2] it was held;

> It is well settled that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused.

[10] In ***Prasad v Prakash***[3] it was held that the test is whether the applicant has a good arguable appeal. The ordinary test for leave to appeal is, "Is there a reasonable prospect that his appeal would succeed on the grounds of appeal which the applicant would rely if leave were granted".

[11] In the case of ***Edmund March v Bank of Hawaii & Ors.***[4] it was held that to grant or refuse leave is a discretionary matter in each case and "may be reviewed if it is clear

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[1] **[2007] FJHC 138**
[2] **[2011] FJHC 302; HBC 403.2009**
[3] **Fiji Court of Appeal No. 93 of 2005**
[4] **[2000] 1 FLR 230**

that it has been exercised on a wrong principle or a conclusion has been reached which would work a manifest injustice".

[12] In ***Lakshman v Estate Management Services Ltd***.[5] the Court of Appeal followed the following observations of Lord Esher, MR in the case of ***Hawkins vs. Great Western Railway***[6];

> *In my opinion it was intended by the legislature that there should be no appeal unless, upon motion to this Court, the Court should be as nearly clear as it possible can be without actually hearing the appeal that injustice will be done unless leave to appeal is given.*

[13] In the same case Rigby LJ observed as follows:

> *It is only where a patent mistake is pointed out, or where it is made clear that there is some injustice which ought to be remedied, that leave should be granted.*

[14] The Court of Appeal also cited the following observations of Lord Atkin in ***Evans vs. Bartlam***[7]

> *While the appellate court in the exercise of its appellate power is in no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it.*

[15] Having in mind the principles laid down in the decisions cited above I will now proceed to consider whether the 1st named 3rd party was successful in satisfying the learned High Court Judge to exercise his discretion in its favour and grant leave to appeal.

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[5] **[2015] FJCA 26; ABU 14.2012 (27 February 2015)**
[6] **(1895) 14 R 360 at 361, 362**
[7] **[1937] AC 473 at 480**

[16] The learned counsel for the 1st named 3rd party submitted that in ***Pacific Agency (Fiji) Limited v Spurling***[8] the Court of appeal considered the merits of the appeal and/or its chances of success and one of the considerations on whether to grant leave or not.

[17] It is his submission that the learned High Court Judge while recognising at paragraph 25 of his decision that the Court needs to be satisfied that the impugned order has the effect of finally altering the substantial rights of the parties and that there is a high probability of success in the appeal and the appeal should have meritorious grounds of appeal, erred in not considering those aspects.

[18] The learned High Court Judge in paragraph 30 of his decision states as follows;

> The 1st named third party has elaborated on the grounds of appeal in the written submissions. The Court at this stage does not have to go to the merits of the case. The Court at this stage only has to consider whether by the impugned order the first named third party's substantive right has been affected and whether the first named third party has an arguable appeal with a probability of success.

[19] Although the learned High Court Judge has stated in paragraph 30 of his decision that the Court at the stage of considering an application for leave to appeal need not go to the merits of the case, on a careful consideration of his decision it appears that he has considered the ruling of the learned Master in arriving at the conclusion that the 1st named 3rd party has failed to satisfy the Court that it would suffer a substantial injustice if leave to appeal is not granted.

[20] The learned High Court Judge has also found, upon consideration of the submissions made on behalf of the 1st named 3rd party, that the appeal of the 1st named 3rd party lacks merit and that he could not see any meritorious grounds or an arguable appeal to grant leave to appeal.

[21] Therefore, although the statement contained in paragraph 30 of the decision of the learned High Court Judge to the effect that the Court does not have to consider the

[8] **[2008] FJCA 49; Civil Appeal Miscellaneous 10 of 2008S (22 August 2008)**

merits of the case at the stage of considering an application for leave to appeal, he has in fact considered the merits and the grounds of appeal before refusing the application of the 1st named 3rd party.

[22] The learned counsel for the 1st named 3rd party also submitted that the Court further erred in holding that the Master's order does not finally determine the rights of the 1st named 3rd party. Paragraphs 32 and 36 of the decision, from which leave to appeal is sought, are to the effect that the rights of the 1st named 3rd party have not been finally adjudicated upon and its rights could be determined in the main case.

[23] It is the submission of the learned counsel that the action between the plaintiff and the defendant is one of personal injuries. There is no privity of contract between the plaintiff and the 1st named 3rd party. Therefore, the 1st named 3rd party will not be able to seek a determination on this issue at the trial of the main case.

[24] The 1st named 3rd party and the 2nd named 3rd party were served with third party notice in terms of Order 16 Rule 1 of the High Court Rules. Rule 1(3) of the said Rules provides as follows;

> Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.

[25] In view of the above provision the 1st named 3rd party is entitled to participate at the trial although he may not be able to challenge the correctness of the learned Master's interpretation over again at the trial. As observed by the learned High Court Judge there is no finding by the learned Master as to how much an each claimant is entitled to recover as damages. The quantum of damages claimed by each party will have to be proved at the trial by such party.

[26] Section 2(a) of the insurance policy which the learned Master was called upon to interpret reads as follows;

> If as a result of an accident caused by or in connection with use of Your Vehicle or a caravan or trailer which it is towing, you are held to be legally responsible, the New India will pay the damage in respect of :-
>
> (a) Death of or bodily injury to persons other than-
>
> (i). any relative or friend of yours ordinarily residing with you or with whom you live.
>
> (ii). any employee who at the time of accident was engaged in your service.
>
> (iii). any person driving the Vehicle or entering or alighting from or about or to alight from or being conveyed by the motor vehicle.

[29] Section 2(b)(2) states;

> The aggregate liability of The New India under sections 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event.

[30] In the insurance policy valid for the period within which the accident occurred it is stated as follows;

> **Third party property damage Ext - $100,000**
> **Passenger risk Ext - $ 100,000**

[31] The learned counsel for the 1st named 3rd party submitted that the policy insured a total of 27 busses for the total insured sum of 800,000 and the total sum insured was $ 1,015,000.00. It would therefore follow that just over $200,000 remained from the total sum insured which would be a third party property damage extension of $ 100,000 and passenger risk extension of $ 100,000. Anything more than $ 100,000 for passenger risk as ruled by the Master would not make commercial sense of the policy. It must surely

be that the parties intended that the passenger risk extension and third party property damage to be a total of $ 200,000.

[32] This calculation of the learned counsel is incorrect. According to the list of vehicles attached to the insurance policy altogether 31 vehicles had been insured and certain vehicles had been subsequently removed from the said list and the sum insured for certain vehicles had been altered and the balance sum of $215,000 was to be paid back to the insured.

[33] In the case of ***Queensland Insurance (Fiji) Ltd v Shore Busses Ltd***[9] the passenger risk liability according to the insurance policy was $ 100,000.00 but in section 6 of the last paragraph of the policy it was stated as follows;

> *"The maximum amount QI will pay under this section for injury or damage to property is limited to $ 30000 in relation to any one accident or series of accidents arising from one event.*

[34] In the said policy there was also a clause which reads as follows;

> *Having paid an additional premium, the maximum amount of liability of QI stipulated in item 6 of this policy is increased to $ 1,000,000.00 INCLUSIVE OF THE ABOVE PASSENGER RISKS EXTENSION"*

[35] The Court of Appeal in that case held that the Queensland Insurance must indemnify the insured for all passenger injury claims arising out of the overturning of the bus on 03rd May 1996 provided that the liability is limited to the maximum sum of $ 1,000,000.00 for all claims covered by section 6 as amended, arising out of that event.

[36] The learned counsel for the 1st named 3rd party relying on the decision in ***Queensland Insurance (Fiji) Ltd v Shore Busses Ltd*** (supra) submitted that in the present case whilst each passenger may claim a maximum sum of $ 100,000 and the total claim cannot exceed the total sum insured which is $ 1,015,000.

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[9] **[2005] FJCA 80; ABU0070.2004 (25 November 2005)**

[37] This is a new issue raised by learned counsel for the 1st named 3rd party in his written submissions regarding the question of leave to appeal. This issue was not raised before the learned Master.

[38] The relevant paragraph of the affidavit of the plaintiffs attached to the summons of 07th September 2007 reads as follows;

> **I am informed by my solicitor that our case has progressed to the Pre-Trial stage and it may be prudent to determine the issue whether the $ 100,000 is payable *in toto* or each claimant is entitled up to a maximum sum of $ 100,000.**

[39] Therefore, since the question whether the total claim can exceed $ 1,015,000 is a new matter which was not brought to the attention of the learned Master, it cannot be considered as a ground of appeal.

[40] For the reasons aforementioned I hold that the 1st named 3rd party has failed to satisfy Court that he has an arguable appeal. I therefore, make the following orders.

Orders

(1) The application of the 1st named 3rd party for leave to appeal is refused.

(2) The 1st named 3rd party shall pay the plaintiffs $ 500 (summarily assessed) as costs of this application.

HIGH COURT OF FIJI
SUVA

Lyone Seneviratne

JUDGE

20.8.2015