IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 15 OF 2016

BETWEEN : **METALWORKS JOINERY LIMITED** a limited liability Company having its registered office at Faiz Khan Lawyers, Level 131, Vitogo Parade, Lautoka

PLAITNIFF/RESPONDENT

A N D : **FIJI TEAHERS UNION CO-OPERATIVE THRIFT & CREDIT LIMITED** a limited liability company having its registered office at 1-3 Berry Road, Suva

DEFENDANT/APPLICANT

Counsel : Mr N Padarath for Plaintiff
Ms Shoma Singh – Devan for Defendant

Date of Hearing : 17.2.2016
Date of Oral Ruling : 17.2.2016
Date of Reasons : 17.3. 2016

REASONS FOR DECISION

1. On 17 February 2016 after hearing Mr N Padarath, counsel for the plaintiff and Ms D. Sharma, counsel for the defendant, I gave an ex tempore ruling dissolving injunction that was granted in favour of the plaintiff on 12 February 2016 and stated that I will give my written reasons later which I now do.

2. This is an application filed by Defendant for dissolution of certain injunctive orders granted ex parte on 12 February 2016. This application is supported with an affidavit sworn by Agni Deo Singh, the chairperson of the Board Directors of the defendant entity (*'the supporting affidavit'*). The court granted the following injunction orders:

1. *The Defendants and/or their servants and/or their agents and/or their lawyers hand back possession of the construction site at Fiji Hideaway Resort & Spa on Lot 2 LD 4/7/2014 to the plaintiff.*

2. *The Defendants and/or their servants and/or their agents be restrained from entering into the construction site of the Fiji Hideaway Resort & Spa on Lot 2 LD 4/7/2014 and/or from interfering with the possession by the plaintiff of the said site unless such entry is done in accordance with the terms of the agreement between the parties.*

3. *The Defendants and/or their servants and/or their agents be restrained from carrying out any construction works of the Fiji Hideaway Resort & Spa on Lot 2 LD 4/7/2014 on the basis of the designs and specification prepared by Habitat Designs on instruction of the Plaintiff unless previous [sic] authorised by the plaintiff to do so.*

4. *The Fiji Police Force to assist with the execution of this order.*

3. The application is made pursuant to Order 29, r.1 (1) of the High Court Rules 1988, as amended ('HCR') which spells out that:

> *'**1**.-(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.'*

4. At the hearing, both parties orally argued the matter. Also, they tendered their respective written submissions. I am grateful for both counsel for their written submissions.

Background

5. In January 2014 the plaintiff, Metalworks & Joinery Limited (*'MJL'*) entered into a building contract which incorporated the Fiji Standard Form of Building Contract (1978 Edn) with the defendant, Fiji Teachers Union Co-operative Thrift & Credit Limited (*'FTUCTCL'*) for the construction of the Fiji Hideaway Resort and Spa on its land (*'Work site'*). The works under the contract included among other things the construction of a central facility, bures and wedding Chapel (*'the project'*). Subsequently, the parties agreed to enter a supplementary agreement which varied certain terms of the building agreement. The

variation plan for the central facility was approved by Rural Authority in September 2015. MJL obtained an estimate of costs for the completion of the central facility through its Quantity Surveyors ('*QS*'). FTUCTCL provided its estimate of costs. There was huge difference between the both. There was chain of email correspondence between the parties. MJL complained of the delay in payment and FTUCTCL of the delay in the work and also defective works. Eventually, FTUCTCL determined the contract by letter of 11 January 2016 issued by its solicitors and took possession of the work site. On 8 February 2016 MJL filed writ of summons with statement of claim endorsed claiming certain injunctive orders, specific performance and special and general damages. By ex parte summons of the same date, which was later converted into inter partes summons, MJL claimed an order restraining FTUCTCL from entering into the construction site and carrying out any works on the project and it also claimed an order that FTUCTCL to hand back possession of the construction site to MJL.The summons that claimed the injunctive orders was served on FTUCTCL, but it defaulted to appear in court to challenge the application for injunction. On 12 February 2016 MJL obtained certain injunctive orders it sought on its ex parte summons but served on FTUCTCL. FTUCTCL now seeks to dissolve those injunction orders.

Principles on Interim Injunction

6. The governing principles applicable when considering an application for interim injunction were laid down in the leading case of ***American Cyanamid Co v Ethicon Ltd*** (1975) AC. 396 as follows:

(1) a serious question to be tried;

(2) inadequacy of damages;

(3) the balance of convenience;

(4) special cases.

Discussion and Determination

7. The defendant by its application seeks to dissolve the injunctive orders granted in its absence. The question to be decided by the court is that whether the plaintiff is entitled to interim injunction. If I decide that the plaintiff is not entitled to such interim injunction I would dissolve the injunctive orders already granted in favour of the plaintiff. For that purpose I will examine the principles applicable to the granting of interim injunction.

(1) A serious question to be tried

8. From the affidavits evidence so far the parties had adduced, it is abundantly clear that both parties are likely to raise serious questions/issues at the trial.

9. The plaintiff seems to raise the following issues at the trial.

1. The defendant via a purported termination notice dated 11 January 2016 forcefully removed the plaintiff from the project site.
2. The plaintiff has contractual license to remain in possession of the project site, which license was irrevocable by the defendant. It is a contractual right as opposed to a propriety right.

3. By its terms the contract was irrevocable by the defendant in that there was implied obligation not to revoke it while the period of the contract was running.

4. The owner (the defendant) took the law into their own hands and treated the notice of 11 January 2016 as a mandatory injunction order.

10. On the other hand, the defendant proposes to raise the following issues at the trial:

1. The plaintiff delayed works by not having enough men on the work site to carry out works and thus acting contrary to and in breach of the Building Agreements.

2. The plaintiff carried out defective works and several calls were made for the plaintiff to rectify the same. In the end the defendant is now left with the defective works to deal with.

3. Deception, dishonesty, trickery, distortion of facts and acting in **bad faith** or absence of good faith.

4. Allegation of '**collusion**' with the supervising architect.

5. Evidence of fraudulent conduct in its dealings with the defendant.

6. That courts generally would not grant Specific Performance of agreements where mutually, trust and confidence has dissipated or has become non-existent or where constant supervision of central agreements will become necessary-such as in the present case as effectively grant of an interim injunction would be tantamount to grant of substantive relief (i.e. grant of Specific Performance).

7. In light of fundamental breaches committed by the plaintiff, it is only fair that the defendant be allowed to complete the construction works with the new contractor.

8. Since the new contractor has mobilised and owing to the court orders, the defendant stands to suffer payment of liquidated damages to the new contractor at the rate of $1,000.00 per day for prolongation cost.

9. Parties can have an expedited or speedy trial which would include attending to all pre-trial matters on an expedited basis and which would meet ends of justice including, the possibility of the parties pursuing the availability of alternative remedy of Arbitration which is provided for under the building contract.

11. Lord Diplock in *American Cyanamid* case (supra) said (at page 407 H):

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial"*

12. The parties had a building contract. The plaintiff is the Builder. The Defendant is the employer. Dispute arose and the defendant has terminated the contract on the allegation of the delay and the detective works.

13. Following the termination of the contract with the plaintiff, the defendant has now entered into a new contract to proceed with its building works. The new contractor has taken over the work site and begun working. Under paras 70 &71 of its affidavit in support the defendant states that:

> *'70. Since termination, the Defendant has been pressed to complete construction as it has a large debt exposure to its bank. The Defendant has since engaged a new contractor to complete all works for a contract sum of $3,965.500-00 (inclusive of all variations). A copy of the new signed building contract is annexed hereto marked "ADS-33".*
>
> *71. The new contractor mobilised to the construction site two weeks ago and has substantially progressed works. To date, the new contractor has been paid a sum of $376,675.77 in certified payments. Copy of payment certificate is annexed hereto marked "ADS-34"'.*

14. The defendant had made allegation of a number of defective works carried out by the plaintiff on the project. The affidavit filed on behalf of the defendant in support of dissolution of injunction states the defective work as follows:

Defective Works

31. The Bank consistently raised its concerns with the supervising architect and the Defendant's board that construction works were not progressing as scheduled and in particular, a large amount of defects were prevalent in the construction work carried out by the Plaintiff.

32. I am aware that the Bank engaged an independent structural engineer to conduct a construction audit which was carried out by Messers. Hamen Lodhia Engineers Limited on 22 September 2014.

33. The Plaintiff's managing director was informed of the Banks desire and requirements to inspect and monitor the works. This was expressly relayed to the Plaintiff throughout emails which are now produced and annexed hereto marked "ADS-13".

34. The Plaintiff was extremely 'confrontational' to the decision taken by the Bank and Sailesh Singh alleged that the inspection being carried out by the Bank was an attempt to "undermine their engineering works".

35. The Plaintiff was explained by the Defendant, that under the loan disbursement terms and loan contract with the Bank, the Bank had full rights to independently evaluate construction works carried out by the Plaintiff to satisfy itself that the works were being performed in accordance with the instructions and within the financial projected budged.

*36. I now produce and annex marked "**ADS-14**", a copy of the report prepared on instruction of the bank which highlights the state of progress of works as at 20th September 2015 and the various defects noted on the works carried out by the Plaintiff.*

37. The Defendant's board of director was very concerned with the findings of the report submitted by Hamen Lodhia especially when the report stated in the opinion of HL Engineering the construction carried out by the Plaintiff did not comply with Fiji National Building Code of requirements to the Insurance Council of Fiji.

38. The said report clearly recorded and detailed the poor quality of works performed by the Plaintiff as at 20th September 2015.

39. I can confirm that from the inception of the construction, the works carried out by the Plaintiff was below standard and on many occasions, defects in works were expressly brought to the notice of the Plaintiff. Effects in works were addressed expressly through:

*(i) Email dated 2 March 2015 and email response from Plaintiff dated 2 March 2015 annexed and marked "**ADS-15**".*

*(ii) When the Bank insisted that they inspect and monitor works, the Plaintiff become "defensive" and claimed that no one was permitted to enter the construction site". Email dated 8 June 2015 from Plaintiff is annexed hereto marked "**ADS-16**".*

(iii) Defective works were also discussed in a face to face meeting with the Plaintiff on 8 July 2015.

*(iv) The supervising architect wrote to the Plaintiff and informed it of the defects in construction works on 30 June 2015 (refer earlier annexure **ADS-5"** herein).*

(v) By a letter dated 6 June 2015, the Plaintiff undertook to "take full responsibility to rectify all defects that will fall within the defects liability period and/or before handing over the project which gives a guarantee to client that all works done and delivered will be to agreed quality of finishing". A copy of the Plaintiff's letter is annexed hereto marked "ADS-17".

15. The affidavit filed on behalf of the defendant also particularise under paras 48 to 69 false/fraudulent progress claims, which I will reproduce shortly for the sake of convenience, made by the plaintiff:-

'False/Fraudulent progress claims

*48. During this period, the Defendant also become concerned with progress payment certificates that were being approved by the supervising architect for works that physically were not present on the construction site. Our email to Ashok Balgovind is annexed hereto marked "**ADS-22**".*

49. *We received a written response from Ashok Balgovind on 1st September 2014 whereby he attempted to explain why "Physical works" could not found on site whereas payments had been done to the Plaintiff. A copy of his letter dated 1 September 2014 is annexed hereto marked "**ADS-23**".*

50. *On or about November 2015, the Defendant on its own accord and without prior consultations with the supervising architect appointed a project manager, Messers. CEESOL who apparently claimed that the Plaintiff was entitled to "prolongation and holdings costs".*

51. *As far as the Board of Director for the Defendant is concerned, the supervising architect has never assessed that the Plaintiff was entitled to any prolongation cost and such assessment has never been presented to the Defendant. I therefore disagree with the Plaintiff on the events and history of dealings as set out in paragraphs 39 to 125 of its Affidavit.*

52. *It quickly became apparent to the Defendant and its bankers that the Plaintiff was now trying to extort monies from the Defendant by putting up false claims for prolongation and holding cost.*

53. *We verily believe that this was done because the Plaintiff had been fully paid on all approved progress certificates. Given that the Plaintiff was not able to raise any further progress claims as hardly any construction works were being progressed by it after the Addendum, it decided to put up a prolongation claim.*

54. *In October 2015, the construction virtually came to a standstill with the Plaintiff stopping works on construction. A copy of the plaintiff's email dated 2 October 2015 is annexed hereto marked "**ADS-24**".*

55. *That whilst the Plaintiff through its self-serving actions put the resort project at risk, the Defendant still made all reasonable attempts to pay the Defendant so that works would not be halted. I annex hereto marked **"ADS-25"** and "**ADS-26**" copy of the progress certificate no. 17 dated 14 December 2015 and Defendants payment voucher confirming that the last progress certificate no, 17 was fully pain d in the sum of $48,848-92.*

56. *The Honourable Court will note that as per the progress certificate no. 17, no claims for prolongation cost were included.*

57. *The supervising architect also in his emails of 6 January 2016 informed the Plaintiff that his claim for "prolongation and holding cost" was unjustified. A copy of the emails dated 6 January 2016 is annexed hereto marked **"ADS-27".***

58. *The Plaintiff in an attempt to extort monies for false claims started threatening legal action against the Defendant which quickly deteriorated the relationship between the parties.*

59. *I verily believe that the Defendant company made all reasonable efforts in cooperation with the Plaintiff complete the project within the specified time lines and financial budget allocation, however the Plaintiff's demand for more monies were unrelenting and wholly unsubstantiated against the quality and quantity of works that were performed.*

60. *On 11 January 2016, by writing the Defendant terminated the Building Contract and regained possession of the construction site. A copy of a letter dated 11 January 2016 which was given to the Plaintiff is annexed hereto marked* ***"ADS-28".***

61. *A further letter was written to the Plaintiff on 12 January advising the plaintiff that a quantity surveyor had been appointed to assess and quantify all works done by the plaintiff against the value of payments made.*

62. *The Defendant also invited the Plaintiff to appoint its own quantity surveyor to assess the works for which access to the site would have been given. However the Plaintiff did not avail itself of this opportunity. A copy of our solicitor's letter dated 12 January 2016 is annexed hereto marked "ADS-29".*

63. *That since the termination, we have had all construction works assessed and we are now astounded to learn that a number of progress claims had been certified and paid in respect of works that were physically not performed by the Plaintiff.*

64. *Whilst the Defendant previously had reasons to suspect that the Plaintiff was inflating and putting up false claims, the report by the quantity surveyor now proves that the Plaintiff has indeed falsified progress claims.*

65. *It is now apparent to the Defendant that the Plaintiff has colluded with the supervising architect to raise false/fraudulent progress claims which appear to have been wrongfully approved by the supervising architect. A copy of the Quantity Surveyors cost and analysis is annexed hereto marked "ADS-30".*

66. *In accordance with this cost analysis, the Defendant has determined that the following false/fraudulent claims amounting to a sum of $443,724-00 have been submitted.*

    [i] ***Reception complex with raised driveway*** *– total amount claimed and paid was $237,000-00 however 0% works has been carried out by the Plaintiff on the construction site.*

[ii] ***Car park/Driveway*** *– total amount claimed and paid was $29,250-00 however 0% works has been carried out by the Plaintiff on construction site.*

[iii] ***Joinery & fit out (fixed joinery)*** *total amount claimed and paid was $110,000-00 however no joinery works had been performed.*

[iv] ***Road Works*** *– total amount claimed and paid was $58,200.00 however the road works carried out are assessed only amount to a value of $5,000-00. The Plaintiff has been overpaid by a sum of $53,200-00.*

[v] ***Fencing Works*** *– total amount claim and paid was $14,274-00 however 0 % works had been performed.*

*67. The quantity surveyor has also prepared a report on valuation of works completed as at 31 December 2015 which is annexed hereto marked "**ADS-31**".*

68. According to the QS Reports, the Plaintiff has been overpaid for works which is detailed below:

- *The Plaintiff claimed and has been paid a sum of $3,358,988-86 by the Defendant for construction works as at 31 December 2015. However in accordance with the Defendant's quantity by the Plaintiff only amounts to a sum of $2,395,309-15.*
- *In the premises the Plaintiff has been overpaid by a sum of $963,679-71.*

69. A preliminary defects list also has been submitted to the Defendant which is annexed hereto marked "ADS-32" which will be confirmed in a report soon.'

16. At the trial, the plaintiff may raise issues that, whether the termination of the contract is unlawful in view of the implied term of the contract that the plaintiff was given the license irrevocably, whether the plaintiff acted forcefully in regaining possession of the work site from the plaintiff and whether the plaintiff is entitled to specific performance considering the unlawful acts of the defendants in terminating the contract.

17. The Defendant admits termination of the contract. The Plaintiff asserts that termination is unlawful and it is a breach of contract. The plaintiff

exhibited some 98 documents while the defendant some 36 documents to support their case.

18. A chain of email correspondence has been exchanged between the parties before the termination of the contract by the defendant.

19. In one of its emails dated 2 October 2015 sent to Ashok Balgovind (Project Engineer) regarding progress payment wrote among other things that:

> *'...*
> *Due to payment not received on time as promised, we have been left to face difficulties with...*
> *I have also put stress on COP being issued. We note that $20,000 deduction has been made. I clarified this in my last email this recovery was for material supplied for central facility which is on hold now. We will entertain this deduction from bure works and demand that full payment be made with deduction of the recovery amount for $20,000.*
> *... we will;*
>
> 1. *Stop all works on site*
> 2. *Proceed this matter with our solicitors*
> 3. ***We will NOT be open to any more dialogues or negotiations from hereon.***
>
> I have above is clear as we have had numerous hindrances in this project with so many changes done on daily basis and now decision not made on time and hence we losing money on this project.'

20. Again,on 6 January 2016 the plaintiff (Sailesh Singh) sent an email to Ashok Balgovind which reads:

> *'Our legal notice will be served on 8-1-2016 for 7 days to settle full prolongation claim without delay as this was issued to all in November and no action has been taken to resolve amicably.*

Writ of Summons after that for 14 days.
If still not settled, then case will be filed in court.
So respectively FTUCTCL has 21 days to sort all issues starting from 8-1-2016, otherwise court will decide the outcome of all our claims and grievances.
I had already mentioned this to Ashok in our last meeting I had in his office.'

21. Ashok replied to the plaintiff on the same day (4.54 PM). His reply ('*ADS-27*') reads:

'You are to note that your claim[s] for prolongation as claimed is not justifiable.

Am out of country at present and will be able to look into this when I am back in office in Feb.'

22. Late in the day (6 January 2016 6.06 PM) Ashok wrote another email in detail ('*ADS-27*') to Sailesh Singh which reads:

'1 Progress
As I have mention to you in our last two meetings, your progress on addendum 1 is well behind, this is still not complete, thus you are liable for delay damages.
2 Prolongation cost
Your prolongation rates and times are unjustifiable. I suggest you get your QS to look into this before you resubmit.
Also a lot of delay has also been on your part and as such you are liable for such delay cost.

3 Litigation

Going on litigation by you while the contract is in progress implys [sic] you are determining the contract. This is not right mode of progressing the contract. Your going to litigation jeopardizes the contract.

4 QS measure

As I have informed everybody, the QS has done the inspection and would give measure to date with 15% vat. The next certificate will be based on that. From there the contract will be revised with 9% vat and this can then be negotiated and finalized to see the way forward. However item 1 does not show due diligent

from you. So you are to take immediate steps to move on the current approved works.

Ashok Balgovind'

23. The emails exchanged between the parties their evidence on affidavit clearly show that there are serious issues to be tried at the trial. The emails forwarded to the defendant by the plaintiff also reflects that the plaintiff was not amenable to any kind of negotiations or settlement.

24. I can gleam from the defendant's affidavit and their arguments that they may raise issues at the trial that, whether the defendant was entitled to terminate the contract in light of the delay in works and the defective works on the part of the plaintiff and whether the plaintiff made false claim for payment without completing the particular works.

25. In American Cyanamid Lord Diplock stated that:

'The available evidence to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunction would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per *cent or less, but permitting its exercise it the court evaluated his chances at more than 50 per cent ... there is no such rule ... The court no doubt must be satisfied that ... there is a serious question to be tried (at 406G).*

Putting it another way, the plaintiff will fail if he cannot show that he has ***'any real prospect of succeeding in his claim for a permanent injunction at the trial'*** *(at 408A).'*(Emphasis provided)

26. The hearing of an application for interim injunction is not a trial on the merits. The merits of the case will be decided at the trial after hearing each party's oral evidence tested by cross examination. It is therefore not

my function at this stage of the proceeding to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend. The defendant filed its affidavit in opposition to the plaintiff's application for interim injunction. But the plaintiff did not file any reply to the defendant's affidavit. But, nonetheless, I am satisfied for the present purpose that the parties have shown that there is a serious question to be decided at the trial.

27. Since I am satisfied that there is a serious question to be tried at the trial, the case goes to the second stage that whether damages would be adequate remedy for the plaintiff.

(2) Inadequacy of damage

28. The speech of Lord Diplock in American Cyanamid in relation to inadequacy of damage to either party is relevant, where His Lordship stated at 408B-C that:

> *'The court should go on to consider whether ... if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages ... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appear to be at that stage.'*

29. At this second stage, the court should consider that if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do the wrongdoing sought to be enjoined.

30. I now turn to consider that whether an award of damages for the loss the plaintiff would have suffered as a result of the wrongdoing which is sought to be enjoined continued.

31. It is pertinent to note that the plaintiff claims damages for breach of the contract. The plaintiff alleges the breach involving the forceful entry into the site and the termination. The plaintiff seeks injunctive relief and subsequently specific performance.

32. Counsel for the plaintiff submits that, it would be difficult to accurately determine what the extent of the plaintiff's damage would be. The amount claimed in the plaintiff's statement of claim is the amount which is already due to the plaintiff by way of progress payments and under the terms of the contract. There is also evidence that the plaintiff has lost other projects due to the actions of the defendant not taking into account the business reputation of the plaintiff which can be another head of damage. Counsel for the plaintiff placed heavy reliance of the case authority of ***London Borough of Hounslow v Twickenham Garden Development Ltd*** (1970) 3 All ER 326.

33. In contrast, counsel for the defendant submits that, damage is adequate remedy for the plaintiff. It is apparent that the plaintiff only has a false claim of prolongation costs which can be assessed and determined under the contract and paid if it is so entitled. The plaintiff now cannot claim that 'its damages are at large'. The rest of the claims, she submits, that any damages has been suffered due to bad publicity is also capable of measure. At the end of the day whether the plaintiff is able to succeed in its claim based on evidence is a live issue. Even if it succeeds whether its claim will be set off against the Defendant's counterclaim is also critical consideration.

34. What is the test to decide that award of damage would be adequate remedy to either party.

35. Lord Justice Jackson in ***Araci v Fallon*** [2011] EWCA Civ 668 (04 June 2011) at para 42 stated that:

'I shall use the phrase "adequate remedy" as that is convenient shorthand. Nevertheless, as is pointed out in chapter 27 of Chitty on contract (30th edition, 2008), that phrase is not entirely appropriate. ***The real question is whether it is just in all the circumstances that the claimant should be confined to his remedy in damages.'*** (Emphasis provided)

36. The real question to be asked in deciding whether an award of damages would be adequate remedy is that whether it is just in all the circumstances that the claimant should be confined to his remedy in damages.

37. The Plaintiff seeks partly mandatory injunction. It has sought injunctions (i) the defendants to hand back possession of the construction site (which is mandatory in nature, (ii) to restrain the defendants from interfering with the works being carried out by the plaintiff on the site, (iii) to restrain the defendants from carrying any works on the site, (iv) to restrain the defendants from entering into the site and (v) carrying out any constructions based on the designs and specification prepared by Habitat Designs, and also claims specific performance of the agreement or damages in lieu of or inaddition to specific performance.

38. If orders sought in (i) and (ii) were allowed at this stage that would amount to the granting of substantive relief at the interlocutory stage. A substantive relief is usually granted after the trial of the action.

39. The plaintiff contends that the license given by way of agreement to construct the building was irrevocable. The plaintiff heavily relied on the dictum of ***Hounslow*** (above), a case decided in 1970 to support this proposition. That was a case where, the entire site was shut down by a strike from 8th November until the end of June 1969. When the strike

ended and work was resumed in July 1969 the borough complained that the work on the site was not sufficient vigorous. After some contentious correspondence as to the slow progress of the work, the architect gave notice on 15th December 1969 under condition 25 (1) that as the contractor had after 14 days to determine the contractor's employment. By letter dated 9th January 1970 the borough gave notice again under condition 25 determining the contractor's employment. The contractor wrote refusing to accept repudiation of the contract and elected to proceed with the work in accordance with the contract. On 3rd march 1970, the borough issued a writ claiming, inter alia, damages for trespass and failure to vacate the site and an injunction to restrain the contractor from trespassing on the site. By notice of motion of the same date the borough claimed an order restraining the contractor from entering, remaining or otherwise trespassing on the site or from interfering in any way with the borough's lawful possession of the site, the court **Held**:-

'(i) The licence given to the contractor to carry out the works on the site was not a separate entity but was created by and formed part of contract (see p 336 b, post); it was by its terms irrevocable in that there was an implied obligation on the borough not to revoke it while the period of the contract was running and equity would not assist the borough to revoke the licence in breach of its contract (see p 337 b and h, post) dictum of Lord Greene MR in ***Millennium Productions Ltd v Winter Garden Theatre*** *(London) Ltd [1946] 1 All ER at 680 followed; Thompson v Park [1944]2 All ER 477 not followed). Accordingly, if the borough failed to establish the validity of the notices given by itself and the architect, it was not entitled to the injunctions sought (see p 338 c, post).*

(ii) The validity of the notices depend on disputed matters of fact, i.e. whether or not the work had been regularly and diligently proceeded with, and before granting injunctions which would be partly mandatory in effect, the court on motion must feel a high degree of assurance that these diluted matters would at the trial of the action be resolved in favour of the borough; and as the court felt no such assurance the injunctions would not be granted (see p 355 g and p 356 g, post).

40. The above case, in my opinion, has no relevance to the present case. That case may be easily distinguished from this case. In that case the licensee was still on the site refusing to vacate. There was an application to restrain the defendant from determining the license. There was an implied term (the court construed there was one) that the license given to the plaintiff was irrevocable. In the case at hand none of these arose, the defendant determined the contract, took the possession of the site as the proprietor of the site and continues with the construction with the different contractor.

41. In this case there is nothing in the contract to suggest that the contract was irrevocable. The contract, according to the defendant, has been determined on the grounds of the delay, fraudulent progressive claim and defective works.

42. The plaintiff seeks interim injunction to regaining possession of the site and to continuing with the building works despite the dissatisfaction of the defendant. If the court granted this injunction that would be against the proprietary right of the defendant. The court will not assist a party to continue a work where trusts placed between the parties has been dissipated.

43. In ***Page One Records Ltd v Britton*** [1968] 1 WLR 157 the plaintiff, the managers of the 'Troggs' pop group, sought to enjoin the singers from changing to a new in breach of their contract with the plaintiffs. The evidence showed that he group would be unable to pursue their joint career successfully without a manager, Stamp J refused an injunction on the grounds that to grant it would mean forcing the group to choose between continuing to employ managers in whom they no longer placed their trust and confidence or giving up their livelihood altogether.

44. In the matter before me, the defendants no longer placed their trust and confidence in the plaintiff or terminated their relationship altogether. If

an injunction were granted that would mean forcing the defendant to employ the contractors in whom they no longer placed their trust and confidence.

45. Generally, remedy available for breach of the contract is an award of damages. The plaintiff claims special damages in the quantified sum of $1,148,434.01. The plaintiff also claims general damages in lieu of specific performance. If the plaintiff succeeded in its claim for damages, the court could assess the damages suffered by the plaintiff by reason of the termination of the contract. In the circumstances an award of adequate damage would be an appropriate remedy for the plaintiff.

46. As was held in American Cyanamid, if damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appear to be at that stage.

47. The defendants in their affidavit state that they are of sufficient financial standing to giving an undertaking as to damages. They state that their total asset value exceeds $76 million which is inter alia comprised of resort at Sigatoka known as Fiji Hideaway Resort and Spa, several commercial and residential properties and members fund and cash at bank of $4 million.

48. The plaintiff when giving undertaking as to damages, he simply states in the affidavit that he undertakes to abide by any order the court may make as to damages in case the court should thereafter be of the opinion that the defendants shall have sustained by reason of the order sought.

49. Fiji Court of Appeal in ***Natural Waters of Viti Ltd v Crystal Clear Mineral (Fiji) Ltd*** [2004] FJCA 59, on how undertaking as to damages should be given, said that the plaintiffs must proffer sufficient evidence of his ability to satisfy the undertaking. When giving undertaking, the plaintiffs must say what their assets are today.

50. The plaintiff fails to say what its assets as at today. The production of the statements of account is not sufficient undertaking. The plaintiff must proffer sufficient evidence of its ability to satisfy the undertaking.

51. I am satisfied with the undertaking given by the defendants. They not only say what their fixed assets but also the cash at their bank account as at today.

(3) Balance of Convenience

52. The principle of balance of convenience, the third stage, may be considered by the court at the interlocutory proceedings of this nature when there is doubt about inadequacy of damages.

53. With regard to balance convenience Lord Diplock in American Cynamid said that:

> *'It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.'*

54. Since I have determined that adequacy of damages would be available to the plaintiff the question of balance of convenience does not arise in this case. I will therefore return to the fourth stage.

(4) Special Cases

55. Lord Diplock concluded his discussion of principle in American Cyanamid by adding that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

56. In this case the plaintiff endeavours to obtain interim injunction partly mandatory in effect. This is one other special factors to be considered.

57. 'Where the grant of refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in the best endeavour to avoid injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case without permitting the defendant the right of trial. Accordingly the guidelines on the balance of convenience do not apply in such a case since, whatever strength of either side, the defendant should not be precluded by the grant of interlocutory injunction from disputing the plaintiff's claim at a trial' (see ***Cayne v Global Natural Resources plc*** [1984] 1 All ER 225; see also ***Cambridge Nutrition Ltd v BBC*** [1990] 3 All ER 523); Ba Town Council v Fiji Broadcasting Commission (1976) 22 FLR 91.

58. As I pointed out earlier, if the injunction sought by the plaintiff were granted that will have practical effect of putting an end to the action. In this circumstance the court will not grant the injunction whatever the strength of either party's case.

59. There has been another special factor to be taken in this case, i.e. mutual trust and confidence. The court will refuse injunction on the ground of breakdown of trust and confidence between the parties, see ***Page One Records Ltd*** (supra).

60. In this case trust and confidence between the parties have irretrievably broken. The plaintiff through email threatened the defendants to stop the work and pull them to court. The plaintiff did not seek recourse to settle the dispute through arbitration though the contract carries such a clause. This has resulted in the termination of the contract.

61. I can find yet another special factor that need to be considered here. The defendant following termination of the contract with the plaintiff had entered into a new contract with another contractor to continue with the construction works. The new contractor, Classic Interior Furniture Construction Ltd has already mobilised to the construction site on or about 20 January 2016, has started working on the site and has performed $376, 675.77 worth of works at the construction site. In this connection, the defendant relies upon the decision of the High Court in ***Digicel (Fiji) Ltd v Fiji Rugby Union & Vodafone Ltd*** (HBC 30 of 2014S.13.3.2014) where Kumar J held that whether Vodafone was aware or not of any subsisting contract between Digicel or FRU there was nothing to prevent them in equity or law in entering into a contract with FRU. Once it had done that, it was in the shoes of a third party outside the contractual relationship between Digicel and FRU.

62. An interim injunction affecting the rights of an innocent third party will not be available to either party. If the injunction were granted it would undoubtedly affect the right of Classic Interior Furniture Construction Ltd that has a new contract with the defendant to continue with the building construction.

Conclusion

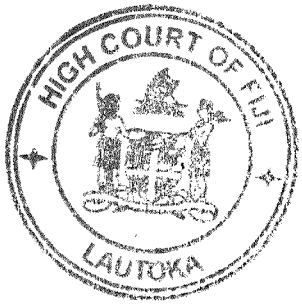
63. In the circumstances, I refuse the injunctions sought and vacate the injunction orders granted in favour of the plaintiff on 12 February 2016. The plaintiff will pay costs of $1,200.00 which is summarily assessed to the Defendant.

Final orders

(i) The interim injunctions sought by the plaintiff in the summons filed on 8 February are refused;

(ii) The injunctive orders granted against the defendants on 12 February 2016 are set aside and dissolved forthwith;

(iii) The plaintiff will pay costs of $1,200.00 which is summarily assessed to the defendants.



Hdhmajeer 17/3/16

.....

M H Mohamed Ajmeer

JUDGE

At Lautoka

17.3.2016

Solicitors:

For the plaintiff : Messrs Samuel K Ram, Barristers & Solicitors

For the defendant : Messrs Neel Shiwam Lawyers, Barristers & Solicitors