IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 87 OF 2016

BETWEEN : **KULTURE ENTERTAINMENT LIMITED** a limited liability company having its principal place of business at Suva in the Republic of the Fiji Islands.

PLAINTIFF

AND : **POSECI BUNE** of 23 Tavewa Avenue, Lautoka, Chief Executive Officer.

1st DEFENDANT

AND : **RETIRED SERVICE LEAGUE HOTEL (FIJI) LIMITED** a limited liability Company having its principal place of business at Tavewa Avenue Lautoka.

2nd DEFENDANT

Appearance : Ms T Rigsby for plaintiff
: Mr K Vuataki with Ms Patricia Mataika for defendants

Date of Hearing : 30.06.2016
Date of Ruling : 25.08.2016

JUDGMENT

Introduction

[01] This is an application for an interim injunction.

[02] By an ex notice of motion (which was subsequently converted into inter parties motion) filed 19 May 2016 with a supporting affidavit of Arthur Philitoga. ("the application")

The Plaintiff seeks the following orders:-

a. *FOR AN INTERIM INJUNCTION against the Defendants by themselves and/or through their agents and servants and/or her solicitors and/or howsoever from proceeding to arbitrarily evicting the Plaintiff and its agents and or servants in any way whatsoever until the determination of the within substantive matter.*

b. *That the Status quo of the Tenancy remains until the determination of the substantive matter with the same terms of the Tenancy.*

c. *An Order that the Fiji Police Force to assist in the due execution of the within Order for the purpose of maintain peaceful transition:*

[03] The application is filed under Order 29, Rule 1 of the High Court Rules.

[04] The Defendants opposed the application. They filed their affidavit in opposition on 23 May 2016 and the plaintiff filed its affidavit in reply on 30 May 2016.

Background

[05] The plaintiff brought this action against the defendants claiming amongst other things declaration that it is unjust, unfair and unconscionable for the 1st defendant to arbitrarily evict and terminate the Lease without a court order; general damages, special charges and injunction.

[06] The claim arises out of an alleged verbal lease agreement for the renting of the Second Defendants premises for the purpose of conducting bar and beverages and a restaurant. The Plaintiff complains that the Defendants unlawfully terminated the lease agreement and forcibly entered into the business premises.

[07] According to the Plaintiff, that prior to commencement of Tenancy; a Lease Agreement ("Lease") was drafted by plaintiff's solicitor and issued to the first Defendant in his capacity as a Chief Executive Officer of the second Defendant. In good faith; Parties agreed for commencement of immediate tenancy on payment of Bond and rental and the Lease Agreement was to be sorted at a later time. Each Party was in dire need to conduct business and generate its own revenue. After payment of first month rental and Bond the Plaintiff took possession of the restaurant and bar and subsequently the Defendants dispossessed the plaintiff. The plaintiff applies for interim injunction restraining the defendants from unilaterally terminating the lease and a mandatory injunction directing the Defendants to forthwith restore Plaintiff's tenancy until final determination of the action.

The Law

[08] Order 29, Rule 1 is relevant to the application. Rule 1 spells out that:-

> ***"Application for injunction (O.29. Rule 1)***
>
> 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.*
> 2. *Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons."*

The Principle

[09] The Principles to be applied in an application for interim injunctions were authoritatively outlined by Lord Diplock in **American**

Cyanamid Co v Ethicon Ltd [1975] All ER 396: According to Lord Diplock the Applicant must establish things namely:

a. A serious question to be tried;
b. Inadequacy of damages;
c. The balance of convenience.

Determination

[10] The plaintiff has applied for an interim injunction restraining the defendants from unilaterally terminating the lease and also a mandatory injunction directing the defendants to forthwith restore plaintiff's tenancy until final determination of the action or further order.

[11] The plaintiff complains that the defendants have unilaterally terminated the lease agreement they had with the defendants and as a result of the termination, the defendants forcefully took possession of the rented premises.

[12] As the plaintiff complains that they have already been evicted from the premises, they cannot seek injunction interim or otherwise to restrain. The act complained of has been completed. There is nothing to restrain. Therefore, the plaintiff's application for injunction to restrain the defendant from proceeding to arbitrarily evicting the plaintiff might fail.

[13] I now turn to the issue that whether or not the plaintiff is entitled to mandatory injunction to place the plaintiff back into the premises.

[14] I would consider the plaintiff's application in line with the principles enunciated in American Cyanamid Co.

Serious Issue

[15] For the Court to consider interlocutory injunction, the plaintiff must establish that the claim raises serious issues to be determined by the court.

[16] In fact, there was no signed lease agreement between the parties. Negotiations had ensued about leasing the bar and restaurant. The defendants seem to have made an offer to lease the premises to the plaintiff for the sum of $2,600.00 as rental payments. The defendants had accepted initial payment of rent for April/May. According to the plaintiff a Lease Agreement was drafted by the plaintiff solicitors and issued to the 1st defendant in his capacity as Chief Executive Officer of the 2nd defendant.

[17] Counsel for the plaintiff, Ms Rigsby submits that since there was offer and acceptance an oral binding contract has been made between the parties. As such, she raises three issues for determination by the court at the trial, namely (a) was there a binding oral contract? (b) Was the contract performed? (c) And if it was preformed, whether the defendants have any defence?

[18] The defendants in their affidavit in reply filed 23 May 2016 deny and states in para 17 of the affidavit as follows:

'(a) The subject property was not leased by plaintiff;

(b) KEQS was a monthly tenant.

(c) I had received a call that Arthur Philtoga was going to break 2nd defendant padlock to the bar. He broke it and put in his padlock which I broke and put in 2nd defendant's padlock.

(d) The 2nd defendant was the owner of the premises and upon finding out about the misrepresentation made to it by KEQS and plaintiff withdrew its consent for KEQS or plaintiff to be upon its premises.'

[19] In essence, Mr Vuataki, counsel appearing for the defendants submits that the plaintiffs do not have any serious issues to be tried and that their claim is frivolous and vexatious and that the plaintiffs are merely trying to vex the defendants.

[20] I am not prepared to accept the contention that the claim is frivolous and vexatious at this stage reading the conflicting affidavit evidence. Plain reading of the statement of claim discloses some issues to be tried. These issues include determination whether there was an oral binding lease agreement between the parties for three years and whether it was unilaterally terminated by the defendants. I am therefore satisfied that there are serious issues to be tried.

Inadequacy of Remedy

[21] I now return to the issue of inadequacy of damages.

[22] Lord Diplock in American Cyanamid case (above) stated 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' (at 408B-C).

[23] The plaintiff claim against the defendants is for damages for breach of the alleged contract where the defendants evicted the plaintiff from the point of operation just one week after a monthly rental was accepted by the defendants.

[24] In appropriate cases the court might order specific performance of the contract. In other cases the court may order damages for breach of a

binding contract. In this case the plaintiff does not seek specific performance, but ask for interim injunctive order to place the plaintiff back into possession of the premises to operate its business.

[25] The plaintiff claim includes general and special damages for breach of the contract. The plaintiff nowhere states that damages are inadequate remedy for the unilateral termination of the contract.

[26] If the plaintiff can be fully compensated by an award of damages, no injunction will be granted. In particular, where the wrongdoing has ceased and there is no likelihood of its recurring, an injunction will generally be refused, see ***Proctor v Bayley*** (1889) 42 Ch D 390.

[27] The plaintiff has operated the bar and restaurant only for one week. It could not have established its business and got fair amount of customers within the short period. The plaintiff claims general and special damages. It appears to me that the alleged wrongdoing has ceased and there is no evidence that there is likelihood of its recurring. In the circumstances, damages would be adequate remedy for the alleged breach of contract in this case. Therefore, the plaintiff should confine its claim to damages.

[28] With regard to undertaking as to damages, Arthur Philitoga (Plaintiff's Director) in his affidavit in support states that he is a legitimate businessperson and his Company is in a solvent and sound position to give an undertaking as to damages. This is not a satisfactory undertaking as to damages. There is no evidence of the plaintiff's financial position. In ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*** [2004] FJCA 59; ABU0011.2004S & ABU0011A.2004S (26 November 2004), Fiji Court of Appeal said:

'Applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy.'

Balance of Convenience

[29] Lord Diplock in American Cyanamid case (above) also stated 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' (at 408E).

[30] Adequacy of remedies in damages available to the plaintiff. Therefore the question of balance of convenience does not arise here.

[31] For all these reasons, I would refuse to issue interim injunction against the defendants. The plaintiff will pay to the defendants summarily assessed costs of $600.00.

Final Outcome

1. Application for interim injunction refused.
2. The plaintiff will pay summarily assessed costs of $600.00 to the defendants.

Hon Mohamed Ajmeer 25/8/16

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M H Mohamed Ajmeer

JUDGE

At Lautoka

25 August 2016

HIGH COURT OF FIJI LAUTOKA