

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 113 of 2016

BETWEEN

NAWIN AVIKASH DEWAN of 56 Naitonotoni Road, Navua, Fiji, Salesman.

PLAINTIFF

AND

SODEXO LAOS PVT SOLE CO a company incorporated in Laos and

having its registered office at No. 34, Unit 4,

Ban Thapahlanxy, Ventiane Lao, PDR

DEFENDANT

Counsel : Mr. S. Nandan for the Plaintiff
Mr. R. Singh for the Defendant

Date of Hearing : 15th June, 2017

Date of Ruling : 27th July, 2017

RULING

[1] The plaintiff and the defendant in case No. HBC 220 of 2010 entered into an on 26th August, 2014, the terms of which are as follows:

1. The Defendant without admission of liability agrees that the sum of US\$119,980.00 ("the sum") currently held by the Bank of South Pacific ("BSP"), formally Colonial National Bank pursuant to an order in Civil Proceedings No. HBC 420 of 2009 be paid out to Munro Leys (Plaintiff's Solicitors) trust account and the Defendant:
 - (a) Waives all rights claims to the sum;
 - (b) agrees to sign and execute all and any necessary documents for the transfer of the money to Munro Leys trust account. (For the avoidance of doubt to the Defendant's cooperation extends to consenting to an order in similar terms in proceedings No. 420 of 2009);
 - (c) the Defendant consents to an application by the Plaintiff for an order in similar terms as this order in Civil Proceedings No. HBC 420 of 2009 and will cooperate and execute all necessary documents for the release of the sum held pursuant to the order of 18th February 2010 in Civil Proceedings No. HBC 420 of 2009.
2. Upon receipt of the sum (US\$119,000.00) into Munro Leys Trust account, these proceedings will be discontinued by consent in full and final settlement of the claim.
3. Upon discontinuance the sum of FJ\$ 45,000.00 paid into court as security of costs pursuant to order of 1 August 2013 be paid out to Munro Leys as solicitors for the plaintiff.
4. No orders as to costs.

[2] The plaintiff instituted these proceedings by writ of summons seeking to have the said agreement rescinded and / or for a declaration that the terms of the said agreement are unenforceable.

[3] The defendant on 29th June, 2016 filed summons seeking the following reliefs:

1. A declaration that the plaintiff has waived all his rights and claims to the sum of US\$119,980 held by and/or on the control of the Bank of the South Pacific (formerly Colonial National Bank) (the Funds) in accordance with the terms of settlement dated 26 August 2014 filed in Civil Action No. 220 of 2010.
2. An order that the Funds be paid into trust account of Munro Leys, solicitors of the defendant in accordance with the Terms of Settlement dated 26 August 2014.
3. An order that the plaintiff be restrained from withdrawing, disposing, remitting and/or dealing with the Funds until the determination of this summons.
4. Further and alternatively:
 - (a) An order pursuant to Order 33 rule 3 that a question or questions be determined separately and in advance of other questions in the proceedings namely:
 - (i) Whether the Terms of Settlement executed by the Plaintiff and the Defendant dated 26 August 2014 and filed in Civil Action No. 220 of 2010 continues a binding agreement between the parties was validly executed and is an absolute bar to this action, and
 - (ii) If so, an order that the Funds be released to the Defendant pursuant to the Terms of Settlement dated 26 August 2014;
 - (b) such consequential orders and directions as the Court shall deem necessary and just.

5. That all further proceedings in this action be stayed until the determination of this summons and/or these proceedings;
 6. That the plaintiff pays to the defendant the costs of this summons and all incidental costs on an indemnity basis.
- [4] The defendant filed this summons pursuant to Order 33 rules 3 and 7 and order 29 of the High Court Rules 1988.
- [5] Under Order 29 the defendant is seeking an order on the plaintiff restraining him from withdrawing, disposing of remitting and or dealing with US\$119,980 which is the subject matter of these proceedings, until this summons is finally determined. The court does not have to consider the merits of this application because the learned counsel for the defendant gave an undertaking to the court that his client, the plaintiff will not deal with the money in any manner until this summons is heard and concluded. Although the learned counsel submitted that the defendant is seeking a restraining order effective until the final determination of the writ of summons, in the summons filed on 29th June, 2016 the defendant has only sought a restraining order until the determination of the said summons.
- [6] It is averred in the affidavit of Stuart Winters that if the plaintiff transfers or disposes of money in the bank the defendant will not be able to enforce any order given by the court in its favour. However, there is no material on record or any averment which suggests that the plaintiff even made an attempt to deal with this money to the detriment of the defendant. The first action in respect of the same dispute between the parties was instituted in the year 2010. Until the summons was filed on 28th June 2016 there had been no complaint or allegation that the plaintiff attempted to deal with the money.
- [7] Injunction is an equitable remedy granted at the discretion of the court. The learned counsel for the plaintiff cited the decision of the House of Lords in **American Cyanamid Co v Ethicon Ltd** (1975) AC 369. In that case the House of Lords set down certain guidelines to assist courts in determining whether the discretion conferred upon the court should be exercised in favour of the applicant. It is important to note that the decision in American Cyanamid case is not the substantive law on injunctions. As held in the case of **Cambridge Nutrition Ltd v BBC** [1990] 3 All E.R. 523 at 534 there may be special cases where the courts would be compelled to grant injunctions

on the grounds of equity. The burden of satisfying that such grounds exist is on the party who seeks an injunction. The defendant in this case has not been successful in satisfying the court that there are sufficient grounds to grant the restraining order it has sought in the summons.

[8] Before considering the facts the court must consider provisions of Order 33 rules 3 and 7 to see whether the summons of the defendant can be considered under those provisions.

[9] **Order 33 rule 3 -**

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[10] **Order 33 rule 7 -**

If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[11] The plaintiff came to court seeking to have the settlement entered into between him and the defendant rescinded and/or for a declaration that the said agreement is unenforceable. There is no difficulty in understanding that reliefs prayed for in the summons of the defendant filed on 28th June, 2016 is in respect of the substantive relief prayed for by the plaintiff in the writ of summons.

[12] Order 33 of the High Court Rules 1988 does not have the effect of conferring the power on the High Court to do anything that has the effect of converting an action commenced by a writ of summons into one begun by an originating summons if that is what the defendant expects the court to do. "Any question or issue" referred to in Order 33 rule 3 do not include the substantive issues to be determined at the hearing of the writ.


[13] The defendant relied on certain averments in the statement of claim and the statement of defence. The pleadings are not evidence before courts of law. In this matter there is an allegation by the plaintiff that he entered into the agreement on certain representations made by the defendant. The burden is on the plaintiff to establish that the alleged representations made by the defendant compelled him to enter into this agreement and also the defendant has the right to test the veracity of the evidence of the plaintiff in this regard, at the hearing of the substantive matter. The court is therefore of the view that the substantive matter of this action cannot be disposed of by the summons of the defendant filed on 28th June, 2016.

[14] For the reasons aforementioned the court makes the following orders.

Orders

- 1) The summons of the defendant filed on 28th June, 2016 is struck out.
- 2) The defendant is ordered to pay the plaintiff \$1000.00 as costs of this application.




Lyone Seneviratne

JUDGE

27th July, 2017