

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 36 of 2016

BETWEEN : **ADVANTAGE CARS LIMITED** a limited company having its registered offices at 142, Ratu Mara Road, Suva.

PLAINTIFF

AND : **GULAM MOHAMMED HOLDINGS AUTO LIMITED** a limited liability company having its registered office at allotment 16 section 9, Samabula, on Crown Lease No. 1609, Ratu Mara Road, Samabula, Suva.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Nandan - for the Plaintiff.
Mr. Vinit Singh - for the Defendant

Date of Ruling: 26th October, 2017

RULING

[Application by the Plaintiff and the Defendant seeking injunctive relief pursuant to Order 29 Rule 1 and 2 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honorable Court]

APPLICATIONS

1. Both parties to this proceeding have each filed Applications as hereunder seeking **injunctive relief** against each other.

First Application:

2. The **Plaintiff's Summons** seeking for the following orders:

- (a) *The Defendant and its agents, servant and employees be restrained from interfering with the Plaintiff's quiet enjoyment of all the land and improvements on Crown Lease 1609 in any manner whatsoever including but not limited to trying to illegally evict the Defendant until the final determination of this matter.*
- (b) *That the Defendant provide consent to the Plaintiff in writing to allow the Plaintiff to apply to Fiji Electricity Authority for the installation of 3-phase power supply in its premises Crown Lease No. 1609.*
- (c) *That costs of this application be in the cause.*

(d) Any other order that the Court deems just and appropriate.

3. The Summons is supported by the Affidavit of Rizwaan Ali Haroon in his capacity as the Director of the Plaintiffs Company.
4. The application is made pursuant to *Order 29 Rule 1 and 2 of the High Court Rules, 1988 and inherent Jurisdiction of this Court.*

Second Application:

5. The Defendant's Summons seeking the following orders-
 - (a) That an injunction be granted restraining the Plaintiff and its agents, servant and employees from interfering with the peaceful enjoyment and the rights of the users of the common areas in the Defendant's property comprised in Crown Lease No. 1609;
 - (b) That an injunction be granted restraining the Plaintiff from operating any other business apart from which it has been permitted to operate pursuant to the lease entered into by the parties while it remains on the Defendant's said property the cost of this application be paid by the Defendant;
 - (c) That costs of this application be paid by the Plaintiff.
6. The Summons is supported by the Affidavit of Mohammed Saheed in his capacity as the Director of the Defendant's Company.
7. This application is made pursuant to *Order 29 Rule of the High Court Rules, 1988.*
8. The orders sought in each application were strongly objected to by the Plaintiff and the Defendant and they filed their respective Affidavits in Opposition accordingly.
9. I must add that the Court intervened and used its Mediatory powers in terms of **Order 59 of the High Court Rules, 1988** to mediate the Injunctive issues sought and see if both parties are able to resolve the issue bearing in mind what transpired between the parties and the nature of the claim at foot.

AFFIDAVITS FILED

10. (i) Affidavit in Support of Rizwaan Ali Haroon deposed on 09th August, 2016;
(ii) Affidavit in Response of Mohammed Saheed deposed on 31st May, 2016 and Reply deposed on 12th September, 2016.

THE LAW & APPLICATION

11. (a) The power of the High Court to grant injunctions is confirmed by the *High Court Rules Order 29 Rule (1)* which state:

- (i) 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.
- (b) **Order 29 Rule 2** deals with Detention, preservation, etc. of subject matter of cause or matter.

ANALYSIS and DETERMINATION

12. The orders sought as per the both parties to the proceedings **Summons** are a **final Order** in terms of a **mandatory** and a **restraining** order.
13. The principles for granting a **mandatory injunction** was set out in **Redland Bricks Ltd -v- Morris (1969) 2 ALL ER 576-**
- (a) *A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution, but in the proper case unhesitatingly.*
- (b) *Damages will not be a sufficient or adequate remedy if such damage does happen.*
- (c) *The cost to the defendant to do the work or the act must be taken into account.*
- (d) *The court must be careful to see that the defendant knows exactly what he has to do.*

However, the House of Lords went on to say that every case must depend essentially on its own particular circumstances and the same applies to this very instant case. [Emphasis mine]

14. In a **mandatory injunction** case, the principles to adhere will change on the circumstance of the case.
15. The **Plaintiff** is seeking the following orders-
- To Restrain the Defendant, its agents, servants and employees from interfering with the Plaintiff's quite enjoyment of all the land and improvements on Crown Lease No. 1609 in any manner whatsoever including but not limited to trying to illegally evict the Plaintiff until the finalisation of this action; AND
 - That the Defendant provide consent to the Plaintiff in writing to allow the Plaintiff to apply to Fiji Electricity Authority for the installation of 3-phase power supply in its premises on Crown Lease No. 1609.
16. On the other hand, the **Defendant** is seeking for the following relief-
- To Restrain the Plaintiff and its agents, servants and employees from interfering with the peaceful enjoyment and the rights of other users of the common areas in the Defendant's property comprised in Crown lease No. 1609; AND

- To Retrain the Plaintiff from operating any other business apart from which it has been permitted to operate pursuant to the Lease entered into by the parties while it remains on the Defendant's said property.
17. In order to determining the above applications, the test the court should follow was laid down in American Cyanamide Co -vs- Ethican Ltd (1975) AC 396. As per the said case in granting injunctive relief, the court should consider the following: -
 - i. Whether there is a prima facie case with the probabilities of plaintiff (Defendant) succeeding and whether there is a serious issue to be tried.
 - iii. Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff (Defendant). (Emphasis mine)
 - iv. Undertaking as to damages.
 18. The consequence of granting the injunction especially in the nature of a **mandatory** and a **restraining** nature has been considered by this court.
 19. It is important to note that the Court documents; including the *Notice of Motion*, *Affidavit in Support* and the *Writ of Summons* as the substantive matter were not served within the timeframe as per the requirements of the Rules and therefore this Court ordered the Plaintiff to re-serve the documents onto the Defendant giving sufficient notice and time to respond.
 20. The **Defendant** after service filed the Statement of Defence and Counter Claim but failed to file and serve any **Affidavit Response** to the **Motion seeking Injunctive Relief**.
 21. This Court therefore had to grant time and again two adjournments (12th April and 04th May, 2016) to the Defendant to file and serve their Affidavit Response to the Plaintiff's Motion seeking Injunctive Relief.
 22. Finally, on 02nd June, 2016 the Defendant succeeded in filing their Response **strongly objecting** to the injunctive relief sought by the Plaintiff. The Court scheduled the application for hearing on 08th November, 2016.
 23. Subsequent to the hearing date being assigned, the **Defendant** thought fit to file **their counter Summons seeking "Injunctive Relief"** together with an **"Undertaking as to Damages"** in Court on 05th August, 2016.
 24. The **evidence** before this Court is that the **Plaintiff** and the **Defendant** entered into a **Leasing Agreement** on 1st June 2015 whereby the Defendant leased o the Plaintiff the whole of the Land contained in **Crown Lease No. 1609** for an initial term beginning 1st June 2015 and ending 1st June 2018. The monthly rental payable was \$2750-11.
 25. The **Plaintiff alleges** that at the time the Lease was executed, a copy of the Lease was not given to the Plaintiff and only some 7 months after persistent demands by the Plaintiff an alleged copy of the Lease was furnished to the Plaintiff which copy according to the Plaintiff was not an accurate copy that he had signed and was executed. He further alleges that second page of the Lease

Agreement was replaced and the amount of monthly rental had been changed from \$2,500 to \$2,750-11.

26. A **Demand Notice** dated 15th January, 2016 was served onto the Plaintiff seeking the Plaintiff to vacate the Defendant's Premises by May 2016.
27. According to the **Plaintiff**, the Defendant has **breached the Lease Agreement** resulting in the Defendant **interfering** with the quiet enjoyment of the premises, including but not limited to disconnecting the 3 phase power supply to the premises, as such the Plaintiff has suffered and continues to suffer loss and damages.
28. The **Defendant's contention** is that the Defendant and the Plaintiff entered a **sub-lease for a part of the said property** which was to be effective from 1st June 2015. The Plaintiff has breached the Lease Agreement as particularised in the Defendant's counterclaim.
29. The Defendant also alleges that there are immediate aggravating situations created at the said property by the Plaintiff making reference to a letter dated 20th April, 2016 from a security firm.
30. As part of the Lease conditions, all the Plaintiff has non-exclusive use of parking areas, driveways and footpaths. Recently there have been several occasions when employees or agents of the Plaintiff have deliberately blocked the driveway by parking cars there in order to frustrate other Tenants of Defendant and their customers. This has resulted in Police complaints and Police visiting the premises. Further, the Plaintiff and its guests also park a large number of vehicles in a cluttered manner in the parking area and take up almost all the common car-parking areas.
31. The Plaintiff has also gone beyond the Leasing Agreement of their business of selling cars and is carrying out vehicle mechanical repair works from the premises. The Defendant also has a Tenant who is the owner of the mechanical garage who operates this garage from behind the said premises and who had been assured that it would be the only mechanical garage in the compound.
32. The Defendant is prepared to give an undertaking as to damages in the event that any damages are suffered by the Plaintiff if the interim orders sought in the Summons are granted.

(i) Whether there is a serious issue to be tried?
33. The Parties are in dispute as to whether there is (are) **serious issues** to be tried. Since they are pointing a finger at each other demonstrates the fact that there is/or are to be tried by the Court of Law. Let's examine what the parties had to submit-
34. According to the **Plaintiff**, there is a substantial question to be investigated, which is not **frivolous or vexatious** as stated by **Lord Diplock** in the **American Cyanide** case that is for the Court to examine or decide whether the Defendant has the lawful right to evict the Plaintiff although the lease agreement made was not authentic and/or the original document that was executed by both parties.
35. He stated further that the level of seriousness in this matter revolves around the notion that if the **Plaintiff is evicted** the Plaintiff would suffer irreparable losses as regards loss of business,

loss in investment, expenses as regards relocating all the vehicles and/or other equipment to a convenient location in a short space of time and other surrounding expenses.

36. On the other hand, the **Defendant** submitted that there is **no serious issue** to be tried. The **Defendant** denies that it is **illegally trying to evict** the Plaintiff from the premises and seeks to restrain this act. The Defendant has acted in its rights under the Lease Agreement.
37. He added that the Plaintiff is in clear breach of its obligations under the Lease. The Plaintiff is carrying out activities and construction works at the property without consent and that are not permitted under the Lease. The Plaintiff has not established any illegality on the part of the Defendant nor provided any material to suggest that there is a serious issue to be tried.
38. It is obvious from the facts and the affidavit evidence before this Court that there is a dispute between the parties to this proceeding. Therefore, it is too early at this stage of the proceedings to decide whether the Lease Agreement had been tempered with in terms of the monthly rental payable by the Plaintiff; Whether, the Plaintiff had agreed to vacate the Defendant's premises at any time and/or whether the Lease Agreement has been breached by either party? Further, there are other issues which come to mind and cannot be resolved and/or decide by affidavit evidence alone.
39. Bearing in mind *Lord Diplock's* observation that "*a resolution of conflicts on facts and claims in Affidavit or difficult Questions of law is not for the Court at this stage to decide*" but should be left for the trial Judge to decide. (Emphasis added).
40. I find as a fact that there are disputes of fact and numerous **tribal issues** that need to be dealt with at the trial when the evidence of witnesses is tested under oath.
- (ii) Undertaking as to damages
41. The **Plaintiff's contention** is that as for damages on the evidence before this court, damages would not be an adequate remedy for the Plaintiff since the result of the said eviction would cause a disruption of business and loss as it pertains to customers which cannot be reasonably equated.
42. He added that the Plaintiff would not be adequately compensated based on the understanding that the losses that would be faced as regards relocating, informing clients and having to expend on developing a facility to house all the Plaintiff's products, vehicles, and other goods/services will be exceedingly costly and as such may not be recoverable through damages per se.
43. Further, if the Plaintiff does not succeed at the substantive hearing, damages would be an adequate remedy for the Defendant and that the Plaintiff is in a position to pay and/or good for the undertaking as illustrated in the affidavit in support of Rizwan Haroon filed herein.
44. Whereas, the **Defendant** submitted that the Plaintiff has not shown evidence of any damages that it would suffer in the event that an injunction is not granted. In fact the Plaintiff makes no mention of damages at all as far as at the prohibitive order is concerned.

45. The **Defendant** submitted that if the Plaintiff does suffer any loss of business as claimed then damages would be an adequate remedy. In its statement of claim, the Plaintiff makes several claims for damages which show that the Plaintiff is aware that damages are an adequate remedy.
46. Reference is made to the *American Cyanamid principles* which clearly indicate that if damages are an adequate remedy than an interim injunction would not be granted. This is expressed in the speech of Lord Diplock wherein at page 408, his Lordship states as follows-
- "..if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should be normally be granted, however, strong the Plaintiff's claim appeared to be at that stage..."*
47. However, I also make reference to the case of *Devi -v- Prasad [2016] FJHC 442*. *Hon Justice Kumar* stated therein that "even damages would be an adequate remedy; the view of the Court is that it should consider the balance of convenience and not strike out application on this basis only."
48. The **Defendant** has furnished its undertaking as to damages and the same has been filed herein. The **Plaintiff** on the other hand has not given any undertaking as to damages.
49. The **Defendant** is the owner and proprietor of the Crown Lease NO. 1609 in Question which is the subject matter of the Substantive Matter impending before this court. The **Plaintiff** as well as the **Defendant** is seeking **Injunctive relief** against each other in his capacity as the Landlord and Tenant to safeguard his interests and rights in terms of the Lease Agreement allegedly executed by them.
50. I also note that although the Demand Notice to Quit the premises was served onto the Plaintiff by the Defendant but the substantive claim does not seek any orders pertaining to Vacant Possession orders but the injunctive relief sought by the Plaintiff is seeking a restraining order against the Defendant from evicting the Plaintiff illegally during the term of the Lease.
51. Further, the **Defendant** in its Statement of Defence and Counterclaim has sought for an order for an immediate vacant possession of the Defendant's property against the Plaintiff.
52. The Defendant also submitted that damages would not be an adequate remedy. The Defendant in its counter-claim does not seek damages.
53. Again, I find that the Question of **Adequacy as to damages** (if any) should be left for the court to determine at the hearing since the evidence of the parties as well as the witnesses' evidence together with the documentary evidence can all then be taken into consideration and tested out accordingly to arrive at a just and fair decision.
- (iii) Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff?
54. The third Test called the '**Balance of Convenience**' will determine which party of the two, whether the Plaintiff or the Defendant will suffer the greater harm from granting or refusal of an

interlocutory injunction pending the decision on the merits of the substantive impending application filed by the Plaintiff in terms of the Writ of Summons.

55. In the current case the **Defendant** is the **owner and the proprietor** of the subject land/and or property which is the subject matter of this case. No harm would be caused to the **Defendant** if this Court grants the Injunctive Relief sought herein in favour of the **Plaintiff**. Any orders made now would be interim in nature until the finalization of this substantive matter.
56. The reason being the Defendant will still remain the owner and or proprietor of the subject property until the final determination of the substantive action.
57. Further, the Plaintiff's right to remain in the property will be determined in the substantive proceedings.
58. I find that it will be both the **Plaintiff** and the **Defendant** who may suffer harm and risk if this court does not accede to grant the Injunctive Relief sought by the Plaintiff and the Defendant. The reason being that the Plaintiff is the Tenant and the Defendant being the Landlord executed a Lease Agreement which expires in 2018, some 7 months from now and is subject to further renewal option.
59. This Court is yet to hear both parties and the evidence with documentary evidence in order to determine what transpired between the parties and whether the Lease Agreement was breached by either party or both parties. Until, these issues are dealt with and determined then only this court will be able to determine a just and fair decision. Whatever orders may be necessary then, would only be acceded to and made as final orders of this court accordingly.

In Conclusion

60. I find that it is only proper that this Court makes appropriate orders in the interim so that the **Status Quo** of the matter remains **intact** and parties move on expeditiously to finalise the **pleadings** in the Substantive matter to enable this court determine the entire case globally once and for all.
61. Further, the orders in terms of the **Status Quo** made hereunder will **restrain** both parties from **interfering with the peaceful enjoyment of the property** by both parties to the proceedings until the substantive matter is dealt with by the court at the hearing-
 - (i) That an interim order is granted Restraining the Defendant, its agents, servants and employees from interfering with the Plaintiff's quiet enjoyment of all the land and improvements on Crown Lease No. 1609 in any manner whatsoever including but not limited to trying to illegally evict the Plaintiff until the finalisation of this action;
 - (ii) That an interim order is granted Restraining the Plaintiff and its agents, servants and employees from interfering with the peaceful enjoyment and the rights of other users of the common areas in the Defendant's property comprised in Crown lease No. 1609;

- (iii) That an interim order is granted Restraining the Plaintiff from operating any other business apart from which it has been permitted to operate pursuant to the Lease entered into by the parties while it remains on the Defendant's said property.
62. There will be no orders made directing the Defendant to provide consent to the Plaintiff in writing to allow the Plaintiff to apply to Fiji Electricity Authority for the installation of 3- phase power supply in its premises on Crown Lease No. 1609.
63. I will now deal with the **costs issue**. There were two applications filed; one by each of the parties seeking Injunctive Relief. The Court has granted orders in favour of both parties as reflected at paragraph 51 (i)-(iii) hereinabove.
64. In light of above orders, this Court has decided that each party should bear their own costs at this stage of the proceedings.


FINAL ORDERS

- A. That an interim order for injunction is granted Restraining the Defendant, its agents, servants and employees from interfering with the Plaintiff's quiet enjoyment of all the land and improvements on Crown Lease No. 1609 in any manner whatsoever including but not limited to trying to illegally evict the Plaintiff until the finalisation of this action;
- B. That an interim order for injunction is granted Restraining the Plaintiff and its agents, servants and employees from interfering with the peaceful enjoyment and the rights of other users of the common areas in the Defendant's property comprised in Crown lease No. 1609;
- C. That an interim order for injunction is granted Restraining the Plaintiff from operating any other business apart from which it has been permitted to operate pursuant to the Lease entered into by the parties while it remains on the Defendant's said property.
- D. Each party to the proceedings to bear their own costs;
- E. That the Court Orders to be sealed and served forthwith in order to effect compliance;
- F. Matter to be listed for further direction on 01st November, 2017 at 9 am.

Dated at Suva this 26th day of OCTOBER, 2017



cc: Reddy & Nandan Lawyers, Suva
Parshotam Lawyers, Suva


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MR VISHWA DATT SHARMA
Master of High Court, Suva