IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 184 of 2017

BETWEEN: **SOUTH SEA SLIPWAY LIMITED**

PLAINTIFF

AND: **FIJI PORTS CORPORATION LIMITED** a duly incorporated company under the Companies Act 2015 and having its registered office situated at Lot 1, Tofua Street, Walu Bay, Suva.

FIRST DEFENDANT

AND: **ASSETS FIJI LIMITED** a duly incorporated company under the Companies Act 2015 and having its registered office at Ministry of Public Enterprises, Level 3, Civic Tower, Victoria Parade, Suva, Fiji.

SECOND DEFENDANT

BEFORE: Hon. Justice Kamal Kumar

COUNSEL: Mr. S. Stanton and Mr N. Prasad for Plaintiff/Applicant
No Appearance for the First Defendant/Respondent
Ms O. Solimailagi and Ms M. Ali for the Second Defendant/Respondent

DATE OF HEARING: 6 December 2017

DATE OF RULING: 1 February 2018

RULING

(Application for Interlocutory Injunction)

1.0 Introduction

1.1 By Notice of Motion dated 27 June 2017, and filed on the same day Plaintiff/Applicant sought following injunctive orders:-

> *"1. an injunction be granted restraining the Defendant jointly and severally whether by itself or by its servants and/or agents and/or by whosoever and/or howsoever be restrained from in any manner whatsoever from:*
>
> *a) interfering with the Plaintiff's quiet enjoyment and occupation of the premises known as Muaiwalu Complex as per Agreement to Lease No. 33061 dated 16 July 2002 ("Agreement") situate at Walu Bay, Suva and comprised in Certificate of Title 35539 Lot 1, DP 8513 over land and property on Suva foreshore including slipway, adjacent wharf and berthage area and/or*
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> *b) terminating, determining and/or from dealing with the Agreement dated 16 July 2002;*
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> *2. an order that time be abridged and this application heard as soon as possible;*
>
> *3. the costs of this application shall be paid by the Defendants; and*
>
> *4. any further or other relief in aid of the prayers sought herein as this Honorable Court deems just and equitable."*
>
> *(**"the Application"**)*

1.2 The Application was called on 29 June 2017, when Counsel for the Applicant informed Court that Applicant has been served with Notice to Vacate and Applicant needs to file Supplementary Affidavit and accordingly Applicant was granted leave to file Supplementary Affidavit by 7 July 2017, and the Application was adjourned to 14 July 2017 at 9.30 am, for mention only.

1.3 The Application was next called on 18 July 2017, when parties were directed to file Affidavits and Submissions when the Application was adjourned to 6 September 2017, for hearing at 2.30pm.

1.4 On 11 August 2017, First Defendant/Respondent filed Application for leave to extend time to file Affidavit in Opposition which Application was returnable on 23 August 2017, when First Defendant was directed to file Affidavit in Opposition by 25 August 2017 and thereafter for parties to file Affidavits in Reply and Submissions by 22 September 2017 and the Application was adjourned to 28 September 2017, for hearing.

1.5 On 11 September 2017, at 9.30am Applicant filed Application to vacate the hearing which Application was called on 28 September 2017 at 9.30am and by consent adjourned to 6 December 2017 at 2.30pm, for hearing.

1.6 The Application was heard on 6 December 2017, and adjourned for Ruling on Notice.

1.7 Following Affidavits were filed on behalf of the Parties:-

For Plaintiff/Applicant

(i) Affidavit in Support of Radhika Kumar sworn and filed on 27 June 2017 (hereinafter referred as **"RK's 1st Affidavit"**);
(ii) Supplementary Affidavit of Radhika Kumar sworn and filed on 5 July 2017 (hereinafter referred as **"RK's 2nd Affidavit"**);
(iii) Affidavit of Radhika Kumar in Reply to Shaheen Ali's Affidavit sworn and filed on 10 August 2017 (hereinafter referred as **"RK's 3rd Affidavit"**);

For First Defendant/First Respondent

(i) Affidavit of Vajira Piyasena sworn and filed on 23 August 2017 (hereinafter referred as **"Piyasena's Affidavit"**).

For Second Defendant/Second Respondent

(i) Affidavit of Shaheen Ali sworn and filed on 1 August 2017 (hereinafter referred as **"Ali's Affidavit"**).

1.8 Parties also filed Submissions.

2.0 Background Facts

2.1 On or about 15 July 2002, the Applicant and the Maritime & Ports Authority of Fiji (hereinafter referred to as **"MPAF"**) entered into a Lease Agreement in respect to certain part of Suva port as mentioned in the Lease Agreement for a term of fifteen (15) years commencing on 1st August 2002, and expiring 3rd July 2017 together with right of renewal for further fifteen years with certain exception (hereinafter referred to as **"Lease Agreement"**).

2.2 Pursuant to section 12(1) of the Sea Ports Management Act 2005 all land and property vested in MPAF was transferred and vested in First Respondent.

2.3 Pursuant to Section 10 of Public Enterprise Act 1996 and Legal Notice No. 95, all land vested in First Respondent was to be transferred to Second Respondent.

2.4 The land subject to the Lease Agreement is yet to be transferred by First Respondent to Second Respondent and as such First Respondent is still the Registered Proprietor.

2.5 On 8 August 2016, Applicant gave notice of its intention to renew the Lease Agreement for a further term of fifteen (15) years from 1st August 2017.

2.6 On 28 November 2016, First Respondent wrote to Plaintiff informing it that the First Respondent's Board has decided not to renew the Lease Agreement in consideration of First Respondent's future developments.

2.7 On or about 20 January 2017, Plaintiff sent request to the Chairman of First Respondent and Permanent Secretary of the Ministry of Industry Trade and Tourism and copied Chief Executive Officer of First Respondent for First Respondent to reconsider its decision.

2.8 On 19 June 2017, Applicants Solicitors wrote to First Respondent requesting the renewal of Lease Agreement.

2.9 Before this Court proceeds any further it is noted with great concern that First Respondent/First Defendant has:-

(i) Failed and/or neglected to file Submission as directed by the Court;

(ii) Failed and or neglected to attend Court on 28 September 2017 at 9.30am, when Applicants Application to vacate the hearing date that was served on First Respondents Solicitor was dealt with;

(iii) Failed and/or neglected to attend Court on 6 December 2017, despite being served with Notice of Hearing by the Court Registry.

3.0 <u>Application for Interlocutory Injunction</u>

3.1 Counsel for Applicant and Second Respondent submitted that the principle to be applied in respect to Application before this Court is that stated by Lord Diplock in **<u>American Cyanamid Co. *v.* Ethicon Ltd</u>** [1975] AC 396 which are:-

(i) Whether there is a serious question to be tried;

(ii) Whether damages would be adequate remedy; and

(iii) Whether balance of convenience favour granting or refusing Interlocutory Injunction.

3.2 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.

3.3 Lord Diplock in **<u>American Cyanamid *v.* Ethicon Ltd</u>** [1975] AC 396 stated as follows:-

"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the

plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages of the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

3.4 In **<u>Series 5 Software *v.* Clarke</u>** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction:

"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case.

(2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.

(3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law.

(4) Major factors the court can bear in mind are

(a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay,

(b) the balance of convenience,

(c) the maintenance of the status quo, and

(d) any clear view the court may reach as to the relative strength of the parties' cases."

3.5 Another factor which Courts now take into consideration in addition to the above is **"overall justice"** as stated by His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd *v.* Harvest Bakeries Ltd** [1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."

Serious Question To Be Tried

3.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

3.7 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant's claim is not frivolous, vexatious or hopeless.

3.8 In **American Cyanamid** Lord Diplock stated as follows:-

"In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination." (p 406)

"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in 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." (p 407)

3.9 His Lordship further stated as follows:-

"In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case."

3.10 Applicant's claim for following relief in the Statement of Claim filed:-

"1. A declaration that the Notices of Non-Renewal and/or Termination dated 28 November 2016 and 28 June 2017 are null, void and of no effect insofar as they were issued by a party incapable of issuing them and/or

were issued for a purpose that did not conform to the ability to rely on non-renewal and/or termination for public purpose as provided for in subclause 6(2)(d) of the Memorandum of Lease Agreement dated 15 July 2002.

2. *A declaration that the Notice of Renewal constituting the option to exercise the renewal of the Lease dated 15 July 2002, such exercise of option being made on 8 August 2016, was valid and of full force and effect to exercise the option as made and provided.*

3. *A declaration that the First and Second Defendants by their servants and agents have engaged in anti-competitive conduct contrary to s.31A of the Fair Trading Decree (as amended) insofar as they have sought to refuse to renew the Lease to benefit by the removal of competition the corporate welfare of their corporate subsidiary Fiji Ships & Heavy Industries Ltd.*

4. *An order that the First and/or Second Defendants grant to the Plaintiff a lease of the premises for a term of 15 years from 1 August 2017 but otherwise upon the terms of the Lease dated 15 July 2002.*

5. *Damages.*

6. *Equitable damages.*

7. *An order by way of injunction restraining the Defendants jointly and severally whether by themselves or their servants or agents and/or by whosoever and/or howsoever such restraint to be in any manner whatsoever from:*

   a) *interfering with the Plaintiff's quiet enjoyment and occupation of the premises known as Muaiwalu Complex as per Agreement to Lease 33061 dated 16 July 2002 situate at Waluy Bay, Suva and comprised in Certificate of Title 35539 Lot 1, DP8513 over land property on Suva Foreshore including slipway, adjacent wharf and berthage area; and/or*

   b) *terminating, determining and/or dealing with the Agreement dated 16 July 2002.*

8. Costs.

9. Such further or other relief as may seem fit."

3.11 The gist of Plaintiff action is in relation to exercise of option to renew the Lease Agreement pursuant to clause 6(1) of the Lease Agreement and refusal to renew the Lease Agreement by First Respondent pursuant to clause 6(2)(d) of the Lease Agreement.

3.12 Clauses 6(1), 6(2) and 6(3) of the Lease Agreement provides as follows:-

"6.(1) The Lessor shall renew this lease for a single further term of fifteen (15) years (hereinafter referred to as the "renewal") if the Lessee gives to the Lessor a written request for renewal not less than nine (9) months (time being of the essence of this sub-clause) before the initial term expires.

(2) The Lessor shall not be obliged to renew this lease if:

a) the Lessee has defaulted on any payment of rent;

b) there is any unremedied default by the Lessee;

c) the Lessee has persistently defaulted under this Agreement; or

d) the demised land or any part thereof is intended to be resumed or taken for public purpose by any competent authority.

(3) If the Lessor grants a renewal, the renewal shall:

a) commence on the day after the initial term expires;

b) be at accurent market rental to be determined by reference to a registered valuer under clause 7 hereof; and

c) be on the terms and conditions contained and implied on this Agreement but not including any provisions for renwal."

3.13 It is not disputed that:-

(i) On 8 August 2016, Applicant issued notice to renew lease and served on First Defendant on the same day;

(ii) Applicant as Lessee has not defaulted in payment of rent (Clause 6(2)(a);

(iii) There is no unremedied default by the Applicant as Lessee (clause 6(2)(b);

(iv) The Applicant as Lessee has not persistently defaulted under the Lease Agreement (clause 6(2)(c));

3.14 By letter dated 28 November 2016, (Annexure RK21 of RK's 1st Affidavit) First Respondent refused to renew the lease.

3.15 The contents of aforesaid letters are as follows:-

"8 August 2016

Attention: Dinesh Lingam

Property Officer
Fiji Ports Corporation Limited
Walu Bay
SUVA

Dear Sir

Re: Memorandum of Agreement to Lease Dated 16th July 2002
Fiji Ports Corporation Limited - Lessor
South Sea Slipway Limited - Lessee - Renewal of Tenancy

We hereby give you notice pursuant to Clause 6 of the above Lease of our desire to take a renewed tenancy of the premises for a further term of 15 years from the 1st day of August, 2017.

Please acknowledge receipt of this letter.

Yours faithfully

Signed
Radhika Kumar
Director

cc: Mr Piyasena

CEO FPCL"

"28 November 2016

Attention: Ms Radhika Kumar

The Director
South Sea Slipway Ltd
P O Box 178
SUVA

Dear Ms Kumar,

Re: RENEWAL OF LEASE - SOUTH SEA SLIPWAY LTD (SSSL)

Reference is made to your letter dated 8th August 2016 on the subject matter.

This is to advise that your application for a renewal of the SSSL lease dated 16th July 2002 for the premises at Muaiwalu Complex 1, Walu Bay, which will expire on 31st July 2017, was discussed that FPCL Board meeting held in October 2016.

The Board after further deliberation on the matter and taking into consideration the FPCL's future developments plans have decided not to renew the lease for SSSL.

Please note that with the implementation of the above Board decision, in due course SSSL will be issued with a formal letter indicating the end of the lease and arrangements required to handover the premises back to FPCL.

Yours sincerely,

Signed
Vajira Piyasena
Chief Executive Officer

cc: Mr Shaheen Ali, Chairman, FPCL
Mr Dinesh Lingam, Acting Manager Properties, FPCL"

3.16 Applicant by its Counsel submitted that:-

(i) Notice of renewal by Applicant was in terms of Clause 6(1) of the Lease Agreement;

(ii) Letter from First Respondent to Applicant does not state that the land subject to the Lease Agreement or part thereof "is intended to be resumed or taken for public purpose by any competent authority."

3.17 Applicant by its Counsel submit that due to the fact "public purpose" is not defined in the Lease Agreement and only legislation that defines what public purpose is State Acquisition of Lands Act 1940 (**SALA**), this Court should adopt the definition in SALA.

3.18 This Court tends to agree with the Learned Counsel for the Applicant in this regard.

3.19 **"Public Purpose"** in SALA is defined at Section 2 to mean:-

"(a) a purpose of defence, public safety, public health or town or country planning;

(b) a purpose of providing a public amenity or public facility; or

(c) a purpose of preserving property of national, archaeological palaeontological, historical, cultural, architectural or scenic value."

3.20 Applicant submits that the future development plans referred to in First Respondent's letter of 28 November 2016 to Applicant (Annexure 21 of RK's 1st Affidavit) does not specifically state that the subject land is to be taken for public purpose by a competent authority and refused to extend the term of the Lease Agreement for First Respondent's own needs.

3.21 The failure by First Respondent to file Submission as directed by this Court and failure to attend at the hearing of the Application leaves the Court with no option but give an opportunity to Applicant to take this issue further at the trial.

3.22 Applicant also submitted that the First Respondent has engaged in anti-competitive conduct, and misused its market power as provided for in Fair

Trading Decree and breached provision of Public Enterprise Act 2010 (**PEA**) and Key Principle of Public Enterprise Reform as appears in Schedule 1 of PEA.

3.23 Before this Court proceed any further it must be noted that:-

(i) Fair Trading Act has been repealed by s160 of Commerce Commission Act 2010; and

(ii) All "Decrees and Promulgation" are to be addressed as "Act" pursuant to Section 3(i)(j) of Interpretation Act 1967.

3.24 Even though Applicant mentioned Fair Trading Act in its submission it provided relevant provision of Commerce Commission Act 2010 (**"CCA"**) in respect of anti-competitive conduct and misuse of market power in this regard.

3.25 At Section 66 and 67 of CCA it is provided:-

"66(1) A person that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:-

a. eliminating or substantially damaging a competitor of such person or of a body corporate that is related to such person in that or any other market;
b. preventing the entry of a person into that or any other market; or
c. deterring or preventing a person from engaging in competitive conduct in that or any other market.

67(1) A person engages in prescribed anti-competitive conduct if the person-

(a) has a substantial degree of power in a market; and

(b) takes advantage of that power with the effect or like effect, of substantially lessening competition in that or another market.

(2) A person must not engage in prescribed anti-competitive conduct."

3.26 Government being fully aware of circumstances in which a GCE can take under advantage of its position set out the key principles on which GCE are to operate in Schedule 1 Part B of PEA and one of the principles (No. 4) is:-

"(d) Principle 4 - Level playing field

The elements of this principle are that

- *the efficiency of overall resource use in the State is promoted by ensuring that markets are not unnecessarily distorted;*
- *in order to ensure, wherever possible, that each Government company competes on equal terms with the private sector and any special advantages (eg. Government guarantees on borrowings) or disadvantages (eg. lack of autonomy in decision making) of the Government commercial company because of its public ownership or its market power will be removed, minimised or made apparent;*
- *where a Government commercial company has excessive market power-*
  - ❖ *structural reform may be necessary to increase competition; and*
  - ❖ *regulation may be necessary to prevent market abuse."*

3.27 The First Respondent is Government Commercial Entity and since it is engaged in the commercial activity by itself or through its subsidiaries in competition with private entities then it is bound by the provision of CCA.

3.28 Whilst there is nothing stopping a GCE to engage in competition with private entities they must do so at level playing field and **do not** use its dominant power of being GCE to suffocate its competitors to the extent of the competitors closing their business. They must operate in good faith.

3.29 At paragraph 33 - 35 of the Statement of Claim Applicant states as follows:-

"33. The First and/or Second Defendants have and will unless restrained seek to engage in anti-competitive conduct by seeking to remove from operation competitors such as the Plaintiff in order to ensure that the Second Defendant's subsidiary Fiji Ships & Heavy Industries Ltd will be

protected in terms of its business from competitors where the competitor operates from a property adjacent to or upon which there are similar if not identical operations undertaken, as a result of which the purported Notice of Non-Renewal and/or Termination was additionally and independently invalid in law, null, void and of no effect.

Particulars

The admission as to anti-competitive conduct appears in the affidavit of Mr Vijara Piyasena sworn 8 August 2017 and is relied upon in circumstances where the incorporation of the First and Second Defendants, as public State enterprises, for the purpose of enabling them to engage in anti-competitive conduct in furtherance of the purported Master Development Plan (as yet unseen) is contrary to the provisions of the Fair Trading Amendment Decree.

34. Further and in support of the contention that the propagation of anti-competitive conduct is an invalid reason for relying upon a Notice of Termination and/or Non-Renewal of Lease, the Plaintiff relies upon the provisions of the Public Enterprise Act, Schedule 1 section 10 and Part B Key Principles (d) and Principle 4 The Level Playing Field and Schedule 2F1 (10) together with the provisions of the Seaports Management Act s.4 which provide and stipulate that the conduct of a public enterprise corporation engaged in the provision of port facilities must be pro-competitive and proactive to ensure a level playing field as made and provided by the statute.

35. In the premises, the conduct of the First and Second Defendants in seeking to wrongly and invalidly fail to renew the lease of the Plaintiff lawfully exercised by the option to renew as made and provided is independently of the failure to issue a valid notice by the landlord further relied upon by reason of the rationale in seeking to have the non-renewal invoked for reasons of anti-competitive conduct as particularized above."

3.30 At paragraph 15 of Piyasena's Affidavit sworn on 8 August 2017, he stated as follows:-

"15. As further reason and defence the Plaintiff is also a competitor of the First Defendant's subsidiary, Fiji Ships and Heavy Industry Limited, which subsidiary was not in existence at the date this Lease was entered into by MPAF, the Predecessor of the First Defendant. The owner of property is entitled to protect its business from competitors if the competitor operates from the same property as the Owner."

3.31 Lord Diplock in **Sudbrook Trading Estate Ltd. v Eggleton and Others** [1983] AC 444 at pages 476 and 477 (paragraph A, B) in respect to option clause in a Lease Agreement stated as follows:-

"The option clause cannot be classified as a mere "agreement to make an agreement." There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or "if" contract. Although it creates from the outset a right on the part of the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversion to the lease. The giving of such notice, however, converts the "if" contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees."

3.32 **Sudbrook** case relates to four Lease Agreements which all had option clause that conferred on tenants an option to purchase the reversion of the fee simple at such price not being less than certain amount as might be agreed upon by two valuers, one to be appointed by landlord and one by tenant and in default an umpire appointed by the valuers except for different minimum price in each lease.

3.33 The tenants exercised their option to purchase reversionary interest in respect to properties subject to three (3) leases which was refused by the landlord on the ground that since the price was to be determined by valuer the price could not be ascertained.

The trial Judge and the House of Lords held for the tenants.

3.34 Even though this case relates to exercise of option to renew the lease the principle would be same as what is stated by Lord Diplock in Sudbrook.

3.35 His Honour Justice Brereton in **In the Matter of Qatar No. 2 Pty Ltd** and **Qatar No. 3 Pty Ltd** [2015] NSWSC 2088 (27 July 2015) stated as follows:-

"... that it has always been held that options must be strictly complied with, because an option gives rise to a contract if and only if the conditions set out in the option are satisfied."

3.36 In this instance, the Applicant has given the required notice within the timeframe stated in the Lease Agreement.

3.37 The grounds upon which First Respondent could refuse to grant the option stated at Clause 6(2) of the Lease Agreement is quoted at paragraph 3.12 of this Ruling.

3.38 At paragraphs 3.13 and 3.16 of this Ruling it is clearly stated that only ground for refusal would have been that First Defendant intended to resume to take back the subject property for public purpose by competent authority.

3.39 No evidence has been adduced to show as what public purpose any would take the subject property for.

3.40 In fact paragraph 15 of Piyasena's Affidavit creates doubt as to whether First Respondent intends to resume or take back the subject property for principle purpose or stifle competition between its subsidiary Fiji Ships and Heavy Industries Limited.

3.41 If that is the case then Applicant having exercised the option as provided for in the Lease Agreement would obviously be entitled to a Lease Agreement for further fifteen (15) years.

3.42 Counsel for the Second Respondent submitted that Applicant should have applied to Second Respondent as Second Respondent is the owner of the subject property.

3.43 Pursuant to powers conferred in section 26(2)(c) of PEA the Honourable Minister for Public Enterprises by Legal Notice No. 95 directed First Respondent to transfer all interest in land currently owned or held by First Respondent to Second Respondent for nil consideration with effect from 13 November 2015.

3.44 At paragraph 13 and 14 of Ali's Affidavit filed on behalf of Second Respondent he stated as follows:-

> *"13. While the transfer of assets to AFL has been endorsed on majority of the land titles of FPCL, the transfer of freehold land interest provided in Certificate of Title Number ('CT') 35539 ('property') to AFL is yet to be endorsed on the same.*
>
> *14. I verily believe, having been advised by counsel, that CT 35539 was partially subdivided on or before 2011. I further state, having been advised by counsel, that on 18 March 2011 via Dealing Number 743516, CT 35539 was partially cancelled out of which Certificate of Title Number 40304 and 40305 were issued. I further state that the balance area of the property exists under CT 35539. A copy of the partially cancelled CT 35539 is annexed and marked as "SA6"."*

3.45 Rule 1(6)(b) of Rules for Transferring Assets and Liabilities in Schedule 2 - Part F of PEA provides as follows:-

> *"(b) where the transfer is registrable or must be recorded, the person responsible for keeping the register shall register or record the transfer forthwith after written notice of the transfer is received by him or her from the Public Enterprise Minister or any person authorised for this purpose by the Public Enterprise Minister."*

3.46 No evidence has been adduced to show that First Respondent gave any notice of Regulation of Titles in respect to the subject property.

3.47 It is clear from Ali's Affidavit that First Respondent was the registered owner of the property that comprises property subject to the Lease Agreement when Applicant exercised the option for renewal on 8 August 2016.

3.48 If both Respondents contend that Applicant should have given notice of renewal to Second Respondent then the question that needs to be asked and answered are:-

(i) Why First Respondent did not inform Applicant soon after it received notice of renewal on 8 August 2016 that Applicant should give notice of renewal to Second Respondent and not First Respondent?

(ii) Instead of doing so, why did First Respondent refuse to grant option when it was not the owner and that refusal came only two days short of nine (9) months notice required for renewal notice?

3.49 This Court has not dealt with issue of Force Morjure as raised in Piyasena's Affidavit on the ground that First Respondent has failed to file any Submission on the issue or attend the hearing of the Application.

3.50 Having commenced the Affidavit evidence submission from Learned Counsel for Applicant and Second Respondent this Court finds that there are serious question to be tried which include:-

(i) Whether exception in clause 6(2)(d) the Lease Agreement has been made out;

(ii) Whether First Respondent's refusal to grant option for renewal was for public purpose or to stifle competition against it and/or its subsidiary Fiji Ship and Heavy Industry Limited;

(iii) Whether First Respondent has misused its dominant power.

Whether Damages would be Adequate Remedy

3.51 Applicant claims that damage will not be adequate remedy on the ground that it has with its subsidiary companies invested substantively and has together employs about four hundred five (405) workers.

3.52 This Court agrees with what is submitted by Second Respondent at paragraphs 44 and 45 which is as follows:-

> *"44. Lord Justice Jackson in Araci v Fallon [2011] EWCA Civ 668 (04 June 2011) at paragraph 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.***
>
> *45.* ***The real question to be asked*** *in deciding whether an award of damages would be adequate remedy is* ***whether it is just in all the circumstances that the Plaintiff should be confined to its remedy in damages****."*
>
> **(emphasis added)**

3.53 In this instance Applicant is trying to enforce its contractual right which Applicant allege is being blocked by First Respondent has misused its dominant power to stifle competition which is in breach of sections 66 and 67 of CCA.

3.54 This Court finds that it is just and fair that Applicant be not confined to damages and be given an opportunity to be heard fully even though this Court has no doubt that damages could be assessed and Respondents have capacity to pay any such damages.

Balance of Convenience

3.55 This Court finds that balance of convenience favours the Applicant for following reasons:-

(i) If Interlocutory Injunction is not granted and when substantive matter is determined and Court finds that Applicant had rightly exercised it's right of renewal and exception in s6(2)(d) does not apply then Applicant:-

  (a) Will be seriously prejudiced in that its business together its subsidiaries business will cease;

  (b) Almost 405 of his employees will be left without a job.

3.56 No evidence has been shown that Respondents will in some way be prejudiced if interlocutory injunction will be granted.

3.57 No evidence has been adduced to show what is to be done according to the Master Plan or when it is to be implemented.

4.0 Costs

This Court has taken into consideration that Applicant and Second Respondent complied with the Court's directions by filing Submission and attended hearing whilst First Respondent failed to comply with Courts direction to file Submissions and failed to attend during hearing of the Application. The Application was made as a result of First Respondents refusal to extend the lease and failure to state for which public purpose it refused.

5.0 Conclusion

This Court makes following Orders:-

(i) The Respondents/Defendants jointly and severally whether by itself or by its servants and/or agents and/or by whosoever and/or howsoever be restrained from in any manner whatsoever from:

  a) interfering with the Applicant/Plaintiff's quiet enjoyment and occupation of the premises known as Muaiwalu

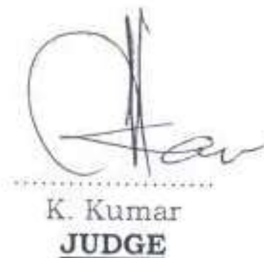
Complex as per Lease Agreement dated 16 July 2002 ("**Lease Agreement**") situate at Walu Bay, Suva and comprised in Certificate of Title 35539 Lot 1, DP 8513 over land and property on Suva foreshore including slipway, adjacent wharf and berthage area and/or;

b) terminating, determining and/or from dealing with the Lease Agreement dated 16 July 2002 and/or taking any action to evict the Applicant/Plaintiff from the premises currently occupied and used by the Applicant/Plaintiff;

until final determination of this action or further order of this Court;

(ii) The Applicant/Plaintiff do pay monthly rental that is currently paid to the First Respondent/First Defendant until final determination of this action or further order of the Court;

(iii) The First Respondent/First Defendant pay Applicant/Plaintiff's costs of the Application assessed in the sum of Three Thousand Dollars ($3,000.00).



....
K. Kumar
JUDGE

At Suva
1 February 2018

MESSRS MITCHELL KEIL for the Applicant/Plaintiff
MESSRS LATEEF & LATEEF for the First Respondent/Defendant
ATTORNEY-GENERAL for the Second Respondent/Defendant