IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 113 of 2017

BETWEEN : **VINIL VIKASH KRISHNAN** trading as **RAINBOW IMPORTS AND WHOLESALERS** of Nadi.

Applicant/Plaintiff

AND : **FIJI REVENUE AND CUSTOMS SERVICE** Revenue & Customs Services Complex, Corner of Queen Elizabeth Drive, Nasese, Suva.

Respondent/Defendant

Counsel : Ms S.Ravai of Messrs Fazilat Shah Legal for the Applicant/Plaintiff
Mr.Singh, In-House Counsel for Fiji Revenue & Customs Service

RULING

INTRODUCTION

1. The full background to this case is set out in the Learned Master's interlocutory Ruling dated 20 November 2017 (see **Krishaan v Fiji Islands Revenue & Customs Authority** [2017] FJHC 881; HBC113.2017 (20 November 2017).

2. By that Ruling, the Learned Master had declined an interlocutory application (Notice of Motion) by the Plaintiff seeking a mandatory injunctive Order against the Fiji Revenue & Customs Service (**"FRCS"**) It is this ruling which the Plaintiffs seek leave to appeal against.

3. By their Statement of Claim and Writ of Summons filed on 14 June 2017, the Plaintiffs allege that they had imported certain goods on 22 May 2017 from a Chinese Company namely Yuhang Import and Export Limited (**"YIEL"**) vide their invoice No. 17/40912. These, the Plaintiffs plead, were declared goods.

4. FRCS had assessed collectible customs on these declared goods at $2,846-20. This, the Plaintiffs have settled promptly. The Plaintiffs allege that despite their having fully settled the said collectible duty, and despite having sent a formal demand notice for the release of the goods, FRCS still has not released the goods. The Plaintiffs allege that, in keeping the goods, FRCS has acted in breach of its statutory duty. They claim to have suffered loss and damages as a result.

5. The Plaintiffs seek an Order in their Statement of Claim that FIRCA do forthwith release all declared goods as per invoices No. 17/40912 from Yuhang Import and Export Limited including General Damages for wrongful detention in the sum of $50,000.

6. The Notice of Motion in question in these proceedings seeks the same substantive order that the Plaintiffs plead in their Statement of Claim.

7. Notably, this matter is ready for trial. The Plaintiffs had filed their Order 34 Summons on 07 May 2018 together with the Copy Pleadings. The Copy Pleadings includes a copy of the Pre-Trial conference Minutes duly executed by both counsel.

COMMENTS

8. As matter of general observation, it is extremely hard to obtain an interim mandatory injunction. Notably, the Master was aware of this, having noted at paragraph 13 of his ruling that the test for mandatory injunctions is far more stringent than the **American Cyanamid** test for interim prohibitory injunctions.

The Master had referred to the oft cited case of **Redland Bricks Ltd v Morris & Anor** [1969] 2 All ER 576 where at pages 579 and 580 the Court sets out the cardinal principles which have guided the courts on the granting or refusal of a mandatory injunction:

> *The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course". Every case must depend essentially on its*

own particular circumstances. Any general principles for it application can only be laid down in the most general terms:

1. *A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damages will accrue to him in the future. As Lord Dunedin said in A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd;* [1919] AC 999 at p 1005 *it is not sufficient to say "timeo". It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly.*
2. *Damages will not be a sufficient or adequate remedy if such damages does happen. This is only the application of a general principle of equity; it has nothing to do with Lord Cairns' Act (the Chancery Amendment Act 1858) or Meux's case.*
3. *Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account: (a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. As illustrative of this see Woodhouse v Newry Navigation Co; (b) but where the defendant has acted reasonably, although in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only on a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudicial for he has his action at law and all his consequential remedies in equity.*

   So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damages to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure on one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such works as on the evidence before it will remedy the wrong but may think it proper to impose on the defendant the obligation of doing certain works may on expert opinion merely lessen the likelihood of any further injury to the plaintiff's land. Sargant J pointed this out in effect in the celebrated "Moving Mountain" case, Kennard v Cory Brothers & Co Ltd ([1922] 1 Ch 265 *at pp 274, 275) (his judgment was affirmed in the Court of Appeal).*
4. *If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.*

9. What the Plaintiff is essentially seeking leave to appeal is the Master's exercise of discretion to refuse to grant an interim mandatory injunction.

10. Having reviewed the case, I am of the view that Master was correct in refusing to grant an interim mandatory injunction. My reasons are:

(i) There is a clear policy in the law which makes it relatively hard, as I have said above, for a Court to exercise his or her discretionary power to grant an interim mandatory injunction (see **Redland Bricks Ltd v Morris & Anor**).

(ii) The Master's decision was an interlocutory one. There is also a clear public interest which have guided the Courts to, except in rare circumstances, entertain an appeal of an interlocutory decision (see Fiji Court of Appeal in **Kelton Investments Ltd v Civil Aviation Authority of Fiji** [1995] FJCA 15; ABU0034D.95S (18 July 1995)[1].

(iii) Accordingly, the onus was heavily on the Plaintiffs to convince the Master that there is a very strong probability on the facts that grave damages will accrue to them in the future if a mandatory injunction is not granted - and/or - that damages will not be a sufficient or adequate if such damages does happen as a result of the refusal of a mandatory injunctive order. In this regard, I am of the view that in the event that

[1] Where the FCA held:

'I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubball v Everitt and Sons (Limited) [1900] 16 TLR 168).

Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:

'.....

5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries [1991] FCA 655 104 ALR 62 at 623 lines 29-31).

5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell [1936] HCA 67; (1936) 56 CLR 221 at 224).

5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.

5.5 Even "if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.

5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:

"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."'

the Plaintiffs were to succeed in their substantive claim, the option of pursuing a claim for damages is still open to them, which, I note, they have also pleaded damages in their statement of claim.

OBSERVATIONS

11. In her submissions, Ms. Ravai said that what the plaintiff was essentially seeking to appeal was the Master's interpretation of various provisions of the Customs Act and also various findings of fact.

12. Admittedly, it would appear that the Master had made certain findings of fact and also made certain pronouncements on the interpretation of various provisions of the Customs Act.

13. In my view, because the Learned Master was only dealing with an interlocutory application for an interim mandatory injunction, his findings cannot be held to be a final determination of those issues. In other words, the related issues of law and fact must remain postponed to be finally determined at trial by a High Court judge possessed with the rightful jurisdiction to determine these.

14. Leave refused. Matter adjourned to the Master to take normal course and later for allocation to a High Court judge as the matter is virtually ready for trial.

HIGH COURT OF FIJI LAUTOKA

Anare Tuilevuka
JUDGE

08 June 2018.