IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 151 OF 2018

BETWEEN	:	**SHANEIL SURESH AUTAR** trading as **ACE TYRE CENTRE & ACE CAR SALES** of 55 Vitogo Parade, Lautoka, Businessman.
		PLAINTIFF
A N D	:	**THE COMPTROLLER OF CUSTOMS** as the Chief Executive Officer of the Fiji Revenue and Customs Authority, a statutory body established by the Fiji Islands Revenue and Customs Authority Act 1999.
		DEFENDANT

Before	:	A.M. Mohamed Mackie- J
Appearance	:	Ms. S. Satala for the Plaintiff
	:	Mr. A. Turuva for the Defendant
Hearing	:	By way of written submissions
	:	Filed by the Plaintiff on 24/10/18; and Defendant on 22/10/18
Date of Ruling	:	30th January 2019

RULING

A. Introduction

1. On 20th July 2018, acting on the Plaintiff's Ex-Parte Notice of Motion dated and filed on 16th July 2018, this Court granted a temporary injunction order restraining the Defendant and/or his servants and/or his agents from condemning or charging or encumbering or transferring or selling or auctioning or damaging or modifying the following vehicles that have been detained pursuant to the detention notice no 121358 until final determination of the proceedings;

a. Porsche ; 2 door
Chassis No; WPOZZZ98ZGK180336
Color; Red

b. Audi A4
Chassis No; WAUZZZF47H121719
Color; Black.

2. The injunction order being duly served on the Defendant, when the matter came up before me on 06th August 2018, court made orders for the filing of affidavits and extended the injunction order till 03rd September 2018. Accordingly, affidavit in reply being filed by the Defendant on the said date, the learned counsel for the Plaintiff intimated that he will not be filing the affidavit in response to the reply affidavit of the Defendant.

3. Subsequently, both the counsel having agreed to dispose the hearing by way of written submissions filed same as stated above.

B. Background

4. The Statement of Claim (SOC) dated and filed on 16th July 2018 states as follows.

1. "The Plaintiff sometime in 2017 on the approval of the Defendant imported two Moto Vehicles (**a Porsche Cayman and an Audi A4**) from "Wonderland Newtown Pty Ltd" in Australia and once the vehicles reached, the Defendant moved to detain them by detention notice no.121358 dated 3rd January 2018.
2. Thereafter, the Defendant wrote a letter dated 10th January 2018 to the plaintiff seeking for the truth and accuracy of customs values of the two vehicles for which the Plaintiff responded by a letter dated 16th January 2018 and the Defendant replied to it by letter dated 24th January 2018. Thereafter, the plaintiff served a Notice of claim for the two vehicles on 26th January 2018.
3. Subsequently, having interviewed the plaintiff under caution on 12th February 2018, the Defendant by his letter dated 22nd March 2018 informed the Plaintiff, among other things, the following.

    a. That they are conducting further investigation with the view of laying charges under Customs Act.

b. Should the Plaintiff wish to make a claim on the vehicles, he may institute proceedings against the controller of customs ....
c. The Plaintiff needs to apply for an import license permit as all used vehicles are subject to import license.

4. Despite the Plaintiff made subsequent requests for the release of the two vehicles, the Defendant refused and is continuing to refuse the release the same.
5. In breach of the Customs Act, the Defendant has caused great loss, damages and inconvenience to the Plaintiff".
6. Accordingly, the Plaintiff in the prayers to the statement of claim pleaded for;

a. The Defendant immediately releases to the Plaintiff two vehicles seized and detained on the 3rd of January 2018 as set out in the Defendant's Detention Notice no.121358;
b. A Declaration that the Defendant has not complied with section 158(1) of the Customs Act 1986 in relation to the two vehicles seized and detained on 3rd January 2018 and as set out in Defendant's Detention Notice no.121358.
c. A declaration that the Defendant is unlawfully holding the Plaintiff's two vehicles seized and detained on 3rd January 2018 as set out in the Defendant's Detention Notice no.121358.
d. A Declaration that the Defendant's action in refusing to release the Plaintiff's two vehicles detained on 3rd January 2018 is a breach of section 158 (1) of the customs Act 1986 and is unlawful;
e. An order that the Defendant pay the plaintiff damages and losses to the amount of $ 1,000,000.00 (One Million).

5. The Defendant by his statement of defence filed on 31st August 2018, having denied the material averments in the SOC, has moved for the dismissal of the SOC and the reliefs claimed therein.

6. In support of the application for injunction, **Shaneil Suresh Autar**, the Plaintiff, deposed and filed an affidavit sworn on 16th July 2018, along with the supporting documents marked from "A" to "G" annexed thereto.

7. In reply, Mr. **Virendra Reddy**, the Senior Customs Officer, filed an affidavit sworn on 31st august 2018 along with a document marked as annexure 1, being the letter dated 16th July 2018 sent to the Plaintiff by the Defendant. The plaintiff opted not to file any affidavit in response.

C. Legal Principles:

8. An interlocutory injunction is a remedy that is both temporary and discretionary in nature. (American Cyanamid v. Ethicon Limited[1975] UKHL 1; [1975] 1 All ER 504 per Lord Diplock) As a temporary remedy, it is obtained before the final determination of the parties' rights in an action and so it is framed in such a way as to show it is to last only until the determination of the matter concerned.

9. The principles on the grant of interim injunctions and whether to dissolve such an injunction pending determination of the matter, are settled. As stated by Lord Diplock in Cyanamid(supra), they are:

   (i) Whether there is a serious question to be tried;
   (ii) whether damages be an adequate remedy, and;
   (iii) In whose favor the balance of convenience lies.

10. Where an interim injunction has been granted ex parte, the Plaintiff bears the onus of satisfying the Court that the injunction ought to continue. (***Westpac Banking Corporation v. Adi Mahesh Prasad Civ App ABU 27 of 1997S (FCA Reps 99/1)***

    In **Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016), Marsoof J** stated:

    "According to the procedure adopted by our courts which are called upon to decide any application for interlocutory injunction, the evidence consists entirely of admissions on record by way of pleadings and the content of affidavits that are filed by the parties".

D. Analysis:

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

11. The first issue for determination is whether there is a serious question to be tried. This is the threshold test or question. In Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016), Keith J, referring to the principles set out by Lord Diplock in Cyanamid (supra), stated:

"The court first considers whether there is a serious issue to be tried. That does not mean that the court must be satisfied that there is a strong case for granting an injunction at the trial of the action. If an interlocutory injunction is to be granted, the court only has to be satisfied that the claim is neither frivolous nor vexatious".

In Cyanamid (supra) at 406, Lord Diplock stated:

"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-hypothesis 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 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 if 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.

12. It is to be observed that the plaintiff, in the 1st paragraph of his statement of claim, states that he sought the Defendant's approval for the importation of the two vehicles and the Defendant gave the approval for the same. However, in his affidavit in support, he neither utters a word about seeking or obtaining such approval nor annexes any document in proof of seeking and/or obtaining such approval (import license).

13. The import license is a pivotal document for the importation of these vehicles, which the Defendant claims as used vehicles. Undoubtedly, these vehicles are subject to the relevant regulations under the customs Act. It appears that the plaintiff has imported these vehicles without an import license and thereby violated the relevant provisions. When the plaintiff has apparently violated the relevant provisions of the Act, it cannot be assumed

that the plaintiff has a, prima- facie, case, which should be comprised of a serious question to be tried at the trial.

14. The letter marked "B" dated 10th January 2018 and annexed to the Plaintiff's affidavit in support is self- explanatory. In paragraph 2 thereof, the Defendant's office informs the plaintiff that it is concerned with the truth and accuracy of the document and declaration presented by the Plaintiff for the Customs valuation purposes and requested the Plaintiff to provide documentation to demonstrate that the declared price represents the total amount actually paid or payable on the imported vehicles.

15. In the aforesaid letter, the Defendant has clearly indicated the reasons to entertain doubt with regard to the truth and the accuracy of the documents presented as follows.

    1. The exporter on the Bill of Lading FPA 172NSL039 does not correspond with the seller on the invoice.
    2. The consignee on the Bill of Lading FPA 172NSL039 does not correspond with the consignee on the invoice.
    3. The exporter Wonderland Newtown Pty Ltd is not an authorized dealer for AUDI-A4 Motor Vehicles.
    4. No documentation and correspondence provided demonstrating the agreed terms of sale and terms of payment.
    5. Inconsistent trade practice such as no payments made for previous importation from same supplier.

16. Accordingly, the Plaintiff was given seven days' time to respond to the irregularities and to comply by disclosing the correct documents including;

    i. Import/ transit documents in Australia for AUDI-A4 and Porsche.
    ii. Correct House Bill of Lading.
    iii. Initial supplier invoice where Wonderland Newtown Pty Ltd acquired the goods from.
    iv. Payment evidence for the initial purchase by Wonderland Newtown PTY Ltd.

17. However, it appears that the Plaintiff has failed to provide the above documents for the Defendant to proceed with the valuation and other formalities. Instead what the Plaintiff submitted was a mere letter dated

16th January 2018 marked "C" with certain explanations in 3rd page thereof for his purported failure to provide the required documentation and particulars. It is to be noted that the Plaintiff for the reason/s best known to him did not submit the required document to facilitate the process of valuation.

18. In response, the Defendant by his letter dated 24th January 2018 marked "D", has informed the Plaintiff that they are still in doubt over the truth and accuracy of the declaration presented and it has to be deemed under provisions of article 1 of the Agreement that the Customs valuation [GATT] cannot be determined. It has been further informed that since the FRCS findings have revealed other discrepancies as well this may constitute offence(s) under the Custom Laws.

19. Accordingly, the Defendant, having carried out further investigation has now, by his letter dated 16th July 2018 marked as "Annexure-1" , intimated that the defendant is satisfied that the offences have been committed and about the possible prosecution. It is at this juncture; the plaintiff has resorted to file this action and moved for injunction order. I don't think it is proper for this court to interfere by way of an injunction when the Plaintiff is being dealt with in terms of the Customs regulations, particularly, in the absence of a serious issue to be decided between the parties.

20. The Plaintiff has now been charged before the Magistrate in Lautoka and in the event of conviction; the vehicles are subject to confiscation. Thus, the defendant should be at liberty to deal with the vehicles in the way prescribed in the Act. The evidence revealed through the pleadings and correspondences has not satisfied me that there is a serious issue to be tried at the trial.

21. The reply affidavit of the Defendant sworn by its senior Customs Officer reveals that the goods subjected to this injunction order were detained under section 129(1) of the Customs Act 1986 for submitting incorrect and falsified entry, invoice, declaration, answer, statement or representation for the clearance purposes. The Plaintiff has not submitted the relevant document/s related to the importation. The controller seems to have entertained reasonable doubt over the truth and accuracy of the declaration

made by the Plaintiff. The Plaintiff has also failed to furnish required security deposit for the release of the goods till the plaintiff provides documentary evidence in proof of purchase. The plaintiff has opted not to file an affidavit in response.

22. In view of the above, I arrive at the firm decision that the plaintiff has not proved the existence of a serious issue to be tried at the trial.

(ii) Whether damages be an adequate remedy?

23. It is settled law 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 the 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 appeared to be at that stage.

24. On the other hand, if the damages would not adequately compensate the plaintiff and if he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a financial position to honor his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused: ***Morning Star Co-operative Society Ltd v Express Newspapers Ltd [1979] FSR 113;*** but not always: ***Allen v Jambo Holdings Ltd [1980] 1 WLR 1252." (INJUNCTIONS, DAVID BEAN, SIXTH EDITION, P.30)***

25. The Plaintiff nowhere in his affidavit in support states that there would be irreparable and unquantifiable loss and damages caused to him in the event the injunction is not granted and/or not extended. Instead, he has in his statement of claim quantified his possible loss and damages limiting to

possible repair and/ or service charges, cost of detention and loss of income. Accordingly, he has prayed for $1,000,000.00.

26. The Plaintiff does not query the capacity of the Defendant to pay such loss and damages in the event the plaintiff succeeds at the end of the action. The Plaintiff has not shown interest in getting the vehicles released on payment of security deposit pending the submission of required documents by him.

27. In the event the vehicles are continued to be detained at the Defendant's yard on account of the injunction order, without being appropriately dealt with or disposed pending the final outcome of the litigation, they can be subjected to deterioration and ultimately be of no use to any party.

28. I am satisfied that in the event the Plaintiff succeeds at the end of the trial , the Defendant, being an officer representing a state institution that is engaged in day to day revenue earning activities , will no doubt be in a position to pay such loss or damages, if any, to the Plaintiff.

29. In my view, damages would be sufficient to the Plaintiff and there is no confusion or uncertainty as to the quantum of it that may result due to lifting of the ex-parte injunction order. Only the Plaintiff claims damages and not the Defendant. Thus, there is no competing interest between the parties as far as the damage is concerned.

30. I decide that the Plaintiff can be monetarily compensated in the event he succeeds in his action and if damage or loss is caused.

(iii) **In whose favor the balance of convenience lies.**

31. In ***Professional West Realty (Fiji) Ltd v Professionals Ltd, Civil Appeal No. ABU 0072 of 2008 (21 October 2010) at [37],*** the Court (per Byrne AP and Calanchini JA) stated:

"Having determined, correctly in our opinion, that the material did raise a serious question to be tried, the learned judge was required to consider the balance of convenience. In some decisions the balance of convenience test is considered fewer than two separate heads and in others the approach is that there are a number of factors that need to be considered in

determining the balance of convenience. However, regardless of the approach adopted, the learned judge was required to consider whether an award of damages would be an adequate remedy for the Respondent if successful on the question of liability at the trial of the action".

32. In ***Honeymoon Island (Fiji) Ltd v Follies International Ltd, Civil Appeal No. ABU0063 of 2007S (4 July 2008)*** at [13], the Court of Appeal (per Pathik, Powell, and Bruce JJA) stated:

"As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "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": American Cyanamid..."

33. In ***Chung Exports Ltd v Food Processors (Fiji) Ltd., Civil Appeal No. ABU0012 of 2003 (26 August 2003)*** at [13], the Court (per Eichelbaum, Tompkins, and Penlington JJA) stated:

"The court will consider whether there is a serious question to be tried, and if so, where lies the balance of convenience. The latter will require consideration of such factors as the relative strength of the plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages, and any other relevant factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end, the court is required to determine where the overall justice lies".

In ***Professional West Realty (supra) at 43***, the Court had this to say:

"The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted".

34. The question of balance of convenience arises where there is doubt as to the adequacy of remedies in damages available to either party.

35. The claim of the plaintiff as damages is for the anticipated cost for repairs and/or service charges, depreciation and loss of income which could be safely compensated. There is no claim for damages by the Defendant for the court to weigh the competing interest of the parties in determining the balance of convenience.

Lord Diplock at para 408E said:

'It is where there is doubt as to the adequacy of remedies in damages available to either party or to both, the question of balance of convenience arises' (at 408E, American Cyanamid case).

36. In this case, I have found that damages would be an adequate remedy to the plaintiff as he has prayed for in the prayer to the statement of claim. Thus, the question of balance of convenience does not arise for any further consideration.

Are there any special factors?

37. Neither party addresses this issue. I do not see any special factors for the continuation of the ex-parte interim injunction granted on 20th July 2018 in favor of the Plaintiff. In my view it deserves nothing but immediate vacation.

E. Conclusion:

38. As I said earlier, the Plaintiff has not made out a strong prima facie case against the Defendant. No serious question to be tried at the trial. The Plaintiff can be monetarily compensated in the event he succeeds in his claim at the end of the trial. The balance of convenience does not warrant consideration. Therefore, the maintenance of the status quo pending the trial in this case is not warranted.

F. Final Orders

a. The ex-parte injunction order granted by this court on 20th July 2018 is hereby revoked and vacated.

b. The action will take its normal course, subject to the disposal of the pending summons by the Plaintiff for summary judgment.

c. The plaintiff shall pay a sum of $2,500.00 unto the Defendant being the summarily assessed costs.

A. M. Mohammed Mackie
Judge

At Lautoka
30th January, 2019