

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO.; HBC 185 OF 2014

BETWEEN : DELZEV LIMITED  
FIRST PLAINTIFF  
AND : FLINN SAWMILLS LIMITED  
SECOND PLAINTIFF  
AND : WILSON INVESTMENT MANAGEMENT LIMITED  
DEFENDANT

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APPEARANCES/REPRESENTATION

PLAINTIFF : Mr A Khan [ Messrs Khan & Co]  
DEFENDANT : Ms P Low with Mr Skiba [Howards Lawyers]  
JUDGMENT OF : Acting Master Ms Vandhana Lal  
DELIVERED ON : 29 May 2019

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**INTERLOCUTORY RULING**

[Discovery for Specific Documents]

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**Application for consideration**

1. The plaintiff on 20 July 2017 filed a Motion seeking following orders:

- 1) *That the defendant make full and proper discovery required by the rules on this Honourable Court as to all documents regarding matters in issue between the parties on the claim and counterclaim;*
- 2) *That further, or in the alternative, the defendant discover and produce the following documents:*
  - a) *The " Chattels Lease" document mentioned and referred to in the defendant's defence and counterclaim and all documents relating thereto, including but not limited to:*
    - i. *An inventory of equipment leased;*
    - ii. *Documents concerning collection and delivery of the equipment leased;*

- iii. Documents evidencing payments and receipts;*
  - iv. Documents evidencing stamping and registration;*
  - v. Documents evidencing insurance and maintenance;*
  - vi. Documents concerning clearance and payment of duties;*
  - vii. All other documents of an incidental to the arrangements made by the Defendant with the Third Party(ies) concerning the leasing of the chattels, which are the subject of this action;*
- b) The documents of and incidental to the Sale and Purchase of Agreement of equipment between the defendant and G.G. Post & Pole Limited mentioned and referred to in Invoice dated 24 January 2014, including but not limited to:*
- i. An inventory of equipment sold;*
  - ii. Documents concerning collection and delivery of the equipment sold;*
  - iii. Documents evidencing payments and receipts;*
  - iv. Documents evidencing stamping and registration;*
  - v. Documents evidencing insurance and maintenance;*
  - vi. Documents concerning clearance and payment of duties;*
  - vii. All other documents of an incidental to the arrangements made by the Defendant with the Third Party(ies) concerning the leasing of the chattels, which are the subject of this action; and*
  - viii. A clear copy of the said Invoice;*
- c) The documents of and incidental to the Income Tax Clearance Certificate given by Fiji Revenue & Customs Authority to the defendant dated 24 February 2014 concerning the repatriation of funds, including but not limited to:*
- i. All application for clearance;*
  - ii. All supporting documents;*
  - iii. Details of payment and receipt;*

- iv. *An inventory of the equipment the subject of the clearance;*
  - v. *All other documents of an incidental to the taxation clearance concerning sale of the chattels, which are the subject of this action; and*
  - vi. *A clear copy of the said Clearance Certificate;*
- d) *Such further other document which the defendant has failed to discover in accordance with the defendant's obligation to make discovery under Order 24 Rules 1 & 2.*
- 3) *THAT the defendant do pay the costs of the plaintiffs on an indemnity basis, to be agreed or assessed.*
- 4) *And any other order that this Honourable Court may deem fit and equitable.*

The said application is made under Order 24 rules 3 and 7 of the High Court Rules and is supported by following affidavits:

- i. *Affidavit in support by Natasha Priyanka Kumar sworn on 19 July 2017 and filed on 20 July 2017;*
  - ii. *Supplementary affidavit by Priyanka Kumar sworn on 15 August 2017 and filed on 16 August 2017.*
2. The said application is opposed and the defendant filed an affidavit by Kevin Zaem Skiba sworn on 28 August 2017.
3. According to the plaintiffs, the defendant filed a counterclaim on 28 May 2015 referring to "chattels lease" by way of explanation as to what had occurred to some of the equipment removed from the plaintiff's possession.

The defendant has not discovered the "chattels lease" in their list of documents filed on 4 May 2015.

On 11 July 2017 the plaintiffs' solicitors wrote to Howards Solicitors via email. On 18 July 2017 the plaintiffs' solicitors again wrote to Howards Solicitors via email. Later on 19 July 2017 the plaintiffs' solicitors wrote to Howards Solicitors.

The plaintiffs have not received any correspondence from the defendant for proper discovery and full disclosure of document as sought in the summons.

The plaintiffs' solicitors received a letter from Howards Solicitors on 11 August 2017 after the motion was filed, inviting the plaintiffs' solicitors to withdraw the application. They

state the affidavit in support is deceptive as they had responded to the plaintiff's solicitor on 20 and 24 July 2017 informing them they will not disclose the documents as they are confidential in nature hence complying with Order 24 rule 10.

Via their email of 24 July 2017 the defendant's Counsel informed they have in possession of defendant's Lease Agreement and will only disclose if the Court orders on the plaintiff's application.

If they are to disclose with any application for further discovery it will be on "a without prejudice" basis with plaintiff not tendering the lease agreement as evidence.

4. In their opposition the defendant states that their statement of defence and counterclaim does not make any reference at all to a "chattels lease" as claimed by the plaintiffs.

There is no need for the defendant to include the claimed "chattels lease" in the defendant's list of documents as it has not been pleaded or forms part of the defendant's defence or counterclaim.

The requested "chattels lease" is commercial in confidence. Due to its expressed position the defendant cannot release the document to the plaintiff before filing its response.

The other documents identified and sought by the plaintiffs are documents incidental to the "chattel lease" and can only be disclosed if ordered to do so.

5. Via their supplementary affidavit filed on 22 January 2019, the defendant's counsel confirms disclosing the Deed of Lease (chattel lease) made on 2 February 2014 between Wilson Investment Management Limited and Green Gold Post & Pole Limited.

#### **Summary of the plaintiff's claim**

6. The plaintiffs' claim relates to a sale and purchase agreement entered between first plaintiff and defendant on 3 April, 2013.

The defendant was the vendor who agreed to sell to first plaintiff plant and machinery described in the schedule of properties attached for the sum of FJD\$250,000 free of all mortgages, charges and encumbrances.

The first plaintiff paid a sum of \$25,000 to the defendant as deposit under the sale and purchase agreement.

Another \$25,000 was to be paid by the first plaintiff upon obtaining grant of Foreign Investment registration certificate and approval.

A balance of \$200,000 was to be paid over a period of 12 months from date of receipt of such certificate with interest payable at the rate of 10% per annum.

As per the agreement the defendant gave the first plaintiff possession of the said plant and machinery which were situated on property on CT 23022 being Lot 1 on DP No. 5631 known as "Tovatova".

Under the said agreement the first plaintiff had the right to assign all its rights and interest to its nominee/assignee. Hence the plaintiff assigned all its rights and interest under the agreement to the second plaintiff Flinn Sawmills Limited.

The second plaintiff duly obtained the Foreign Investment Registration Certificates. The defendant was notified of this and was invited to provide details of the bank account to which \$25,000 was to be paid into.

It is alleged the defendant breached the agreement by purportedly terminating the agreement and giving a cancellation notice to the first plaintiff.

It is claimed the defendant purportedly sold and/or parted with the possession of the plants and machinery to third parties.

The defendant mislead and informed the plaintiffs that part of the plants and machineries were received from the property not for sale but were leased out to the third party on short term lease and the items were recallable when the plaintiffs had obtained the Foreign Investments Registration Certificate and were in a position to comply with the condition of the agreement.

#### **Defence and counterclaim by the defendant**

7. According to the defendant, the first plaintiff and defendant had previously entered into an earlier sale and purchase agreement dated 4 December 2012 for the plant and machinery on terms as per the agreement. It also admits that on or about 3 April 2013 the first plaintiff and defendant entered into a subsequent sale and purchase agreement. It alleges the plaintiff failed to perform its obligation under this first agreement.

The defendant admits the first plaintiff had paid to it \$25,000 as deposit payable upon execution of the agreement. The first plaintiff was to pay another \$25,000 upon obtaining the grant of Foreign Investment Registration Certificate and \$200,000 was to be paid over a period of 12 months from date of receipt of Foreign Investment Registration Certificate.

The defendant had given possession of the plant and machinery which were situated on CT No. 23022 Lot 1 on DP No. 5631 known as Tovatova, to the first plaintiff.

According to the defendant, the plaintiffs failed to take proper care of the plant and machinery.

The first plaintiff could not assign its rights and interests to the second plaintiff as the first plaintiff was de-registered from the Australian Securities and Investments Commission register of companies at the time the assignment took place. Hence the defendant disputes the validity of the agreement being assigned to second plaintiff.

The second plaintiff only advised then of the Foreign Investment Registration Certificate after the defendant had validly cancelled the agreement. And since the agreement was invalidly assigned to the second plaintiff, it did not complete obligation of the first plaintiff.

The defendant claims to have validly cancelled the agreement on 3 April 2014 under the terms of the agreement. A cancellation notice was served on the first plaintiff. Hence the defendant was entitled to deal with the plant and machinery in any manner as the agreement was validly cancelled.

By way of counterclaim, the defendant claim for monies due and owing under the first agreement as this was not cancelled by the parties and remained in force.

#### Law

8. Order 24 rule 1(1) of the High Court Rules states that once pleading is closed in action begun by Writ, there shall be discovery by parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.
9. Sub-rule 2 reads:
 

*"Nothing in this order shall be taken as preventing the parties to an action agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other"*
10. Order 24 rule 3 reads:
  - 3.-(1) *Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.*
  - (2) *Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom the discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.*
  - (3) *An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order.*

11. Party must disclose and the court is said to have powers to order the party to do so (rule 3 (1)) the following classes of documents:
- a. *Documents that are or have been in his possession.*
  - b. *Documents that are or have been in his custody.*
  - c. *Documents that are or have been in his power – this includes documents that are not in his possession or custody but he has a right to obtain from the person who has them.*

[Explanatory notes to Order 24 rule 2 on paragraph 24/2/13 at page 437 of Supreme Court Practice 1993 volume 1].

12. The words "*relating to any matter in question between them*" is said to refer to the questions in the action rather than the subject-matter of an action.

It also said discovery is not limited to documents which would be admissible in evidence. (*Compagnie Financiere du Pacifique v. Peruvian Guano Co.* [1882] 11 Q.B.D. 55 per Esher M.R. pp 62, 63; nor to those which would prove or disprove any matter in question; any document which, it is reasonable to suppose, "contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lend him to a train of inquiry which may have either of these two consequences" must be disclosed. Any documents shedding light on the amount of the damages claimed must be disclosed.

[paragraph 24/2/15 of the Supreme Court Practice 1993 Volume 1 at pages 437 - 438].

13. Order 24 rule 7 reads:

- 7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.*
- (2) An order may be made against a party under this rule not withstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.*
- (3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.*

14. Under Order 24 rule 8, discovery is ordered if the court is satisfied it is necessary for fair disposal of the cause or matter or for saving costs, either wise it may dismiss or adjourn the application and refuse to make such order.

15. The Supreme Court Practice commentary to Order 24 rule 7 states that subject to two qualifications the affidavit verifying list of document is held to be conclusive.

First qualification is that a party is entitled to apply for a further and better list, where it appears on the face of the list already served or on the face of disclosed documents or on an admission that in all probability the party has or has had other relevant documents beyond those disclosed.

The second qualification is that under the present rule an application may be made for an affidavit as to specific documents or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent the other party has or has had certain documents which relate to a matter in question. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power and (b) relevance of the specified documents (*Astra National Productions Ltd. v. Neo Art Production Ltd.*[1928] W.N. 218).

#### Determination

16. In their notice of motion the plaintiffs asks for *discovery and disclosure of "chattels lease" referred to in the statement of defence and counter claim.*

However, when one peruses the statement of defence and counterclaim there is no mention of the "chattels lease".

In paragraph 3 of the affidavit in support the deponent states "*that the Defendant filed a Counterclaim on 28 May, 2015 referring to a "Chattels Lease" by way of explanation as to what had occurred to some of the equipment, which is the subject of these proceedings removed from possession of the Plaintiffs*".

Upon perusal of the statement of defence and counterclaim I find there is no mention by the defendant as to what happened to the chattels.

17. In their application and affidavit in support the plaintiffs have not specifically shown the relevance of the "chattel lease".

18. However when one peruses the minutes of the pre-trial conference filed on 25 June 2017 on paragraph 1.24 it is agreed that:

*"That the defendant alleges that the defendant did deal with the chattels by a deed of lease with a third party in or about February 2014".*

Further on paragraph 1.26 it is agreed:

*"That the defendant in the defendant's dealings with the third party allegedly retained title and the right to require delivery of the chattels to it by the third party in order to ensure that the chattels are available on settlement under the second agreement".*



19. I also find that the documents sought out by the plaintiffs will assist court in making a finding how the defendant compensated for its loss due to non-performance of first agreement.
20. Hence I find there should be an order made for discovery of documents identified in paragraph 2 (a) (i) – (vii) and (b) (i) – (viii) of the prayer.
21. The plaintiff has failed to prove why document in prayer 2 (c) are necessary, I do not find it is necessary for disposing fairly of the matter or for saving costs. Hence I refuse to make orders for disclosure of the same.

### Final Orders

22. Accordingly, the defendant shall within 14 days from date of delivery of this ruling file a supplementary affidavit verifying list of document stating whether any document specified and described in paragraphs 2 (a) (i) – (vii) and (b) (i) – (viii) [see list below] is or has at any time been in its possession, custody or power and if not in its possession, custody, or power, when it parted with it and what has become of it.

*a) The " Chattels Lease" document mentioned and referred to in the defendant's defence and counterclaim and all documents relating thereto, including but not limited to:*

- i. An inventory of equipment leased;*
- ii. Documents concerning collection and delivery of the equipment leased;*
- iii. Documents evidencing payments and receipts;*
- iv. Documents evidencing stamping and registration;*
- v. Documents evidencing insurance and maintenance;*
- vi. Documents concerning clearance and payment of duties;*
- vii. All other documents of an incidental to the arrangements made by the Defendant with the Third Party(ies) concerning the leasing of the chattels, which are the subject of this action;*


*b) The documents of and incidental to the Sale and Purchase of Agreement of equipment between the defendant and G.G. Post & Pole Limited mentioned and referred to in Invoice dated 24 January 2014, including but not limited to:*

- i. An inventory of equipment sold;*

- ii. Documents concerning collection and delivery of the equipment sold;
- iii. Documents evidencing payments and receipts;
- iv. Documents evidencing stamping and registration;
- v. Documents evidencing insurance and maintenance;
- vi. Documents concerning clearance and payment of duties;
- vii. All other documents of an incidental to the arrangements made by the Defendant with the Third Party(ies) concerning the leasing of the chattels, which are the subject of this action; and
- viii. A clear copy of the said Invoice;

23. After service of the list/affidavit as ordered above, the defendant to allow the plaintiffs and/or counsel to inspect the document referred to in the list and to take copies thereof under Order 24 rule 9.
24. Parties to thereafter (if required) to reconvene another pre-trial conference and file an amended minutes before the next call date.



  
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Vandhana Lal [Ms]  
Acting Master  
At Suva.