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

CIVIL ACTION No. HBC 270/2019

BETWEEN : **SEQUITUR HOTELS PTY LIMITED** a duly incorporated company having its registered office at Piper Point, New South Wales, Australia

First Plaintiff

AND : **SEQUITUR CAPITAL PTY LIMITED** a duly incorporated company having its registered office at Piper Point, New South Wales, Australia

Second Plaintiff

AND : **SATORI HOLDINGS PTE LIMITED** a foreign company registered in Fiji under section 367 Companies Act 2015 having its registered office c/o Steven Pickering, Level 7, 1 Butt Street, Suva

First Defendant

AND : **ANDREW HUGH GRIFFITHS** of Nasoso, Nadi, Company director

Second Defendant

Appearances : Ms Lal for the First & Second Plaintiffs
Mr Hannif for the First & Second Defendants

Date of Hearing : 18 March 2020

Date of Judgment: 3rd April 2020

DECISION

1. On 18 October 2019 the first and second plaintiffs commenced proceedings by writ of summons in the High Court at Lautoka against the first and second defendants seeking damages of FJ$11,215,998 in four alternative causes of action for misleading and deceptive conduct in trade and for breach of contractual warranties. This conduct or these warranties were said to have been taken place or were given by the first and second defendants in the course of or as part of negotiations and agreement between the parties for the investment by the plaintiffs in 2018 in a holiday resort on Malolo Island off Denarau.

2. Simultaneously with filing the writ of summons, the plaintiffs applied ex parte for:
   i. A Mareva injunction freezing all of the assets in Fiji of the first and second defendants which the defendants were said to be in the process of disposing

of so as to frustrate the plaintiffs' claims, and requiring the defendants to disclose details of those assets.

ii. An Anton Piller order requiring the defendants to allow agents on behalf of the court to search for and take into their possession an extensive range of documents said to be at risk of destruction by the defendants.

iii. Orders preventing the second defendant Mr Griffiths from leaving Fiji (a writ *ne exeat civitate*) to escape the jurisdiction of the court.

3. In support of the ex parte application the plaintiffs filed two affidavits of Gordon Fell, a director of the plaintiff companies, dated 3 October 2019, and 18 October 2019. These affidavits referred to six bound volumes of copy annexures comprising many hundreds of pages. Subsequent affidavits (there have been four made by Mr Fell so far) add even more pages of evidence and annexures. In spite of this, the present application is founded mainly on the defendants' complaint that the plaintiff failed to make full disclosure of all relevant facts at the time of making their ex parte application referred to above.

4. The plaintiff's ex parte application came before me, and after reading the file, and hearing and reading submissions filed by counsel for the plaintiff the court made the Mareva and Anton Piller orders largely in the terms sought on 22 October 2019. After discussion with counsel, in the course of which I expressed some reluctance to make an order preventing Mr Griffiths from leaving the jurisdiction, at least on an ex parte basis, the plaintiffs chose not to pursue that application. I note that Mr Griffiths has attended court for most mention dates since then, so he has clearly not fled the country as the plaintiffs suggested was likely.

5. On 4 November 2019 the defendants filed an application to discharge or vary the orders I had made on 22 October. That application was accompanied by an affidavit by the second defendant sworn on the same date in response to the affidavits of Mr Fell filed prior to the making of the orders. Since then there have been three further affidavits sworn by Mr Griffiths, respectively on 12 and 24 November, and 13 January. The last two affidavits are in reply to Mr Fell's affidavits in response to the application for discharge or variation.

6. In addition to the evidence referred to, counsel for both parties have provided to the court written submissions (supported by authorities), and these have made my work much easier. I am grateful.

Background to the dispute

7. Prior to the events that give rise to these proceedings the first defendant company Satori Holdings Pte Ltd (*Satori*), of which the second defendant Mr Griffiths is a director, held a 50% interest in the Island Grace Joint Venture, the assets of which are owned by Island Grace (Fiji) Limited as bare trustee for the joint venture.

8. The main/sole asset of the Island Grace Joint Venture is the luxury beach resort called Six Senses Fiji on Malolo Island (*the resort*) which opened for business in April 2018. The resort is managed for the joint venture by Six Senses which operates a chain of luxury resorts around the world. The resort is in turn part of a larger mixed use development at Malolo (consisting of residential properties for sale, marinas, shops, sporting facilities etc). This wider development (apart from the resort) is being undertaken and is owned by a separate unincorporated joint venture, the Vunabaka Bay Joint Venture, the assets of which are owed by Vunabaka Bay Fiji Limited. These assets include infrastructure assets (water, electricity supply, a marina, boats for transport to the mainland etc) that are essential to the overall viability of the whole development, including its component parts such as the resort.

9. In addition to its interest in the resort, Satori also has a 31.66% interest in the Vunabaka Bay Joint Venture, and Mr Griffiths is also a director of Vunabaka Bay Fiji Ltd.

10. In 2017 the Island Grace Joint Venture was looking for a long term capital partner to contribute FJ$20m for a 50% participating interest in the joint venture, and Mr Fell of the plaintiff companies was one of those who was approached as a possible investor/purchaser. A great deal of relevant information was passed over or made available to Mr Fell (how complete this information was is the subject of the current proceedings), and in due course the plaintiff companies agreed to purchase a 50% share of the joint venture from the existing joint venture partners for the agreed amount of FJ$20m to be paid in two instalments. As a result Satori's share of the joint venture was reduced from 50 to 25%, and other participants' shares were also reduced.

11. The parties' arrangements were extensively documented. Much of that documentation was provided by the plaintiffs to the court in support of the ex parte application, but apparently not all, because when the extent of the plaintiffs' disclosure was challenged by the defendants in the course of making their application for discharge and variation of the orders, Mr Fell swore a 70 page affidavit in response (the third Fell affidavit) on 19 November 2019 which was accompanied by a further three volumes of annexures.

12. The original transaction documents were signed on 7 December 2017, and completion occurred on 25 April 2018 with payment by the plaintiffs of the initial FJ$16m payment to Island Grace Fiji Ltd as trustee for the joint venture.

13. It was an important component of the transaction that the funds to be invested by the plaintiffs were to be used to retire part of the joint venture's debt. Accordingly as part of the preconditions to completion, the joint venture trustee Island Grace Fiji Ltd on 21 April 2018 provided to Sequitur a warranty to the effect that following Sequitur's payment of the first instalment of the amount due, the joint venture's total debt would not exceed FJ$33m. For this to happen in the terms agreed it was important that the information that the plaintiffs had been given about funding the construction and development of the resort was accurate (if it was inaccurate, part of the money paid by the plaintiffs for their investment might be diverted to paying for development, rather than retiring debt).

14. It was also important, the plaintiffs say, that any information that they had been given in the course of their investigation of the investment, and negotiation of the terms of the investment, was both accurate and complete.

15. Accordingly, as part of the completion process Satori was required to and did give a warranty, effective both as at the date of the agreement in December 2017, and the date of completion in April 2018, in the following terms:

> *To the best of its knowledge all representations, information, disclosures and statements made by it or its agents to Sequitur during the course of negotiating and agreeing to this Deed are true and accurate and are not misleading in any material particular, whether by inclusion of misleading information or omission of material information.*

16. In these proceedings the plaintiffs say that Satori and Mr Griffiths were in breach of the warranty referred to in paragraph 15 above, or were guilty of misleading and deceptive conduct (presumably in breach of the Fijian Competition and Consumer Commission Act 2010) in that they had:

    i. made representations, or provided information, statements and disclosures as to the Island Grace Joint Venture's ability to

        - meet development costs from its own resources, and
        - apply to repay debt the money paid by the plaintiffs,

    that had no reasonable basis or were untrue and inaccurate.

ii. failed to disclose to the plaintiffs relationship difficulties that the defendants and the Island Grace Joint Venture had with the Vunabaka Bay Joint Venture and its participants that amounted to such a fundamental breakdown of trust and confidence between the parties that it was no longer tenable for the Vunabaka Bay Joint Venture to continue. This would in turn profoundly affect the success of the resort within that wider development, dependant as it was on the use of essential infrastructure and facilities owned by that joint venture.

17. The plaintiffs say that these breaches of warranty or misleading and deceptive conduct has caused them losses of:

i. $2,560,698 for losses arising from the project funding deficit/debt retirement issue.

ii. $8,655,300 for losses arising from the relationship issues with Vunabaka Bay Joint Venture (it seems that this represents the plaintiffs' 52% share of the reduced value of the Island Grace Joint Venture arising from these relationship issues).

Criteria for orders sought by plaintiffs

18. To obtain the orders sought in their ex parte application the plaintiffs needed to show:

i. For the Mareva injunction:

- a good arguable case in its substantive claim
- that the defendants had assets within the jurisdiction of the Court to which any orders could apply
- that there was a real risk (something more than a belief or fear of the plaintiff) of the defendants dissipating those assets or removing them from the jurisdiction for the purpose of frustrating any judgment that the plaintiffs might obtain.

ii. For an Anton Piller order:

- a strong prima facie case on its substantive claim
- that there is potential for actual or serious damage to the applicant if the Court declines the order
- the evidence being sought by the applicant/plaintiff is in the possession of the respondent/defendant

- there is a real risk that the respondent will dispose of or destroy the evidence if the orders are not made.

19. In the case of Mareva injunctions Lord Donaldson MR in the decision of the English Court of Appeal in **Polly Peck International Plc. v. Nadir and Others (no.2)** [1992] 4 All ER 769 at pp785-786 usefully set out the issues and the principles that apply:

> *I therefore turn to the principles underlying the jurisdiction.*
>
> *(1) So far as it lies in their power, the Courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may therefore obtain.*
>
> *(2) It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action.*
>
> *(3) Justice requires that defendant be free to incur and discharge obligations in respect of professional advice and assistance in resisting the plaintiff's claims*
>
> *(4) It is not the purpose of a Mareva injunction to render the plaintiff a secured creditor, although this may be a result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed.*
>
> *(5) The approach called for by the decision in **American Cyanamid Co. v. Ethicon Ltd**[1975] AC 396 has, as such, no application to the grant or refusal of a Mareva injunction which proceeds on principles which are quite different from those applicable to other interlocutory injunctions.*

These words were referred to and followed by Chitrasiri JA in the Fiji Court of Appeal in **Silver Beach Properties Ltd v Jawan** [2011] FJCA 48 in a case where the bank account of an employee who had stolen money from his employer, and fled overseas was frozen.

20. Emphasising the point referred to in item 4 of the passage in paragraph 19 the House of Lords in **Fourie v Le Roux & ors** [2007] UKHL 1 (per Lord Bingham) said:

Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign.

21. Hence the key words in the criteria listed for a Mareva injunction in paragraph 18 above are 'for the purpose of frustrating any judgment that the plaintiff may obtain'. If the plaintiffs wanted to have security for any claims that they might have against the defendants as a result of the transaction they were considering, they had the opportunity to negotiate for such security. Understandably they did not or could not do so. But the function of the court in such situations, and the purpose of any order that is made, is to ensure that an order of the court is not rendered nugatory by actions of a party calculated to frustrate a legitimate claim. More important than the plaintiff's interest in these situations is the need to preserve confidence in the Courts as an institution for resolving disputes and giving aggrieved parties the opportunity to obtain appropriate and effective redress. Failure to do so may lead parties to resort to other means of redress, with anarchy the ultimate result. The purpose of a Mareva injunction is not to help a party improve on the arrangement it agreed to.

22. While obtaining a Mareva injunction is not confined to cases where the plaintiff has a proprietary claim to the funds or assets that the plaintiff seeks to freeze, it is nevertheless true that the courts are much more ready to grant such an injunction in those cases than they are in cases where there is no connection between plaintiff's claim and the defendant's assets. In this important sense a Mareva injunction, while it is broader in its application, and may be far more intrusive than the remedy contemplated by Order 29, rule 2 of the High Court Rules, which refers only to property that is the subject matter of the court proceedings, serves the same purpose. Examples of such cases include the Fiji Court of Appeal's decision in **Silver Beach Properties** referred to above, and the English Court of Appeal's decision in **Fitzgerald v Williams** [1996] 2 All ER 171.

23. In relation to Anton Piller orders it is useful to remember the origins of such orders, such as in the case after which the orders have come to be named, **Anton Piller Kg v Manufacturing Processes Ltd** [1975] EWCA civ 12. This was a case about the theft of trade secrets and confidential information, and this context needs to be remembered when we come – as courts often do - to apply Lord Denning's exposition of the principles behind such orders:

Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say, 'Get out.' That was established in the leading case of ***Entick v. Carrington****. None of us would wish to whittle down that principle in the slightest.*

But the Order sought in this case is not a search warrant. It does not authorise the Plaintiffs' Solicitors or anyone else to enter the Defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the Defendants. The Plaintiff must get the Defendant's permission. But it does do this: It brings pressure on the Defendants to give permission. It does more. It actually orders him to give permission—with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court.

Lord Denning went on to say:

It seems to me that such an order can be made by a judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties, and when, if the defendant were forewarned there is a grave danger that vital evidence will be destroyed ... so that the ends of justice be defeated, and when the inspection would do no real harm to the defendant or his case

and Lord Ormerod in the same case suggested:

There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

24. Because of the nature of the case, in **Anton Piller** the Court of Appeal was satisfied that if the court refused to make the order sought on an ex parte basis the defendant would have the opportunity to pass on the trade secrets to the plaintiff's competitor. This would have negated the whole point of the proceedings, even if the plaintiff was ultimately successful, because once communicated, the value to the plaintiff of the trade secrets and confidential information was lost. Hence the court made orders ex parte requiring the defendants to give access to the plaintiff's agents to identify and secure all the confidential information. It should also be remembered that the information that was the subject of that case, and that the court authorized to be secured in the manner directed, belonged to the plaintiff, and

therefore the defendant had no right to have or keep that property in denial of the plaintiff's ownership.

25. I acknowledge that Anton Piller orders have been made in many different contexts since the first case, and that many of those cases no doubt are much closer to the situation that arises with the present parties than the original case was. Nevertheless, the articulation by the Court of Appeal of the circumstances in which such an intrusive order can be justified needs to be understood in the context of that case. **Anton Piller** was not a case, as this one is, where what is sought to be preserved/secured is documentary evidence that unquestionably belongs to the defendant. Nor was it a case, as this one is, where, while the documentary evidence sought to be preserved may no doubt be useful to the plaintiff:

- it is just as likely to be useful to the defendant in the conduct of their defence,
- it – or parts of it - is very likely also to be in the possession of others connected closely or peripherally with the dispute from whom discovery can be sought
- it is likely to be inter-related (e.g. in email trails, or part of a sequence of regular accounts) in a way that makes it obvious when parts of the chain are missing.
- the absence of any evidence that is in the control of the defendants is likely to lead to inferences against the defendants, rather than be a disadvantage to the plaintiffs
- given the passage of time since these disputes were first raised (at least six months before these proceedings were filed), the defendants have had ample opportunity to destroy anything that they wished to destroy
- there is no evidence that the defendants have destroyed or are likely to destroy any records, either before or since the orders were made.

Ex parte applications – the importance of disclosure

26. The importance, where an ex parte application is made, for full and frank disclosure by the applicant of all relevant facts (including those that are in dispute, or are adverse to the applicant's case) is incontestable. In **Ghafoor & others v Cliff & others**[2006] 2 All ER 1079 David Richard J held, at p1091:

> *... the claimants submit that Mr. Cliff's affidavit in support of the application contained serious misrepresentations and failed to make full and frank disclosure of relevant facts. These are serious criticisms in any case, but the importance of accurate evidence is particularly acute on an application without notice, and the duty of disclosure on such an application has been stressed by the courts on many occasions (see, for example,* ***Fitzgerald v Williams, O'Regan v Williams*** *[1996] 2 All ER 171 at 177, per Bingham MR). The principles are well established and well known on applications without notice for injunctions and other interim relief, but they are fundamental to the proper functioning of the court's process on any application*

without notice. It is of course the very fact that the application is made without notice to other interested parties which makes these principles so important. Other parties do not have the opportunity to correct or supplement the evidence which has been put before the court.

27. In **The Vosso** [1984] 1 QB 477 Robert Goff LJ had this to say about the consequences of inadequate disclosure:

> *It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made on the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified (see **R v Kensington Income Tax Comrs, ex p Princess de Polignac**[1917] 1 KB 486).*

And although these dire consequences have moderated, this is not because such disclosure is now seen as less important. In **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 at 1356 the English Court of Appeal set out the principles for applying consequences for non-disclosure:

> *In considering whether there has been relevant non-disclosure and what consequences the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:-*
>
> 1. *The duty of the applicant is to make a 'full and fair dsclosure of all the material facts' see **Rex-v- Kensinghton Income Tax Commissioners, Ex-parte Princess Edmond de Polignac** [1917] 1 KB 486, 514, per Scrutton L.J.*
> 2. *The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors: see **Rex-v-Kensington Income Tax Commissioners**, per Lord Cozens-Hardy M.R., at p. 504, citing **Dalgish v Jarvie** (1980) 2 Mac. & G. 231, 238 and Browne-Wilkinson J. in **Thermax Ltd v Schott Industrial Glass Ltd** [1981] FSR. 289, 295.*
> 3. *The applicant must make proper inquiries before making the application: see Bank **Mellat v Nikpour** [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
> 4. *The extent of the inquiries which will held to be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant; see for example, the*

examination by Scott J. of the possible effect of an Anton Piller order in ***Columbia Picture Industries Inc. v Robinson*** *[1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank* ***Mellat v Nikpour*** *[1985] F.S.R. 87, 92-93.*

5. *If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains (an ex parte injunction) without full disclosure .....is deprived of any advantage he may have derived by that breach of duty.' se per Donaldson L.J. in* ***Bank Mellat v Nikpour*** *at p. 91, citing Warrington L.J. in the* ***Kensington Income Tax Commissioner'*** *case [1917] 1 K.B. 486, 509.*
6. *Whether the fact not disclosed is of sufficient materially to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*
7. *'when the whole of the facts, including that of the original non-disclosure, are before (the court, it) may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.' per Glidewell L.J. in* ***Lloyds Bowmaker Ltd v Britannia Arrow Holding Plc.****, ante, pp. 1343H – 1344A'.*

In the same case Balcombe LJ stated:

The rule that an ex-parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained: ***seeRex v Kensington Income Tax Commissioners, Ex-parte Princess Edmond de Polignac*** *[1917] 1 K.B. 486, 509. But it also serves as a deterrent to ensure that persons who made ex-parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex-parte injunction was obtained: see in general* ***Bank Mellant v Nikpour*** *[1985] FSR 87, 90 and* ***Lloyds Bowmaker Ltd v Britannia Arrow holdings Plc.****, ante, p. 1337, a recent decision of this court in which the authorities are fully reviewed. I make two comments on the exercise of this discretion: (1) it is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon l.J. in the* ***Lloyds Bowmaker*** *case, at p. 1349C-D, that, if there is jurisdiction to grant a fresh injunction, then there must also be discretion to refuse, in an appropriate case, to discharge the original injunction.*

15. Inoke J, in **Vinod Patel & Company v Vimal Construction & Joinery Works Ltd** [2011] FJHC 194 cited the following passage of Donaldson LJ in **Bank of Mellat v. Nikpour** [1985] F.S.R. 87;

> *This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. But happily we have been referred to a dictum of Lord Justice Warrington in the case of* ***R.v.Kensington Income Tax Commissioners, exp. Princess Edmond de Polignac*** *[1917] 1 K.B. 486 at p. 509. He said: 'It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.'*

28. The reason for these policies is obvious, but it is useful to remind oneself of this to understand how these principles apply in any given situation. The starting point is the *audi alteram partem* principle (translated as 'listen to the other side') that gives any person the right to be heard before they are judged, and which is a foundation principle for the whole of the justice system, be it criminal or civil. An *ex parte* (without notice) application is the antithesis of this principle. A party making such an application invites the court to make orders affecting the rights of someone else, only on the basis of what the court is told by the applicant, and without the other party having the opportunity to be heard, or even being told that the application has been made. Centuries of experience has shown time and time again that there is never only one side to any story, and that denying a party the right to be heard before judgment is made is the antithesis of justice, and usually leads to poor outcomes. Therefore making orders on ex parte applications is justifiable only where the harm that may occur if notice of the application is given outweighs the harm that may result from making orders that, in hindsight, should not have been made. The dilemma a court has in making this judgment is that while the applicant is ready and willing to explain the harm that will result for him or her if no order is made, there is no-one - on an ex parte application – to present the other side of the story.

29. Courts have sought to address this dilemma with a number of strategies. These include:

- the requirement for undertakings as to damages (and the enforcement of those undertakings if an order is made that should not have been),

- the principle that ex parte orders will not be made if damages are likely to be an adequate remedy for any harm that an applicant suffers,
- the making of temporary orders (which the court will reconsider on application by the defendant) and short return dates.

The principle that a party making an ex parte application must make full and frank disclosure of all relevant facts, and the supporting practice of setting aside orders obtained where this has not happened, is perhaps the most important of these strategies. It imposes on the party responsible for the non-disclosure (and their advisers), the consequences of their own failure to provide the information they should have. The fact that in rare cases a court, having set aside an order obtained without full disclosure, may then, having seen all the relevant evidence and heard argument, immediately make the same orders again, should not be seen as weakening the requirement for disclosure. Rather, it is an illustration of the need to do justice.

30. With these principles in mind, what are the material facts that an applicant needs to disclose? As principle 2 from the **Brink's Mat** case (paragraph 27 above) points out, what is material is for the court to determine, and includes anything that it is material for the judge to know in deciding the application before the court. Because the court can only determine the materiality of facts that it knows, this means that the applicant must err on the side of including facts that might possibly be material, rather than made a judgment for itself. In the present case any facts that shed light on the following issues will be material:

- The basis for and strength of the plaintiffs' case, and a realistic assessment of the amount that might be awarded should the plaintiff succeed. This will include all matters in dispute between the parties in this and other jurisdictions, so that the court can have a perspective on where the present application sits in the context of the wider issues.
- All matters that might foreseeably be raised in defence of that case, and the factual basis for those contentions (this will inevitably include all matters that have already been raised by the defendant in answer to the plaintiffs' claims, but will not necessarily be confined to that). If this means that the plaintiff has to disclose possible defences that the defendant hasn't yet thought of, that is a risk that the plaintiff will need to take if it wishes to make its application without notice.
- In relation to the Mareva application, information about the defendants' assets (including any available history of the acquisition and disposal of those assets, and the manner in which such assets are held, i.e. through trusts or companies), liabilities, business and lifestyle that would enable the court to determine the relevant issues of whether there is a real likelihood (as

opposed to a fear on the plaintiffs' part) that the defendant will dispose of those assets for the purpose and with the likely effect of frustrating any judgment that the plaintiff is able to obtain.

- In relation to the Anton Piller order: information about the material that the applicant already has, or that is available to him, as compared with what the applicant seeks to secure from the defendants; Information about alternative sources of the information, including whether third parties have the information and can provide it; Evidence about the likelihood that the defendants would destroy that material, and a realistic appraisal of how the plaintiffs' case would be harmed by such destruction.
- A chronology of the dispute, including when the issues raised in the claim were first referred to the defendants, and what dialogue has taken place between the parties leading up to the making of the application. This will enable the court to have a sense of how urgent the matter is (including the sense of urgency shown by the applicant), and what opportunity the defendant has already had to do the things that the application seeks to enjoin, and whether the defendant has taken that opportunity.

Alleged non-disclosure by the applicant/plaintiffs

31. The main basis for the defendants' application to discharge or vary the orders made by the Court on 22 October 2019 is that the applicant/plaintiffs did not meet their obligation of full and frank disclosure. The aspects of non-disclosure that have been raised by the defendants are:

    i. Failure to disclose that Mr Fell and Island Grace Fiji Ltd entered into a non-disclosure agreement in October 2017 in anticipation of the joint venture providing information to the plaintiffs about the investment opportunity. It is said that disclosure of this information would have shown that the information that the plaintiff now claims is incomplete and wrong was provided not by the defendants, but by the joint venture, which would in turn reflect on the alleged strength of the case against the defendants.

    ii. The fact that from at least January 2018, after the agreement was signed whereby the plaintiffs were to purchase a share of the joint venture, but well before the completion date, the plaintiffs were aware of the fact that the joint venture existing debt facilities were insufficient to fully cover the project costs. This would mean that the plaintiffs went ahead with the transaction with their eyes open, and that they had known about the

issues for more than 18 months before the application for the Mareva and Anton Piller orders was made, and would reflect on the strength of the plaintiffs' case, or the defendants' defence.

iii. That on 21 April 2018, in anticipation of completion of the plaintiffs purchase of a share of the joint venture, the plaintiffs confirmed in writing the satisfaction of the conditions precedent to completion, including the provision by the joint venture (via Island Grace Fiji Limited, its trustee) of the debt limit undertaking confirming the level of the joint ventures indebtedness after the plaintiffs investment, would not exceed $33m. It is said that at the time this confirmation was given, the plaintiffs well knew that it could not be met by the joint venture. Again, the issue is the extent to which the plaintiffs were mislead, or have suffered damage. Again this has an impact on the strength of the parties' respective cases, and on the justification for the application, and the manner in which it was made, and would assist the court to make a decision on whether or not to make the orders sought.

iv. That a settlement was reached in January 2019 of the parties' dispute arising from the breach of the debt limit undertaking, whereby the plaintiffs share of the joint venture was increased, in compensation for the breach of the debt limit undertaking. The significance of this fact is that it shows how long these dispute issues had been festering, and the possibility of an argument by the defendants that the issue had already been settled, and/or that the plaintiffs had already been compensated for the breaches they complained of. This is an issue that affects both the strength of the respective parties' positions, and on the calculation of damages.

v. That the defendants' would also argue that the January 2019 settlement took into account and therefore included settlement of the Vunabaka Bay Joint Venture relationship issues.

vi. That in any case the Vunabaka Bay Joint Venture had given an assurance in writing in November 2017 of its commitment to supporting the Six Senses resort.

vii. That the threats by Vunabaka Bay Joint Venture to damage or withhold essential services to the Six Senses Resort did not occur until some six months after completion of the plaintiffs' purchase and could not therefore have been disclosed.

viii. That the property owned by Blue Views LLC (in which the second defendant was a shareholder and director) had been on sale for almost a year before the application for Mareva orders was made, and before the present proceedings were raised with the defendants in May 2019. Hence the sale of the property was not likely to be part of an attempt to dissipate assets to frustrate any judgment the plaintiffs might obtain.

ix. The sale of the defendants' interests in the Island Grace and Vunabaka Bay Joint Ventures would be subject to extensive pre-emptive rights in favour of other joint venture partners (including the plaintiffs), and could not therefore be completed quickly or without notice to the plaintiffs of any sale. Hence there was no need – certainly no urgent need - for the orders restraining this sale at this time.

x. The fact that the plaintiffs had first raised their current claims against the defendants in May 2019, and had sent a draft statement of claim to the defendants' solicitors in September 2019, so that the defendants had ample time to destroy documents or records, if that is what they were minded to do, before the ex parte applications were made.

xi. The fact that most if not all the records sought to be seized and preserved replicated (or were merely copies of) primary and hard copy records held by the Joint Venture itself, or by other parties to the joint venture, which were outside the defendants' control.

xii. The significance of the fact that the defendants were themselves contemplating action against the Vunabaka Bay Joint Venture, and so would probably not wish to destroy documents that might be relevant to that action.

xiii. The full history of the drug allegations against Mr Griffiths, and the fact that this history did not demonstrate a history of Mr Griffiths fleeing Fiji when facing legal issues.

xiv. The plaintiffs' intention to issue separate proceedings in New Zealand relying on similar causes of action (breach of warranty and misleading and deceptive conduct) arising from the same or similar issues (disclosure of information by the Island Grace Joint Venture in the lead-up to execution and completion of the plaintiffs' investment in the joint venture). A draft copy of the statement of claim in the New Zealand

proceedings was sent to the defendants' solicitors in September 2019, at the same time as a copy of the statement of claim in these proceedings. It is said by the defendants that the disclosure to the court of these proceedings would have put in question the bona fides of evidence given by the plaintiffs about the jurisdiction of the High Court of Fiji (see paragraphs 78-79 of Mr Fell's first affidavit of 3 October 2019). It might also have enabled the court to get a perspective of the overall situation, and the plaintiffs' tactics, that might have affected its decision on whether to make the orders sought, at least on an ex parte basis. Given that the New Zealand proceedings seek damages of over $17m, the information would also put into perspective the plaintiffs' argument that the Fiji assets of the defendants should be frozen to ensure that the defendants could not frustrate any order that the court might make in the current proceedings. Now that we know about the New Zealand claim, the Mareva injunction takes on the appearance of a step to secure claims by the plaintiff that greatly exceed the amount of his investment in the joint venture.

32. The plaintiffs' response to some of these allegations is troubling, particularly in the context of an application that was supported – in the first instance - by hundreds of pages of annexures, in six volumes much of it only peripherally relevant to the issues. The non-disclosure agreement and the parties to it, is likely to be a much more significant document than, say, the Foreign Investment Registration Certificate of the first defendant, or the New Zealand Companies Office certificate of incorporation for Vunabaka Bay Fiji Ltd (which is not a party to these proceedings). It records that at the commencement of the parties' negotiations that led to these proceedings, the contract was between Mr Fell and Island Grace Fiji Ltd, and neither of the defendants was a party. Yet the two documents referred to above are included in the numerous (58) annexures to Mr Fell's first affidavit, while the non-disclosure agreement was not mentioned, even if only to be explained away. Of this aspect (the plaintiffs do not contest that this agreement was not disclosed) – which is by no means, in my view, the most important aspect of non-disclosure raised by the defendants - the plaintiffs' counsel dismisses the complaint by explaining in her submissions[1] that the non-disclosure agreement was superseded by the warranties in the Joint Venture Interest and Capital Contribution Deed (to which the first defendant was a party as warrantor) and as a consequence:

> *... the [non-disclosure agreement] was no longer material and consequently did not require disclosure.*

[1] Paragraph 11 Respondents' Submissions in Reply to the Applicants' Submissions dated 22 March 2020.

33. In paragraphs 22 to 24 of same submissions counsel is similarly dismissive of the complaints about non-disclosure of the settlement of the dispute about the breach of the debt limit undertaking. There is no dispute that in January 2019, in settlement of concerns raised some months earlier by the plaintiffs about breaches of the debt limit undertaking (i.e. the undertaking that following completion the debts of the joint venture would not exceed $33m), the shares in the joint venture we re-arranged, increasing the plaintiffs' share from 50% to 52%. This is disclosed by the plaintiffs in paragraphs 28 & 29 in Mr Fell's first affidavit in support of the ex parte applications. What is not disclosed in those paragraphs, or anywhere else, is the defendants' argument, which by October 2019 the plaintiffs were certainly aware of even if they didn't agree with it, that the restated joint venture agreement of January 2019 resolved all these newly raised matters. The plaintiff has gone to some lengths, in Mr Fell's third and fourth affidavits, and in counsel's submissions, to show that the defendants are wrong in saying that all these issues were settled by the January 2019 restated joint venture. And they may be right. But that is not the point; on an ex parte application the applicant's duty of full and frank disclosure extends to all issues that the applicant knows or expects (or should know and expect) the defendants will raise by way of defence. It is not for the applicant to decide that material can be omitted because the defendants' arguments are wrong. Both the court and the defendants are entitled to have the court receive this information so that it can make its own assessment about its significance. Hence the submission by counsel in paragraph 24 on this issue:

> *For the above reasons, the argument that the project funding deficit claim (or any other claims other than the breach of the debt limit undertaking) has already been settled as a result of the Breach of Debt Limit Undertaking Documentation[this refers to the January 2019 settlement] has no merit and cannot constitute a material non-disclosure by the [plaintiffs] ...*

not only implicitly accepts that the non-disclosure has occurred, but is also wrong in its assessment of the significance of that non-disclosure.

34. In the same vein is the submission in paragraph 19 of the submissions in reply:

> *For the foregoing reasons, the argument that the Debt Limit Undertaking in and of itself resolved the project funding deficit claim has no merit and was not required to be disclosed to Court. Again, this does not constitute a material non-disclosure by the [plaintiffs] and cannot form the basis of a discharge of the Injunctive Orders.*

35. I have not attempted to deal with the weight and significance of every aspect of the 14 instances of non-disclosure raised by the defendants as listed above. Some of these are less important than others, and some of the complaints about non-disclosure are more or less

contestable, but cumulatively the failure to provide full and frank disclosure presents a distorted picture of:

i. the strengths and weaknesses of both the plaintiffs' and the defendants' positions on the substantive claims (i.e. whether the plaintiff has a strong prima facie case, a good arguable case or a serious question to be tried) and the amounts claimed as compensation, and

ii. the facts whereby the Mareva injunction, Anton Piller order and Writ ne exeat civitate were said to be justified.

36. In particular I find it inexplicable that, in the context of applying for an order that Mr Griffiths should not leave Fiji, and for a Mareva injunction freezing assets in Fiji, the plaintiffs did not think it was important to disclose that:

i. they were about to issue proceedings in New Zealand that Mr Griffiths would, at some point, have to travel to New Zealand to defend, and

ii. that they thought it worthwhile (notwithstanding their concerns about the disposal of assets in Fiji) to sue in New Zealand for recovery of even more in damages than they were claiming in Fiji.

While the plaintiffs elected to withdraw the *ne exeat civitate* aspect of their application, the non-disclosure of this evidence shows I think the mindset of the plaintiffs against which all the other aspects of non-disclosure should be assessed. It demonstrates that the plaintiffs were prepared to make a selective use of facts that supported their applications, while failing to disclose material that might have been adverse to their position.

37. In paragraphs 83 and 84 of his first affidavit of 3 October 2019 Mr Fell says:

> *83. ... I have been advised that the Plaintiffs are under a duty to make full and frank disclosure of all or any known facts that may affect the decision of whether this Honourable Court should grant these Orders.*
>
> *84. For this reason, the Plaintiffs have gone to great lengths to ensure that they have complied with the requirement of full and frank disclosure as can be seen by the substantial documentation annexed herein that clearly sets out:*
>
> *i. the facts that give rise to the Plaintiffs' Substantive Claim as well as the claims for interlocutory relief (please see paragraphs 1 through 8 hereinabove);*
>
> *ii. the facts relied upon justifying the Plaintiffs' interlocutory applications being made on an ex parte basis as there is a serious threat of destruction or disposal of evidence, asset dissipation and the 2nd Defendant fleeing the Fijian jurisdiction; and*

iii. *the precise relief being sought through a Mareva injunction, Writ Ne Exeat Cevitat and Anton Piller Orders in order to preserve the position of the Plaintiff in not being frustrated from realizing an award of this Court.*

38. Regrettably there is nothing in this paragraph or elsewhere in Mr Fell's affidavits that acknowledges or shows awareness of the duty to disclose information even where that is adverse to the plaintiffs' case and applications. That duty is not discharged by annexing hundreds of pages of annexures from which might be distilled the essence of the defendants' response, or analysis of which might provide insights into defences that are available to the defendants. It is part of the plaintiffs' duty of disclosure to provide that distillation and analysis in a form that enables the court – in the absence of the defendants, given the plaintiffs' choice to bring the applications ex parte – and in the context of a situation that is said to be urgent, to weigh the plaintiffs' case against that of the defendants. That is a serious responsibility, which the plaintiffs must fulfill conscientiously. Nothing in Mr Fell's affidavits sets out information that by October 2019 Mr Fell well knew would be the defendants' response to the substantive proceedings, and to the applications the plaintiffs were making. Instead the affidavits (including by the volume of annexures) obscure rather than reveal the real issues, tend to deter rather than encourage any analysis of the facts, and characterize Mr Griffiths by their selective use of evidence as a devious and self-absorbed, if not criminal character who is likely to try, and is readily able to flee the country and dissipate his assets to escape liability. A further extract from paragraph 119 of Mr Fell's first affidavit is illustrative:

> *I say that the 2nd Defendant has a history of absconding from Fiji where a legal issue arises. This can be illustrated by his reaction to allegations of drug possession in April 2018, where he immediately left Fiji with his wife and three (3) young children without word or warning. By the 2nd Defendant's own admission ... he moved overseas despite the stress it caused to his family members. This pattern of behavior coupled with the misleading and deceptive conduct in his dealings with the Plaintiffs leads me to believe that there is a real risk of him absconding from Fiji.*

Worst of all, Mr Griffiths is apparently a poor parent. This does not constitute full and frank disclosure of all material facts on this issue. I am satisfied that Mr Fell had or could readily have obtained information that enabled him to present a much more balanced view of this incident. He chose not to because it didn't suit his case.

39. I do not believe (it is not suggested) that these aspects of non-disclosure arise accidentally, or by oversight. I am more inclined to suspect (the readiness to withdraw the writ *ne exeat civitate* when challenged is a clue) that the plaintiffs' approach to this dispute is a calculated tactic to overwhelm and intimidate the defendants by the volume and number of proceedings in Fiji and New Zealand, and

by the degree to which they can cause the defendants inconvenience and force them to incur expense, possibly with a view to obtaining further commercial advantage in negotiations over the future of their joint business ventures. This may be a legitimate business strategy; what is not permissible is to provide, in pursuit of this or any other objective, something less than full and frank disclosure on these applications.

40. The plaintiffs have complained about the defendants' failure to comply with the order for disclosure of assets, and the Anton Piller order for the delivery of documents. They argue that these failures are contemptuous, and show the defendants' readiness to frustrate the orders of the court, hence making it more likely that they will remove or dissipate assets, and destroy records. I am not persuaded by this. No evidence has been provided by the plaintiffs about the manner in which they sought to execute the orders of the court. The impression I have (I accept that this is not based on evidence put before the court, and I may be mistaken) is that the parties have reached some sort of accommodation about compliance with the orders pending the hearing and decision on the defendants' application for a discharge of the orders. If this is not the case, it was up to the plaintiff to attempt to execute the orders (which set out in detail what was to happen) and to apply for such further orders as may have been necessary to do so, including an application for committal for contempt if that was called for. No such application has been made to my knowledge.

41. Nor do I accept that the fact that the defendants have kept on the market property that was listed for sale before the orders were made, and have given notice of their wish to sell other assets, amounts to breaches of the Mareva orders. There is a difference between advertising for sale, and selling and disposing of assets. I have no reason to believe that the defendants and their advisers are not aware of that difference, or are not aware that activity by advisers that knowingly enables a breach of court orders is itself contemptuous. The fact that the defendants are openly continuing to try to sell their investments is not necessarily sinister, and does not prove the plaintiffs' case for restraining orders. See paragraph 2 of the principles listed by Lord Donaldson MR in **Polly Peck** (paragraph 19 above).

42. I am satisfied that the orders made on 22 October 2019 should be discharged on the basis that they were made following and as a result of non-disclosure by the plaintiffs of material facts. I am not persuaded by the evidence now available that there is a real risk (something more than a belief or fear of the plaintiff) of the defendants dissipating their assets or removing them from the jurisdiction for the purpose of frustrating any judgment that the plaintiffs might obtain. If and when the

plaintiffs are able to provide evidence that this is happening, they can make a fresh application for orders at that time.

43. Nor am I satisfied that the criteria for an Anton Piller order (set out in paragraph 18 above) are met. I expressed my doubts about this aspect of the plaintiffs' application in my reasons given on 25 October 2019. Now that I have seen more evidence, and heard/read the parties' submissions I am more than sure that the plaintiff cannot meet these tests. The documents in the possession of the defendants are not essential to the success of the plaintiffs' claims, and there is no credible evidence that there is any risk that the defendants will destroy those documents. The plaintiff can obtain discovery and inspection in the usual way. Accordingly I am not persuaded that there is any need (or indeed jurisdiction) to make new Mareva and Anton Piller orders in place of those that are discharged.

44. The defendants are entitled to costs on this application which I summarily assess (having regard to the number and volume of affidavits, and submissions) at $6,000.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 3rd **day of** April **20** 20

SOLICITORS:
Lal Patel Bale Lawyers of Nadi for the first and second plaintiffs
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