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

Civil Action No.: 214 of 2019

BETWEEN : **EVOLUTION FIJI LIMITED** a limited liability company having its registered office at Neel Shivam Lawyers, Level 1, 11 Renwick Road, Suva, Fiji.

PLAINTIFF

A N D : **RADISSON HOTELS (FIJI) PTE LIMITED** trading as **RADISSON BLU RESORT FIJI LIMITED** a limited liability company having its registered office at its premises at Denarau Island, Nadi, Fiji.

DEFENDANT

Appearances : **(Ms) Joana Takali for the plaintiff**
Mr. Melvin Chand for the defendant

Hearing : **Monday, 30th September 2019.**

Ruling : **Friday, 24th January 2020.**

RULING

[A] INTRODUCTION

(1) The matter before me stems from an inter-parte notice of motion filed by the plaintiff seeking the grant of the following orders:-

1. *That the Plaintiff be allowed to complete the 43 days remaining term of Contract signed by the Plaintiff and the Defendant on the 25th and 26th days of July, 2016.*

2. *That the Plaintiff be allowed to continue its business operations at the Defendant's premises after the completion of 43 days until the determination of these proceedings.*

3. *That the Defendant by itself and/or its servants and/or agents and/or employees or otherwise howsoever be restrained from interfering with the Plaintiff's business operations at the Defendant's premises.*

4. *That the costs of this application be costs in cause.*

(2) The application is made pursuant to Order 29, rule 1 (2) of the High Court Rules 1988 and under the inherent jurisdiction of the High Court.

(3) The prayer (1) and (2) in the inter-parte notice of motion are mandatory injunctions and payer (3) is for a prohibitory injunction. The defendant opposes the application.

(4) The following affidavits have been filed;

(a) Affidavit in Support of Mathew James McKinley and Asilika Edwin both filed on 28th August, 2019 on behalf of the plaintiff.

(b) Affidavit in Opposition of Denny Akira Tanaka filed on 17th September, 2019.

(c) Affidavit in Reply of Mathew James McKinley filed on 25th September, 2019.

[B] BACKGROUND

(01) The plaintiff and the defendant were parties to a contract for the plaintiff to provide water sporting activities at the defendant's premises for defendant's guests as well as the general public. The contract was executed on 25th and 26th July, 2016 for a term commencing on 01st September, 2016 and expiring on 31st August, 2019.

(02) To give the whole picture of the action, I can do no better than set out hereunder the avertments/assertions of the pleadings. In the **affidavit in support** of the Inter-parte Notice of Motion filed on 28th August, 2019, Mathew James McKinley, a director of the plaintiff company deposes as follows in his affidavit sworn on 26th August, 2019.

1. *I am a Director of the Plaintiff Company and am duly authorized by the Plaintiff to make and swear this Affidavit on its behalf.*

2. *Annexed hereto and marked with the letter "A" is copy of Authority from the Plaintiff to me.*

3. *I confirm and verify the contents of the Statement of Claim filed herein.*

4. *The matters deposed herein are within my knowledge and others have been obtained from records maintained in the relevant file.*

5. *The Plaintiff provides water sports activities under a Contract that was signed on the 25th and 26th days of July, 2016.*

6. *Annexed hereto and marked with the letter "B" is copy of Contract.*

7. *The Defendant on the 19th of July, 2019 terminated the Contract citing that the Plaintiff had repudiated the Contract which was not true.*

8. *Annexed hereto and marked with the letter "C" is copy of letter dated the 19th day of July, 2019 from the Defendant's Counsel to the Plaintiff's Counsel. This termination came about when a scheduled meeting between the Plaintiff's Directors and the Defendant's General Manager ended without any resolution.*

9. *The Plaintiff and the Defendant were negotiating the terms of the renewal of the Contract for a further one (1) year which was on the condition that the Plaintiff does not renew its Contract with the Wyndham Resort. The Plaintiff had agreed to this and did not write to the Wyndham Resort of its intentions to renew the Contract.*

Background to the termination of the Contract

10. *On the 11th day of July, 2019 a staff member of the Plaintiff was racially abused by an outside guest, namely Mrs. Godwin, of the Defendant.*

11. *Mrs. Godwin's husband had booked for snorkeling activities scheduled for the 11th of July, 2019 with the Plaintiff and had paid monies to the Plaintiff. Mr. Godwin tried to cancel the booking on the 11th of July, 2019.*

12. *Under the Cancellation Policy of the Plaintiff, if a booking is cancelled on the day the activity is scheduled for, the deposit paid is non-refundable.*

13. *Annexed hereto and marked with the letter "D" is copy of the Plaintiff's brochure.*

14. *Ms. Beatrice Marama, who was attending to the Godwin's tried to explain to them the Plaintiff's Cancellation Policy and further tried to assist in scheduling the booking a later date.*

15. *This was not acceptable to the Godwins and Mrs. Godwin while arguing and shouting, called Ms. Beatrice Marama a Monkey. This was a racial comment made by Mrs. Godwin towards Ms. Marama.*

16. *Another guest by the name of Mr. Paul Stachurski, intervened Mrs. Godwin and told her to leave Ms. Marama alone and stayed with Ms. Marama to ensure that Mrs. Godwin does not continue to racially abuse Ms. Marama further.*

17. *Annexed hereto and marked with the letter "E" is copy of Incident Report of Mr. Paul Stachurski.*

18. *The matter was taken up with the Defendant through its General Manager Mr. Charles Homsy. Mr. Homsy was more interested in dealing with the refund of the Godwin's deposit and was not interested in the way how Ms. Marama was racially abused.*

19. *Under clause 8.1 (viii) of the Contract the Defendant is to include the Plaintiff in the checklist of the Defendant's roving security guards. Clause 8.1 (viii) states as follows:-*

> *"(viii) Include the Contractor's premises on the checklist of the Operator's roving security guards (but shall not provide full time security for the Contractor's premises)."*

20. *The Defendants Security Guards had failed to intervene and escort the Godwins from the Plaintiff's operating bure, but rather allowed the racial abuse.*

21. *From the 12th of July, 2019 tensions arose between the Plaintiff and the Defendant.*

22. *The Defendant refunded the Godwins their monies for the booking and at the same time promoted racial abuse as they failed to address the issue with the Godwins and local authorities.*

23. *The Plaintiff employs local citizens for the conduct of its business. After the incident that occurred on the 11th of July, 2019 and the Defendant's failure to ensure the staff of the Plaintiff are protected, the staffs of the Plaintiff were reluctant to continue with the Plaintiff's business operations. The staffs continued to dispatch the motorized equipment but when it came to the non-motorized equipment, they didn't feel safe.*

24. *The Defendant thereafter alleged that the Plaintiff was not carrying out its normal operations but failed to see the reasons behind it.*

25. *A note was circulated by the Defendant advising all in-house guests that the Plaintiff will be closed until further notice.*

26. *Annexed hereto and marked with the letter "F" is copy the note circulated by the Defendant.*

27. *This note did a lot of harm to the Plaintiff's normal business operations and the Plaintiff had lost out on revenue.*

28. *A meeting was scheduled for the 18th of July, 2019 between the Directors of the Plaintiff and the General Manager of the Defendant. This meeting was not to be attended by any other person.*

29. *The General Manager brought with him the Food & Beverages Manager and the Hotel Manager of the Defendant and they started accusing the Plaintiff's Directors for causing problems.*

30. *The meeting was scheduled to find a resolution on the issues and this failed.*

31. *The Plaintiff's Lawyers informed the Defendant's Lawyers on the 19th of July, 2019 of the failed meeting and on the same day a letter was received by the Defendant's Lawyers terminating the Contract.*

32. *Annexed hereto and marked with the letter "G" is copy of letter from the Plaintiff's Counsel.*

33. *The Defendant also forcefully tried to get the Plaintiff to operate on 18th to 20th July, 2019 on high sea swells knowing that the swells could cause injury to any guest who was carrying out either a motorized activity or a non-motorized activity.*

34. *Annexed hereto and marked with the letters "H" and "I" are copies of emails dated the 19th July, 2019 between the Plaintiff and the Defendant.*

35. *This was informed by the Directors of the Plaintiff to the Defendant's representative which was not taken well.*

36. *The Plaintiff was given till the 20th of July, 2019 to carry out its normal business activities and on the 21st of July, 2019 the Plaintiff was lockout by the Defendant and was refused entry.*

37. *The Defendant had given the Plaintiff till the 21st of July, 2019 to remove all its equipment from the Defendant's premises.*

38. *The Plaintiff was only able to remove the equipment on the 29th of July, 2019 after proper transport was secured for the transportation of the equipment.*

39. *Annexed hereto and marked with letter "J" is a USB Drive which contains videos of high sea swells, the lockout by the Defendant, photographs of the*

Plaintiff's operations bure located at the Defendant's premises and a Notice stating a change of management of the Plaintiff's operations.

40. *The Defendant's actions also lead to the Plaintiff refunding guests for the bookings it had for the 21st of July, 2019.*

41. *Annexed hereto and marked with the letters "K", "L", "M" and "N" are copies of emails dated the 22nd July, 2019, 23rd July, 2019 and copy of Receipt No. 9509 and 9510.*

42. *The Plaintiff had till the 31st of August, 2019 remaining for the Contract with the Defendant to come to an end and thereafter with the renewal, the Contract would have ended on the 30th of September, 2020.*

43. *It was also part of the Contract that should the Defendant not be satisfied with the Plaintiff's conduct of the activities, the Defendant is to then give a Notice in writing of its dissatisfaction and the Plaintiff upon receiving the Notice is to rectify its performance within 1 (one) month.*

44. *The Defendant failed to give such Notice to the Plaintiff when the Defendant terminated the Contract.*

45. *The Plaintiff therefore seeks orders in its application filed, for an order that the Plaintiff be allowed to carry out the number of days remaining in its current contract which is approximately 42 days and a further one (1) year based on the renewal of the Contract and also for a further order that the Defendant be restrained from interfering with the Plaintiff's business operations.*

46. *The Plaintiff undertakes to abide by any Order this Court may make as to damages in case this Court should hereafter be of the opinion that the Defendant shall have sustained any by reason of this Order sought by the Plaintiff which the Plaintiff ought to pay.*

47. *The company has assets which are worth the sum of $1,107,660.27 (One Million One Hundred Seven Thousand Six Hundred Sixty Dollars and Twenty Seven Cents).*

48. *Annexed hereto and marked with the letter "O" is a list of assets of the Plaintiff.*

49. *I therefore humbly ask this Honorable Court for Orders in terms of the application filed herein.*

(3) In the **affidavit in support**, Asilika Edwin, the Operations Manager of the plaintiff Company deposes as follows in the affidavit sworn on 26th August, 2019.

1. *I am the Operations Manager of the Plaintiff Company and am duly authorized by the Plaintiff to make and swear this Affidavit on its behalf.*

2. *Annexed hereto and marked with the letter "A" is copy of Authority from the Plaintiff to me.*

3. *On the 12th of July, 2019 when I returned to work from my day off on the 11th of July, 2019, I was told by Ms. Michele Jane McKinley, who is a Director of the Plaintiff and Mr. Emosi who is a boat captain, of the incident that occurred on the 11th day of July, 2019, when a guest, who was staying at the Sheraton racially abused Ms. Beatrice Marama by calling her a Monkey.*

4. *On the same day, 12th of July, 2019 I received a call from Mr. Denny Akira Tanaka, the Director of Food and Beverage of the Defendant and was asked if the Plaintiff can refund the money to Ms. Godwin.*

5. *I informed Mr. Tanaka that as per our Cancellation Policy, we are not in a position to refund Mrs. Godwin and further advised him that Ms. Beatrice Marama deserves an apology from Mrs. Godwin for the racial abuse.*

6. *I was advised by Mr. Tanaka to provide evidence of the Cancellation Policy and was further asked as to what I can do for Mrs. Godwin, he had disregarded the fact that Ms. Beatrice Marama was racially abused by Mrs. Godwin who was an outside guest of the Defendant. I then advised him that the Cancellation Policy is on our brochure.*

7. *Annexed hereto and marked with the letters "B" is a brochure of the Plaintiff showing the Cancellation Policy.*

8. *I was advised by Mr. Tanaka to call Mr. Godwin and advise her that we cannot do a refund which I did without being successful as Mrs. Godwin did not answer the telephone.*

9. *I informed Mr. Tanaka that Mrs. Godwin didn't pick up and later that afternoon the Plaintiff received an email stating that the Defendant had refunded the money to Mrs. Godwin and will be deducted from the Plaintiff's account.*

10. *On the 13th of July, 2019 we dispatched the tours of the Plaintiff and didn't dispatch the non-motorized equipment. This was due to the staffs of the Plaintiff feeling uncertain after the racial abuse faced by Ms. Beatrice Marama.*

11. *On the 14th of July, 2019 the Duty Manager of the Defendant by the name of Ms. Miri approached me at the Plaintiff's bure located in the Defendant's premises and was asked about the operations for the day. I advised her to*

check with the Plaintiff's Directors Mr. Mathew James McKinley and Ms. Michele Jane McKinley.

12. *We were not able to carry out the normal business operations and we had to take the guests who had booked with us at the Defendant to Pullman Resort.*

13. *We were also not able to assist the guests who were coming to the Plaintiff on the 14th of July, 2019 for the daily activities.*

14. *This continued till the 20th of July, 2019 and on the 21st of July, 2019 we were locked out of the Defendant's premises.*

15. *On the 21st of July, 2019 when the Defendant locked the Plaintiff out, the Plaintiff lost all its pre-booking which was estimated in the sum of $3,000.00 (Three Thousand Dollars) and a further $3,000.00 (Three Thousand Dollars) being for the daily activities.*

(4) Denny Akira Tanaka, the director of the defendant's Hotel deposed as follows in his **affidavit in opposition** sworn on 16th September, 2019.

1. *I am the Director of Food and Beverage at the Defendant's Hotel on Denarau Island (**"Radisson"**). I am authorized to swear this affidavit and I have personal knowledge of the subject matter of this proceeding.*

2. *I make this affidavit in opposition to the Plaintiff's Notice of Motion filed on 28th August, 2019 seeking the following orders that:*

   (a) *the Plaintiff be allowed to complete the 43 days remaining term of contract signed by the Plaintiff and Radisson on 25th and 26th July, 2016.*

   (b) *the Plaintiff be allowed to continue its business operations at Radisson's premises after the completion of 43 days until the determination of these proceedings.*

   (c) *Radisson by itself and/or its servants and/or agents and/or employees or otherwise howsoever be restrained from interfering with the Plaintiff's business operations at Radisson's premises.*

   (d) *Costs.*

3. *Radisson opposes the application. I have been advised by Radisson's lawyers and believe that the Plaintiff is not entitled to any of the reliefs it seeks.*

4. *I have either personal knowledge of the matters contained in this affidavit or, where matters are not known personally to me, I have ascertained their truth*

by reference to the personnel of, and the files kept by Radisson or its Solicitors and/or from sources specified. Where the contents are not within my personal knowledge, they are true to the best of my information, knowledge and belief. In identifying the sources of my information, I am not to be taken to be waiving any of Radisson's legal privilege.

Response to Plaintiff's supporting affidavits

5. *The Plaintiff and Radisson were parties to a contract for the Plaintiff to provide water sporting activities at Radisson's premises for Radisson guests as well as the general public (**"Contract"**). The Contract was executed on 25th and 26th July, 2016 for a term commencing on 1st September, 2016 and expiring on 31stAugust, 2019. Had the Plaintiff not repudiated the Contract (which I explain below), the Contract would by now have expired.*

6. *On 10th July, 2019 a guest, Mr. Godwin of a neighboring hotel Sheraton booked and paid cash [$258] for snorkeling services with the Plaintiff scheduled for 11th July, 2019 from Radisson's premises. As I understand it, Mr. Godwin 4 hours after his booking tried to cancel with the Plaintiff as his daughter had fallen ill. Mr. Godwin states he was told that he could come at 9am on 11th July, 2019 (the day of the snorkeling) and confirm if he could snorkel. If he wasn't able to, the Plaintiff would reschedule to Friday 12th July, 2019 or give a refund.*

7. *On 11th July, 2019 before the snorkeling activity, Mr. Godwin confirmed their unavailability and requested a full refund as promised, however the Plaintiff's employees refused citing its refund policy.*

8. *Mrs. Godwin joined Mr. Godwin to demand a full refund. An argument took place and a scene was created, however Radisson is unable to verify from video footage the allegations made by the Plaintiff that Mrs. Godwin racially abused the Plaintiff's staff by calling a staff "monkey".*

9. *On request by the Plaintiff, Radisson's security escorted Mr. Godwin to Radisson's lobby where he and his wife met with the duty manager. The Godwins informed our duty manager and on their statement complained that the Plaintiff's employees were very unhelpful. The argument lasted for about 2 hours without an agreement to reschedule or refund. I believe Mrs. McKinley was on site but did not intervene to help the situation. I annex marked **DAT 1** Mrs. Godwin's statement.*

10. *Radisson's duty manager emailed me a report and I emailed the Plaintiff asking for their side of the story. I followed up by email and text message on 12th July, 2019 however, there was no reply. I annex marked **DAT 2** email correspondence where the Plaintiff did not respond to the issues regarding the Godwins with Radisson.*

11. *Mr. Godwin again visited Radisson on 12th July, 2019 seeking a response to the incident with the Plaintiff's staff and seeking a full refund. The Plaintiff by this time had not provided any response to Radisson and Radisson was left to deal with an irate Mr. Godwin who was causing a disturbance at Radisson's lobby.*

12. *As an international brand, Radisson cannot afford any disturbances in front of its guests. Radisson's standard policy is to respond to guest issues within 24 hours (although Mr. Godwin was not a Radisson guest). The lack of response from the Plaintiff and the need to preserve our standards and rapport left us with no option but to refund the Godwin's booking. Radisson's General Manager Charles Homsy approved the refund.*

13. *On 12th July, 2019 the Plaintiff's director Mr. McKinley emailed Radisson outlining the incident with the Godwins (after Radisson had issued the refund).*

14. *Unfortunately, without any notice the Plaintiff ceased operation at the Radisson from 13th July, 2019. Ms. Edwin at paragraphs 10 to 14 and Mr. McKinley at paragraphs 23 and 24 of their respective affidavits confirm that the Plaintiff ceased operations at the Radisson.*

15. *I responded to Mr. McKinley's 14th July, 2019 email by inviting him for a face to face meeting to resolve the issue. Mr. McKinley replied that they have engaged lawyers (instead of the dispute resolution mechanism under the Contract) and that the Plaintiff would not work on Radisson's premises until the situation is resolved.*

16. *Radisson's general manager Mr. Homsy responded to Mr. McKinley reminding him the importance of compliance with the Contract and that the Plaintiff ought to resume operations immediately. Mr. Homsy referred to the dispute resolution process under clause 18 of the Contract saying that immediate cessation of guest services was not a reasonable approach. I annex marked **DAT 3** a copy of that email correspondence.*

17. *On 14th July, 2019 Radisson's Financial Controller Christina Spillane separately emailed the Plaintiff's directors enquiring about the closure of services without prior notice. 14th July, 2017 was a busy day for Radisson with many guests wanting to utilize the Plaintiff's services however the Plaintiff had stopped providing services for non-motorized activities. Ms. Spillane requested that operations immediately resume and to discuss any issues in a meeting scheduled for the following week. Radisson received no response. I annex marked **DAT 4** a copy of Ms. Spillane's email.*

18. *Radisson viewed this non-performance without prior notice not only as a breach of contract but a breach of the dispute resolution mechanism.*

19. *For reasons best known to the Plaintiff and Mr. McKinley, he walked out of a scheduled meeting on 18th July, 2019 which was organized to resolve the issues apparently because I was present. I do not believe there was any inappropriateness in me attending the meeting with Mr. Homsy since I am a senior Radisson staff member and recognized as an agent under the Contract. As the Director of Food and Beverage, Activities at the hotel are under my direct management and I was nominated to liaise with the Plaintiff, I had done so on previous occasions. I also had first-hand knowledge of the Godwins incident.*

20. *The Plaintiff did not provide water sporting services under the Contract at Radisson from 13th July, 2019 to 19th July, 2019 (7 days). It refused to meet for discussions and Mr. McKinley walked out of the 18th July, 2019 scheduled meeting. The Plaintiff's behaviour amounted to a repudiation of the Contract. Accordingly, on 19th July, 2019 our Solicitors wrote to the Plaintiff's Solicitors (see annexure C in Mr. McKinley's affidavit) accepting the Plaintiff's repudiation and arranging for the vacation of the premises. The Plaintiff complied and removed its equipment.*

21. *The Plaintiff's behavior was bizarre and inexplicable. Even if the Plaintiff's staff had been verbally abused by a guest, although not a Radisson guest, Radisson cannot be responsible for the activities of guests. The Plaintiff adopted an entirely unreasonable position and refused to perform its contractual obligations. The dispute may have been resolved in a meeting but the Plaintiff refused to even meet with us and instead engaged Solicitors.*

22. *Radisson is an international brand and it cannot afford to compromise the services our guests expect at our premises. Damage to reputation cannot be calculated in monies worth and paid by the Plaintiff. Accordingly, Radisson has now acquired the services of other water sporting providers and no longer needs the Plaintiff's services.*

Fundamental flaws

Expired contract

23. *The Contract was due to expire on 31st August, 2019. In May, 2019 we agreed an extension until 30th September, 2019 to discuss renewal. An agreement on renewal was not reached and the Contract expires at the latest on 30th September, 2019 although we say the Plaintiff brought the Contract to an end in July.*

24. *Radisson has acquired the services of other providers and no longer wishes to contract with the Plaintiff.*

25. *I do not understand the basis on which the Plaintiff seeks an order that the Plaintiff operate at Radisson until the final determination of this matter given that the contract has expired without any renewal agreements in place before the Plaintiff's repudiation.*

Damages an adequate remedy

26. *I am advised by Radisson's Solicitors that an injunction will only be granted if damages are not an adequate remedy. I leave further legal submissions to our Solicitors however, I say that the Plaintiff's damages (if at all any) can be calculated based on contractual rates and paid in monies worth.*

27. *I annex marked **DAT 5** a letter from our lawyers to the Plaintiff's lawyers outlining these fundamental flaws and asking them to withdraw the application. We have put them on notice for indemnity costs and Radisson seeks costs accordingly.*

Conclusion

28. *The Plaintiff repudiated the Contract. It does not have a good arguable case; the Plaintiff was the creator of its own circumstances.*

29. *I believe the application is misconceived and ought to be dismissed with costs on an indemnity basis.*

(5) Mathew James McKinley deposed as follows in his **affidavit in reply** sworn on 24th September, 2019.

1. *I am a Director of the Plaintiff Company and am duly authorized by the Plaintiff to make and swear this affidavit on its behalf. A copy of the Authority from the Plaintiff to me is annexed in my earlier affidavit in support and is marked as Annexure "A".*

2. *I have read and understood the Affidavit in Opposition sworn by Denny Akira Tanaka filed on the 17th of September 2019 (hereinafter called "the Defendant's Affidavit"). The Defendant's Affidavit was filed out of time.*

3. *The matters deposed herein are within my knowledge and others have been obtained from records maintained in the relevant file.*

4. *As to paragraph 3 of the Defendant's Affidavit, I stated that the Plaintiff has every right to the relies sought for in its Inter-parte Notice of Motion filed on the 28th of August 2019.*

5. *As to paragraph 5 of the Defendant's Affidavit, the Plaintiff had not repudiated the contract at any time. The Defendant seems to be using the word repudiation to show that the Plaintiff was at fault whereas it was the Defendant who breached the Contact and locked the Plaintiff out, without reasonable cause.*

6. *The Plaintiff at the time when it was locked out had 43 days to fulfill its Contract, which was denied by the Defendant's unlawful actions. Even though the Contract is now expired, the Plaintiff still has 43 days remaining which I believe should be honored by the Defendant and not blame the Plaintiff for repudiation.*

7. *I refer to my earlier affidavit at paragraph 7 which states as follows:-*

> *"7. The Defendant on the 19th of July 2019, terminated the Contract citing that the Plaintiff had repudiated the Contract which was not true.*

8. *I refer to paragraph 6 of the Defendant's Affidavit and stated that under the Policy of the Plaintiff, a booking if cancelled on the day of the scheduled activity, the deposit is non-refundable. Mr.. Godwin was not advised to come on the 11th of July 2019 as it was his own will to come on 11-07-2019 to confirm if he wanted to cancel the booking.*

9. *I refer to Annexure marked "D" in my earlier affidavit in support, which is the Plaintiff's brochure. The cancellation policy is stated at the bottom and is very clear. There was no talks between the Plaintiff's staff and Mr.. Godwin about any refund.*

10. *I refer to paragraphs 7, 8 and 9 and stated as follows: -*

    (i) *As to paragraph 7, there was no promise made to be Godwins for a refund and the allegations made in paragraph 7 of the Defendant's Affidavit are disputed.*

    (ii) *As to paragraph 8, Statements were given by a guest at the Defendant. This statement is annexed to my earlier affidavit in support and marked as Annexure "E". Had it not being for Mr.. Paul Stachurski, the Godwins would not have stopped their racial abuse towards Ms. Marama.*

(iii) *Mr. Paul Stachurski and his wife Carol Wills on the 17th of July 2019 also sent an email to the Defendant through one N. Matai.*

(iv) *I verily believe that the Defendant failed to verify the statement of Mr.Paul Stachurski and is only relying on the statement of the Godwins to protect their image.*

(v) *Annexed hereto and marked with the letter "A" is copy of email dated 17th day of July 2019.*

(vi) *As to paragraph 9, the Defendant has confirmed that it was not able to protect the Plaintiff under Clause 8.1 (viii) of the Contract. The Plaintiff had to seek assistance of the Defendant's security. The Godwins tried to cancel the booking on the 11th day of July 2019, and not the 10th of July, 2019.*

11. *As to paragraphs 10, 11, 12 and 13 I state as follows:-*

(i) *As to paragraph 10, I do not disagree to the contents, however I was engaged in the business activities, which was the reason why I could not respond to the Defendant on their terms.*

(ii) *As to paragraph 11, the Defendant should be aware of the Plaintiff's Cancellation Policy and should have advised the Godwins to visit us for the refund. The Defendant cannot deny that it did not know about the Plaintiff's Cancellation Policy as the Plaintiff has been operating from the Defendant's premises since 2016.*

(iii) *As to paragraph 12, it's sad to see that the Defendant trying to uphold its so called international image and preserve its standard and rapport, decided to promote racial abuse by refunding the Godwins their monies. The Plaintiff does not engage itself in such a manner even though we are known throughout the world for the excellent activities that we provide.*

(iv) *I verily believe that should there be another incident where staffs of the Defendant or any other company operating from the Defendant's premises is racially abused, the Defendant will once again act in the same manner as it did on the 12th of July 2019.*

(v) *As to paragraph 13, there was no need for the Defendant to refund the Godwins and go against the Plaintiff's Cancellation Policy. Annexed hereto and marked with the letter "B" is copy of chain of emails from the 11th of July 2019 till the 12th of July 2019, when I sent a detailed facts of what transpired.*

12. *As to paragraph 14 of the Defendant's Affidavit, the Plaintiff's staffs reserved their right not to be racially abused and what transpired on the 11th of July 2019 was a shock to the staffs as this was the first time they had encountered a staff member and colleague being racially abused and accepted by the Defendant. The Plaintiff was still carrying out its normal business operations and did not cease operations as mentioned.*

13. *I am surprised that the Defendant has failed to respond to paragraphs 25, 26, and 27 in my earlier affidavit, which I now deem that the Defendant has accepted that they circulated the Note which is marked as Annexure "F" in my earlier affidavit, which caused the Plaintiff a loss in its business operations.*

14. *As to paragraph 15 of the Defendant's Affidavit, I had tried to meet with the General Manager of the Defendant and when it became to difficulty I had no choice to engage Solicitors.*

15. *Annexed hereto marked with the letter "C" is copy of email that was sent to the General Manager of the Defendant and his reply.*

16. *A letter dated the 16th of July 2019 was sent from the Plaintiff's Solicitors to the General Manager of the Defendant seeking a meeting to resolve the issue. This letter was sent after it became difficult to resolve the issue with the Defendant.*

17. *Annexed hereto and marked with the letter "D" is copy of letter dated the 16th of July 2019.*

18. *There was no harm in sending that letter as the Plaintiff wanted to resolve the issue.*

19. *As to paragraph 16 of the Defendant's Affidavit, the Plaintiff had not ceased operations but it was the Defendant that circulated the Note advising guests that the Plaintiff's operations is closed until further notice. This caused losses to the Plaintiff's business which is claimed in its Writ of Summons and Statement of Claim in prayer (i) which is in the sum of $110,000.00 (One Hundred Ten*

Thousand Dollars) which I am advised by my Solicitors will be determined at the time of trial.

20. *The Defendant has always blamed the Plaintiff for ceasing its business operations when as a matter of fact the Defendant was itself stopping the Plaintiff from carrying out its normal business operations and finally locked the Plaintiff out of the premises.*

21. *As to paragraph 17 of the Defendant's Affidavit, there was no need to respond to Ms. Spilane's email as she had already advised the Plaintiff to discuss issues in a scheduled meeting the following week.*

22. *As to paragraph 18 of the Defendant's Affidavit, the Plaintiff simply does not agree with what is deposed. The Plaintiff has time and again advised that it was not the plaintiff that has breached the Contract and cased its business operations.*

23. *As to paragraph 19 of the Defendant's Affidavit, the meeting was to be between the General Manager of the Defendant, myself and Ms. McKinley. This was confirmed by way of emails between the General Manager of the Defendant and myself.*

24. *Annexed hereto and marked with the letter "E" are chains of emails exchanged between the General Manager and myself.*

25. *Surprisingly, the General Manager was with Mr.. Tanaka who is the Food and Beverages Manager and Mr.. Clyde who is the Hotel Manager were present at the meeting. This was contrary to what the emails had said.*

26. *On the 19th of July 2019, a letter was sent advising the Defendant's Solicitors as to what had transpired and gave the Plaintiff's resolution to solve the issues.*

27. *Annexed hereto and marked with the letter "F" is copy of letter dated the 19th of July 2019.*

28. *In their response, the Defendant through its Solicitors denied the contents of letter dated the 19th of July 2019 and ended the Contract citing repudiation by the Plaintiff. There was no repudiation by the Plaintiff.*

29. *As to paragraph 20 of the Defendant's Affidavit, the Plaintiff only removed itself and equipment from the Defendant's premises to avoid any form of conflict and*

the only way to do things right was to take the matter to Court which the Plaintiff has done.

30. *The Plaintiff's behavior did not amount to repudiation. It was the Defendant who had stopped the Plaintiff from carrying out normal business operations.*

31. *As to paragraph 21 of the Defendant's Affidavit, the contents are not agreeable. The Plaintiff did try to meet with the Defendant when letter dated the 16th day of July, 2019 was sent. The Defendant refused and continuously blamed the Plaintiff for repudiation and failed to take into account their own actions.*

32. *As to paragraph 22 of the Defendant's Affidavit, it simply shows that the Defendant will allow racial abuse on its premises and turn a blind eye to protect itself as an international brand. It is more concerned about its reputation and not of those who are being racially abused. They are correct that damage to reputation cannot be calculated to monies but fail to see the damage a racial abuse can cause to a human being.*

33. *As to paragraph 23 of the Defendant's Affidavit, there were talks for the Contract to be renewed and negotiations were being held and emails exchanged.*

34. *Annexed hereto and marked with the letter "G" are copies of emails exchanged between the Defendant and the Plaintiff.*

35. *The Plaintiff had not brought to the Contract to an end but was done through the actions of the Defendant.*

36. *The Plaintiff has not in its Writ of Summons and Statement of Claim asked for damages for the remaining 43 days under the Contract and has come to this Honorable Court for an order that the Plaintiff be allowed to complete the 43 remaining days.*

37. *The Defendant had assured that the Plaintiff will be given a further Contract for one year which was accepted by the Plaintiff and negotiations on the terms had begun and only ended with the Plaintiff being locked out by the Defendant.*

38. *As to paragraph 25 of the Defendant's Affidavit, the order is being sought after the Plaintiff was given a further one year by the Defendant.*

39. *As to paragraph 26, 27, 28 and 29, I am in no position to comment on the same and I will leave it in the hands of this Honorable Court to make a determination on the same.*

40. *I therefore humbly ask this Honorable Court for orders in term of the application filed herein.*

[C] THE LEGAL PRINCIPLES

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "Interlocutory Injunction".

(2) The plaintiff's application is made pursuant to Order 29, rule 1 (2) of the High Court Rules, 1988, which provides;

Application for injunction (O.29, r.1)

1.- "(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counter claim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

(3) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of **"American Cyanamid Co v Ethicon Ltd"**[1] as follows;

(A) Whether there is a serious question to be tried?
(B) Whether damages would be an adequate remedy?
(C) Whether balance of convenience favour granting or refusing interlocutory injunction?

[1] **(1975) (1) ALL.E.R 504**

In that case **Lord Diplock** stated the object of the interlocutory injunction as follows at p. 509;

> *"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 favor 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 favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies."*

In **Hubbard & Another v. Vosper & Another**[2] Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

> *"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."*

(4) In this action, the plaintiff, the Evolution Fiji Ltd seeks, inter alia

(i) *Judgment in the sum of $110,000.00 (One Hundred Ten Thousand Dollars) for lost revenue.*

(ii) *A declaration that the termination of the Contract by the Defendant was unlawful.*

(iii) *Damages for breach of Contract signed by the Plaintiff and the Defendant on the 25th and 26th days of July, 2016.*

(iv) *An order that the Plaintiff's Contract be renewed for a further one (1) year commencing from the date of judgment.*

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[2] **[1972] EWCA Civ 9; (1972) 2 WLR389**

The motion now before me is **primarily** for interlocutory relief in the form of a mandatory injunction to: -

(01) plaintiff be allowed to complete 43 days remaining of the contract signed by the plaintiff and the defendant on the 25th and 26th days of July, 2016.

(02) plaintiff be allowed to continue its business operations at the defendant's premises after the completion of 43 days until the determination of these proceedings.

"The Cyanamid guidelines are not relevant to mandatory injunctions. There are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it ultimately established that the defendant was entitled to retain the erection. Kindersley V.C said in Gale v Abbot (1862)10 W.R. 748, 750, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, "for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing". Even if today the degree of rarity of such application is not quite so profound, the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued; except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all that he seeks. The case has to be unusually strong and clear before a mandatory injunction will be granted at the interlocutory stage even if it is sought in order to enforce a contractual obligation. On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a high standard than is required for a prohibitory injunction"[3].

In **Honeymoon Island (Fiji) Ltd v Follies International Ltd**[4] Pathik, Powell and Bruce JJA in the Court of Appeal said:

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[3] **per Megarry J in Shepherd Homes Ltd v Sandham, (1971) 1 Ch. P. 348.**

[4] **[2008] FJCA 36; ABU0063.2007S (4 July 2008)**

"[12] The grant of interlocutory injunctive relief is discretionary. The Court must be satisfied that there is a serious question to be tried, in other words ***whether the applicant has any real prospect of succeeding in its claim for a permanent injunction at the trial.*** *If the Court is satisfied that there is a serious question to be tried the Court must then consider whether the balance of convenience lies in favor of granting or refusing to grant the interlocutory relief sought: American Cyanamid Co v Ethicon Ltd [1975] AC 396.*

[13] 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 (supra) at 408."

[Emphasis added]

[5] The principles are summarized in **Nottingham Building Society v Eurodynamics Systems**[5] (summarized in the *White Book* 1999 at paragraph 29/L/1).

"First, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or, alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.

Secondly, ***in considering whether to grant a mandatory injunction, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.***

Thirdly, ***it is legitimate, where a mandatory injunction is sought, to consider whether the Court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial.*** *That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted."*

[Emphasis added]

[6] This formulation was approved by Phillips LJ in the English Court of Appeal in **Zockoll Group Ltd v Mercury Communications Ltd**[6], Phillips LJ stated:

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[5] **[1993] F.S.R. 468 at 474**

[6] **[1977] EWCA 2317 p.11. At p.10-11**

*"In Shepherd Homes Ltd v Sandham, Megarry J spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage: they usually go further than the preservation of the status quo by requiring a party to take some new positive step or undo what he has done in the past; an order requiring a party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do; **a mandatory order usually gives a party the whole of the relief which he claims in the writ and make it unlikely that there will be a trial**.....An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial."*

[Emphasis added]

[7] The note at O.29/1/5 of the **White Book** ends with a paragraph that begins:

"The Cyanamid guidelines are not relevant to mandatory injunctions. The case has to be unusually strong and clear before a mandatory injunction will be granted at the interlocutory stage even if it is sought in order to enforce a contractual obligation."

[8] This note is consistent with the statement of Megarry J. in **Shepherd Homes Ltd v. Sandham**[7] that:

".....on motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

[9] The note in the White Book is also consistent with the comment made by Mustill L.J. in relation to that statement by **Megarry J. in Locabail Finance Ltd v. Agroexport**[8]

"It was pointed out in argument that the judgment of Megarry J. antedates the comprehensive review of the law as to injunctions given by the House of Lords in American Cyanamid Co. v Ethicon Ltd

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[7] **[1971] 1 Ch 340 at 351**
[8] **[1986] 1 WLR 657 at page 664.**

[1975] A.C. 396 but to my mind at least, the statement of principle by Megarry J. in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the Cyanamid case."

[D] CONSIDERATION AND THE DETERMINATION

(1) The defendant opposes the plaintiff's application for interlocutory reliefs for the following reasons; (reference is made to paragraph (69) of the defendant's written submission filed on 27/09/2019).

(a) The Plaintiff claims loss of revenue which can be calculated and paid in monies worth. The Plaintiff's claim for damages in the sum of $110,000 in the Statement of Claim is evidence that the Plaintiff itself agrees that damages are an adequate remedy.

(b) Prayers 1 and 2 are requests for mandatory injunctions. The test for mandatory injunctions is higher than the American Cynamid prohibitory injunction test. The Plaintiff has the heavy burden of establishing on the affidavits a strong and clear case which it has failed to.

(c) The Plaintiff does not have a strong clear case to warrant mandatory injunctions. Radisson's position is that the Plaintiff repudiated the Contract between Radisson and the Plaintiff by contract – non-performance for 7 consecutive days and breach of the dispute resolution process under the Contract. Accordingly, the Plaintiff is not entitled to any remedies, whether under this application or the damages it seeks in the Statement of Claim.

(d) The Contract had an end date of 31st August, 2019 and has expired. The purpose of an interlocutory injunction is to preserve the status quo but it cannot recreate the status quo ante. The 43 days (from 20 July 2019 to 31 August 2019) of performance that the Plaintiff requests have lapsed and an injunction cannot re-create those days for performance.

(e) Under the American Cynamid principles an interlocutory injunction should be granted if the Plaintiff can satisfy likelihood that it will obtain a permanent injunction at the trial. Here the Plaintiff seeks no permanent injunction in its Statement of Claim, there is no claim for orders for specific performance. Instead the Plaintiff claims damages in the sum of $110,000 (without providing any particulars of the figure claimed). This application is accordingly wholly inconsistent with the Statement of Claim and should be dismissed in limine.

(f) A grant of the injunctions prayed for would allow the Plaintiff to perform and recover the $110,000 damages it claims in the Statement of Claim and would

remove the need for a trial, the grant of injunctions under this application would amount to granting final orders.

(g) *Radisson has already engaged the services of other providers and does not need the Plaintiff's services anymore. To do so would put unnecessary expenses on Radisson and disrupt its services as well as contractual relations with its new service providers.*

(2) The defendant submits that; (Reference is made to paragraph (10) to (16) of the defendant's written submissions filed on 21/09/2019).

- *On 10th July, 2019 Mr. Godwin, a guest of a neighboring hotel Sheraton (not a guest of Radisson as the Plaintiff pleads/deposes) booked and paid **$258** cash for snorkeling services with the Plaintiff scheduled for 11th July, 2019 from Radisson's premises.*

- *Four hours after his booking Mr. Godwin tried to cancel his booking as his daughter had fallen ill. Mr. Godwin was told that he could come at 9am on 11th July, 2019 (the day of the snorkeling) to confirm if he could snorkel. If was not able to, the Plaintiff would reschedule to Friday 12th July, 2019 or give a refund.*

- *On 11th July, 2019 before the snorkeling trip, Mr. Godwin confirmed their unavailability and requested a full refund, however the Plaintiff's employees refused citing its refund policy.*

- *Mrs. Godwin joined Mr. Godwin to demand a full refund. An argument took place during which the Plaintiff alleges that Mrs. Godwin called one of the Plaintiff's staff a "monkey". The argument took place at the water sporting bure at Radisson and created a disturbance. Radisson's internal CCTV footage does not confirm the allegation that the word monkey was used.*

- *On request by the Plaintiff's employees, Radisson's security escorted Mr. Godwin to Radisson's lobby where he and wife met with Radisson's duty manager. The Godwins stated (see annexure DAT 1 in the affidavit in opposition) that the Plaintiff's employees were very unhelpful. A two-hour argument took place about the refund of **$258.***

- *On the same day (11th July, 2019) Radisson's Director of Food & Beverages, Mr. Tanaka emailed the Plaintiff's directors asking for their explanation. A follow up email and text message sent on 12th July, 2019 was not replied to(see annexure DAT 2 in the affidavit in opposition).*
- *Mr. Godwin returned to the Radisson on 12th July, 2019 seeking a response to the incident and seeking a full refund. At the time the Plaintiff had not provided any response to Radisson and Radisson was left to deal with an irate Mr. Godwin who was causing a disturbance at Radisson's lobby.*

(3) On the other hand the plaintiff submits that; [reference is made to paragraphs (05) to (20) of the plaintiff's written submissions filed on 27/09/2019].

(*) *The Plaintiff disputes that it repudiated the Contract to provide Activities (hereinafter called "the Contract") signed between the Plaintiff and the Defendant on the 25th and 26th days of July, 2016.*

(*) *It was the Defendant through its Solicitors on the 19th day of July, 2019 terminated the Contract. This termination was not given to the Plaintiff but to the Plaintiff's Solicitors. A copy of letter dated the 19th day of July, 2019 is marked as Annexure "C" in the Plaintiff's Affidavit in Support filed on the 28th of August, 2019 which states as follows:-*

> *"We refer to your letter of 19th July, 2019 the contents of which are denied. We will respond in more detail shortly.*
>
> *Radisson regards your client's behaviour over the last week as amounting to a repudiation of the contract which is now formally at an end. Radisson will make alternative arrangements and your client is required to vacate the premises and property by COB Saturday 20th July, 2019."*

(*) *The Defendant by giving the termination letter dated 19th July, 2019 through its Solicitors breached Clause 2.4 of the Contract (page 4 of the Contract) which states as follows:-*

> *"In the event the Contractor fails to carry out the Activities to the reasonable satisfaction of the Operator (including without limitation in accordance with the specifications described in clause 2.3) the Operator shall give notice in writing of such dissatisfaction. In the event that the Contractor fails to rectify such performance shortfalls within one month of the written notice the Operator may terminate the contract on 45 days' notice **and** go through a mediation process to solve the issue or alternatively lodge a dispute for arbitration."*
>
> *(the bold and underlining is ours)*

(*) *We further refer to Clause 18.1 of the Contract (page 14 of the Contract) which states as follows:-*

> *"A party must not start arbitration or court proceedings (except proceedings seeking injunctive, declaratory or interlocutory relief) in respect of a dispute arising out of this Contract ("Dispute") unless it has complied with this clause (18)."*

(*) *The Defendant in its Affidavit in Opposition in paragraph 18 states that the*

Plaintiff breached the Contract and also breached the dispute resolution mechanism.

(*) *We submit that the Plaintiff did not breach the dispute mechanism as it did not receive a 45 days' notice under Clause 2.4 of the Contract. If the Plaintiff had received the 45 days' notice it would then had the opportunity to start as dispute resolution.*

(*) *Any Notice to be given under the Contract has to be followed pursuant to Clause 3.3 of the Contract (page 6 of the Contract) which states as follows:-*

> *"3.3 Any notices which are to be served upon the Contractor of the Operator pursuant to this Contract shall be in writing and shall be deemed to have been sufficiently served if they are delivered in person to the representative of the other party or sent by repaid post in correctly addressed envelope to the other party's address as listed in Schedule B of this Contract."*

(*) *We submit that no Notice from the Defendant was served upon the Plaintiff in accordance of Clause 3.3 of the Contract, thus the Defendant being in breach.*

(*) *The Plaintiff is entitled to complete the remaining 43 days being the term of the Contract which was till the 31st August, 2019. However, we refer to paragraph 23 of the Defendant's Affidavit which states that the extension was till the 30th of September, 2019.*

(*) *These proceedings were filed before 30th September, 2019 and at that Contract had not expired. The Plaintiff had filed an Ex-Parte application which was then turned into Inter-parte. We submit that the Plaintiff has now 73days remaining until the expiration of the Contract and seeks an order that it be now allowed to complete the 73 days remaining under the Contract and not 43 days.*

(*) *The Plaintiff in its application has also asked that it be allowed to operate at the Defendant's premises until the determination of these proceedings. The Plaintiff had not repudiated the Contract at any time.*

(*) *The Defendant had offered the Plaintiff the renewal of the Contract for a further period of one (1) year, which the Plaintiff accepted. The Defendant had also via email sent to the Plaintiff its comments and requirements for the renewal.*

(*) *We refer to Annexure "G" in the Plaintiff's Affidavit in Reply, which is an email dated 12th July, 2019 from the General Manager of the Defendant to Mr. McKinley, a director of the Plaintiff. It was agreed between the parties that the Contract would be renewed for another year.*

(*) *The offer and acceptance between the parties are clear in the email dated 12th*

July, 2019. The terms for renewal were never reached as the Defendant unlawfully terminated the Contract.

(*) *Since there is no extension of the Contract, the Plaintiff has a right under Clause 1.4 of the Contract (page 2 of the Contract) to continue operating its business on a month to month basis. Clause 1.4 states as follows:-*

> *"1.4 In the absence of any agreement to extend or renew this Contract in terms of Clause 1.3 then this Contract will be deemed to continue (except for the rights under Clause 1.3) after the expiry of the Terms on a month to month basis unless and until one party gives to the other party one month's notice in writing that this Contract is to terminate and that notice has expired."*

(*) *We submit that there was no proper Notice given by the Defendant to the Plaintiff terminating the Contract and therefore the Plaintiff ought to be allowed to operate its business from the Defendant's premises until the determination of these proceedings where the Plaintiff has asked in its Statement of Claim for the Contract to be renewed for a further year from the date of judgment.*

(4) **Does the Court feel a high degree of assurance about the plaintiff's chances of establishing its right?**

I gather from the affidavit evidence that the plaintiff did not provide water sporting services under the contract at Radisson (the defendant) from 13th July, 2019 to 19th July, 2019. (Mrs) Edwin at paragraphs (10) to (14) and Mr. McKinley at paragraphs (23) and (24) of their respective affidavits in support confirms that the plaintiff ceased operations at Radissons. The plaintiff's excuse for not providing water sporting services under the contract at Radisson is expressed in paragraph (23) of the affidavit in support of Mr.. McKinley which he swore on 26th August, 2019. He said this:

> *"The plaintiff employs local citizens for the conduct of its business. After the incident that occurred on the 11th of July, 2019 and* ***the defendant's failure to ensure the staff of the plaintiff are protected,*** *the staffs of the plaintiff were reluctant to continue with the plaintiff's business operations."*
>
> [Emphasis added]

(5) **I further gather from the affidavit evidence** that there were email correspondences and meetings between Mr. Tanaka, Mr. Homsy, (Ms) Spillane (Radissons) and Mr. McKinley (the plaintiff's director). The purpose of those correspondences and meetings, at least as it appeared was to seek to persuade the plaintiff to negotiate to resolve the issue.

On 14th July, 2019 Mr.. Tanaka (Radisson) emailed Mr. McKinley (Plaintiff's director) inviting him for a meeting to resolve any issues. Mr. McKinley replied that the plaintiff

had engaged lawyers (instead of the mandatory dispute resolution mechanism under clause 18 of the Contract) and that the plaintiff reserved working on Radisson's premises until the situation was resolved. [Mr. McKinley's email is at annexure DAT 3 in the affidavit in opposition]. Radisson's Mr. Homsy responded to Mr. McKinley reminding him to comply with the Contract and resume operations immediately. Mr. Homsy referred to the dispute resolution process under clause 18 of the Contract saying that immediate cessation of guest services was not a reasonable approach. [Annexure DAT 3]. On 14th July, 2019 Radisson's Financial Controller Ms. Christina Spillane separately emailed the plaintiff's directors enquiring about the closure of services. 14th July, 2019 was a busy day for Radisson with many guests wanting to utilize the plaintiff's services. Ms. Spillane requested that operations immediately resume and to discuss any issues in a meeting schedule for the following week, [Annexure DAT 4].

Mr. McKinley walked out of the meeting on 18th July, 2019 which was organized to resolve the issues, because Radisson's Director of Food & Beverage, Mr. Tanaka, was present. Mr. Tanaka is a senior Radisson staff member and a recognized agent under the Contract. Activities including water sporting activities fall under Mr. Tanaka's direct management and he was appointed to liaise with the plaintiff, as he had done previously. More relevantly, Mr. Tanaka had first-hand knowledge of the incident with the Godwins.

On 19th July, 2019 the defendant's solicitors wrote to the plaintiff's solicitors (annexure 'C' in McKinley's affidavit) accepting the plaintiff's repudiation and terminated the contract and arranged for the vacation of the premises. The plaintiff complied with and removed its equipment.

(6) It was McKinley's contention that the meeting was to be between the General Manager of the defendant, himself and (Ms) McKinley. The excuse made by the plaintiff for walking out of the meeting was that the defendant's General Manager, Mr. Homsy brought with him Mr. Tanaka who is the Food and Beverages Manager and Mr. Clyde who is the Hotel Manager. The plaintiff says that Mr. Homsy should be the only person to meet to resolve the issue.

This contention seems to me to be of little force. I shall return to this later.

(7) The plaintiff raised two issues in its pleadings; First, it denied that it had **repudiated** the Contract; Secondly, it denied that the defendant could **terminate** the Contract at the date alleged because Clause 2.4 of the Contract (plaintiff should receive 45 days' notice) and Clause 3.3 of the Contract (notices should be served on the plaintiff) have not been invoked by the defendant. The plaintiff alleges that (1) the defendant's letter of termination (annexure "c" in Mr. McKinley's supporting affidavit) was not served on the plaintiff but was served on the plaintiff's solicitors.(2) the defendant by giving the termination letter dated 19-07-2019 through its solicitors breached clause 2.4 of the contract which says "in the event the contractor fails to carry out the activities to the reasonable satisfaction of the operator, the operator may terminate the contract on 45 days' notice". The plaintiff claimed a declaration that the defendant's notice of

termination dated 19/07/2019 was not valid and claimed damages for breach of Contract by the defendant by termination of the Contract.

(8) I'm deciding the issue of **repudiation** which arises in this case, the guiding principle is that enunciated by Lord Coleridge CJ in **Freeth v Burr**[9].

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

The matter is to be considered objectively – per Bowen LJ in **Johnstone v Milling**[10]

"The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract".

The importance of looking at the whole circumstances of the case was emphasized by Lord Selborne LC in **Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co**[11] and by Singleton LJ in **James Shaffer Ltd v Findlay Durham & Brodie**[12]

There is a tract of authority which vouches the proposition that the assertion by one party to the other of a genuinely held but erroneous view as to the validity or effect of a contract does not constitute repudiation. In the **Spettabile**[13] case the plaintiffs sent to the defendants a letter claiming that certain contracts were no longer binding on them and followed it up with service of a writ seeking declarations to that effect. The Court of Appeal held that the plaintiff's conduct did not amount to repudiation of the contracts. Warrington LJ said[14] with reference to the letter:

'It seems to me that that is not telling the defendants that whatever happens, whatever is the true state of the case, whether the contracts are binding on the plaintiffs or not, they will not perform them: but that they have instructed their Solicitors to take proceedings with the object of having it determined that the contracts are not binding upon the plaintiffs and are at an end .....[and with reference to the writ].....I think that it is desirable to say this, that in my opinion where one party to a contract conceives that he is no longer bound by the contract or has a right to have it rescinded or declared null and void, and issues a Writ for the purpose of obtaining that which he believes to be his right,

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[9] (1874) LR 9 CP 208 at 213, [1874 – 80] All ER Rep 750 at 753
[10] (1886) 16 QBD 460 at 474
[11] (1884) 9 App Cas 434 at 438 – 439, [1881-5] All ER Rep 365 at 367-368
[12] (1953) 1 WLR 106 at 116
[13] (1919) 121 LT 628, [1918-19] All ER Rep 963
[14] 121 LT 628 at 633, [1918-19] All ER Rep 963 at 965-966

he does not by that mean to repudiate the performance of the contract in any event. It seems to me that he submits to perform it if the court, as the result of the action, comes to the conclusion that he is bound to perform it, and it cannot be taken to be an absolute repudiation.'

Atkin LJ, after observing that it must be shown that the party to the contract made quite plain his own intention not to be bound by it, said[15]:

'*.....the substance [of the Writ] appears to me to be this: that the plaintiffs in the action are asking the court to declare whether or not they are any longer bound by the contracts. It appears to me that that is an entirely different state of facts altogether from an intimation by the plaintiffs, apart from the courts of law, that they in any event are not going to perform the contracts. It is something quite different from a repudiation. So far from expressing the intention of the parties not to perform the contracts, it appears to me to leave it to the court to say whether or not the contract is to be performed, and if the court says it is, then it impliedly states that it will be performed. I think, therefore, there was no repudiation of the contract.*'

(9) Mr. McKinley, the director of the plaintiff company in paragraphs 23 of his affidavit in support said that the plaintiff did not provide water sporting services from 13/07/2019 because of the defendant's failure to ensure that the staffs of the plaintiff are protected. (Ms.) Asilika Edwin, the Operations Manager of the plaintiff in paragraphs (10) to (14) in her affidavit in support said that the plaintiff did not provide water sporting services under the Contract at Radissons from 13th July, 2019 to 20th July, 2019.

> *10. On the 13th of July, 2019 we dispatched the tours of the Plaintiff and didn't dispatch the non-motorized equipment. This was due to the staffs of the Plaintiff feeling uncertain after the racial abuse faced by Ms. Beatrice Marama.*
>
> *11. On the 14th of July, 2019 the Duty Manager of the Defendant by the name of Ms. Miri approached me at the Plaintiff's bure located in the Defendant's premises and was asked about the operations for the day. I advised her to check with the Plaintiff's Directors Mr. Mathew James Mckinley and Ms. Michele Jane Mckinley.*
>
> *12. We were not able to carry out the normal business operations and we had to take the guests who had booked with us at the Defendant to Pullman Resort.*
>
> *13. We were also not able to assist the guests who were coming to the Plaintiff on the 14th of July, 2019 for the daily activities.*

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[15] **121 LT 628 at 635, [1918-19] All ER Rep 963 at 968**

14. *This continued till the 20th of July, 2019 and on the 21st of July, 2019 we were locked out of the Defendant's premises.*

I desire to observe that the dispute arose with the plaintiff's own customer (not a Radisson guest) where the plaintiff alleges its staff member was called a 'monkey' – **a conversation which Radisson was never a party to.** Under these circumstances, I feel that the defendant is not required to ensure that the staffs of the plaintiff are protected and it was not open to the plaintiff to rely on the defendant's failure to ensure that the staffs of the plaintiff are protected to refuse to provide water sporting services under the Contract. The plaintiff ceased operation (water sporting services) unless and until the defendant gives an assurance that the plaintiff's staffs are protected. I feel that relying on the defendant's failure to ensure that the plaintiff's staffs are protected is totally abusive, or lacking in good faith. I believe that the plaintiff's failure to provide water sporting services under the Contract (relying on the defendant's failure to ensure that the plaintiff's staffs are protected) is a conduct deserving condemnation. I feel that the plaintiff did not have a valid reason for immediate cessation of water sporting services under the Contract because; (1) The dispute arose with the plaintiff's staff and the plaintiff's own customer (not a Radisson guest); (2) Radisson was never a party to the alleged conversation or dispute. (3) Radisson cannot be held responsible for the conduct of the plaintiff's own customers. I believe that the plaintiff's failure to provide water sporting services under the Contract relying on the defendant's failure to ensure that the plaintiff's staffs are protected is totally abusive, or lacking in good faith.

I feel that the plaintiff's conduct has amounted to a repudiation of the Contract which entitles the innocent party (the defendant) to treat the Contract as terminated, and claim damages for the breach by repudiation of the Contract by the plaintiff.

However, I feel that the defendant regarded the Contract as still alive and insisted on performance at the time emails marked as annexure DAT -3 and DAT -4 were written. The defendant had not accepted the repudiation; and repudiation, however wrongful is nugatory until accepted by the other contracting party.

The right to terminate the Contract as a result of the repudiation may be lost where an innocent party has affirmed the Contract. This occurs where the innocent party, although entitled to choose whether to treat the Contract as continuing or to accept the repudiation and treat himself as discharged, decides to treat the Contract as continuing. However, he will not be held to have elected to affirm the Contract unless (1) he has knowledge of the facts giving rise to the breach, (2) he has knowledge of his legal right to choose between the alternatives open to him and (3) if implied affirmation there must be some unequivocal act from which it may be inferred that he intends to go on with the Contract or from which it may be inferred that he will not exercise his right to treat the Contract as repudiated. It must be shown that the unequivocal act was done with knowledge of the breach and of his right to choose. **Peyman v Lanjani**[16].

[16] **[1984] 3 All ER 703**

I am satisfied by the above email correspondences that the defendant had demonstrated an intention to go on with the Contract. It was an unequivocal act. The only issue that requires consideration is whether at the time the defendant wrote annexure DAT-3 and DAT-4 it had knowledge of its right to choose between terminating the Contract or remaining bound to perform its obligations. **In my judgment the answer is in the negative**.

At the costs of some repetition, I state that the defendant stated on affidavit that on 14th July, 2019 Mr.Tanaka (Radisson) emailed Mr. McKinley (Plaintiff's director) inviting him for a meeting to resolve any issues. Mr. McKinley replied that the Plaintiff had engaged lawyers (instead of the mandatory dispute resolution mechanism under clause 18 of the Contract) and that the plaintiff reserved working on Radisson's premises until the situation was resolved. [Mr. McKinley's email is at annexure DAT 3 in the affidavit in opposition].

As stated earlier, Radisson's Mr. Homsy responded to Mr. McKinley reminding him to comply with the Contract and resume operations immediately. Mr. Homsy referred to the dispute resolution process under clause 18 of the Contract saying that immediate cessation of guest services was not a reasonable approach. [Annexure DAT 3].

As stated, on 14th July, 2019 Radisson's Financial Controller Ms. Christina Spillane separately emailed the plaintiff's directors enquiring about the closure of services. 14th July, 2019 was a busy day for Radisson with many guests wanting to utilize the plaintiff's services. Ms. Spillane requested that operations immediately resume and to discuss any issues in a meeting schedule for the following week, [Annexure DAT 4].

Mr. McKinley walked out of the meeting on 18th July, 2019 which was organized to resolve the issues, because Radisson's Director of Food & Beverage, Mr. Tanaka, was present. Mr. Tanaka is a senior Radisson staff member and a recognized agent under the Contract. Activities including water sporting activities fall under Mr. Tanaka's direct management and he was appointed to liaise with the plaintiff, as he had done previously. More relevantly, Mr. Tanaka had first-hand knowledge of the incident with the Godwins.

It was McKinley's contention that the meeting was to be between the General Manager of the defendant, himself and (Ms) McKinley. The excuse made by Mr. McKinley for walking out of the meeting was that the defendant's General Manager, Mr. Homsy brought with him Mr. Tanaka who is the Food and Beverages Manager and Mr. Clyde who is the Hotel Manager. The plaintiff says that Mr. Homsy should be the only person to meet to resolve the issue. **This was the attitude of the plaintiff.**

It appears to me that the presence of the defendant's Food and Beverages Manager, Mr. Tanaka and the Hotel Manager, Mr. Clyde at the meeting does not make a great deal of difference and is not an excuse to the plaintiff's director Mr. McKinley to walk out of the meeting. I do not believe there was any inappropriateness in Mr. Homsy (the director of the defendant) attending the meeting with Mr. Tanaka (the food and beverages manager of the defendant) and Mr. Clyde (the hotel manager of the defendant). **It seems to me**

that the plaintiff's refusal stems not from a genuine dispute as to the participants of the meeting but rather from a desire to reject the performance of the contract.

I see no ground on which Mr. McKinley (the plaintiff's director) could avoid attending the scheduled meeting arranged by the defendant. Walking out of the meeting is totally abusive or lacking in good faith and would constitute further conduct on the plaintiff's part which can itself be regarded as having repudiatory character. The plaintiff thereby demonstrated nothing more than an adherence to their position as they had earlier expressed it.

All I need say now is this; when one examines the totality of the plaintiff's conduct and its impact on the defendant it is plain that the plaintiff was evincing intent not to be bound by the contract. Under these circumstances, I **feel** that the plaintiff's continued, long and immediate cessation of guest services (snorkeling activities) may constitute **repudiation** of the contract. Therefore, it was legitimate for the defendant to regard plaintiff as having repudiated the contract by 19-07-2019. The defendant is entitled to terminate the contract on the stated ground and could claim damages for the breach by repudiation of the contract by the plaintiff.

Next, turning to the question of **termination**, normally, a letter signifying that the party was terminating the contract would be sufficient notice to the other party that the giver of the notice was terminating the contract. The defendant stated on affidavit that on 19th July, 2019 the defendant's solicitors wrote to the plaintiff's solicitors (annexure 'C' in McKinley's affidavit) accepting the plaintiff's repudiation and terminated the contract and arranged for the vacation of the premises. **The plaintiff complied with and removed its equipment**. The defendant argued that the plaintiff's immediate cessation of guest services was a repudiation of the contract which it accepted and there by brought the contract to an end by the termination letter. The question is the defendant's alleged failure to; (1) serve the notice of termination on the plaintiff personally (2) give 45 days' notice.

What is the effect of this? Was it a fatal deficiency?

Had the plaintiff waived the time limit requirement or was estopped from relying on it?

Had the plaintiff lost all rights against the defendant by accepting the termination letter?

Besides, the effect of section 12(2) of the Property Law Act is that a breach of a stipulation as to time is not of itself a **repudiatory** breach.

These are matters which will ultimately have to be resolved at the trial. For the purposes of my task at this interlocutory stage, it is sufficient to say that there was some intention to abandon or repudiate the Contract. This is a case in which I do not feel a high degree of assurance that the plaintiff will succeed in establishing that the Contract was not repudiated by them; or, to put the point the other way round, I

feel confidence that the defendant will show that there has been a repudiation of the Contract by the plaintiff.

(10) I remind myself the words of 'Megarry' J in '**Shepherd Homes Ltd v Sandham**'[17].

> "Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

(11) The following passage of Hoffman Justice in " **Films Rover International and Others v Cannon Film Cells Ltd**[18], is illuminating;

" *The principle dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.*

The passage quoted from Megarry J. in Shepherd Homes v. Sandham qualified, as it was, by the words "in a normal case," was plainly intended as a guideline rather than an independent principle. ***It is another way of saying that the features which justify describing an injunction as mandatory will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage, unless the court feels a high degree of assurance that the plaintiff would be able to establish his right at trial.*** *I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren, the question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction.*

The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is normal and therefore within the guideline, or exceptional and therefore requiring special treatment. If it appears to the court that exceptionally the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it, even though

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[17] **(1971) Ch.340, 351**
[18] **(1986) 3 All.E.R. 772**

the court does not feel a high degree of assurance about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction".

(Emphasis added)

A similar point was considered subsequently by the Court of Appeal in **Leisure Data v. Bell** [19] and said that:

Where what is in question is an interlocutory mandatory injunction, general guidelines, which were approved by this court in the Lockabal case, were given by Megarry J. in Shepherd Homes v. Sandham [1971] Ch. 340 at 347, where at B, he approved a passage in Halsbury saying that in the absence of special circumstances a mandatory injunction will not be granted on motion. At page 349 B he said that:

> *"...it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."*

Whether damages would be a sufficient remedy to the plaintiff if I refuse the injunction sought and the plaintiff ultimately succeeds at the trial?

(12) The court's do not grant an injunction if damages are an adequate remedy. Diplock LJ in '**American Cyanamid**' (supra) said at page 510:

> *"If damages in the measure recoverable at common law 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".*

(13) I accept as Counsel for the defendant submits;

"On a perusal of the plaintiff's statement of claim, the plaintiff is suing for breach of the Contract and seeks *inter alia* damages in the sum of $110,000. This shows that the plaintiff itself considers damages to be an adequate remedy."

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[19] **[1988] F.S.R. 367. At page 372 Dillon L.J.**

Counsel went on to submit this; "The plaintiff in this application seeks to perform the remaining 43 days term of the Contract. Ms. Edwini at paragraph 15 of her affidavit in support indicates that the plaintiff on average earned $3,000 per day.

If the plaintiff is allowed to operate for the remaining 43 days terms, it would be able to recover its $110,000 claim and the reliefs sought *inter alia* in the statement of claim would be satisfied. In other words, the plaintiff would have obtained final remedies and there would be no need for a trial. (I have been referred to **Zockoll Group Ltd v Mercury Communications Ltd**[20]). Even if the $110,000 claimed does not represent the purported losses for the 43 days, lost revenue for those 43 days can be calculated (like the plaintiff has calculated the $110,000) and paid."

I acknowledge the force of the submissions of Counsel for the defendant. The position as to damages appears to me to be this; **the loss of the plaintiff if the injunction is refused is easy to calculate and is eminently compensable in damages**. In above circumstances, there would be no doubt that damages would be an adequate remedy to the plaintiff.

It is common ground that Radisson is an international brand. The defendant's own evidence suggests that Radisson has substantial assets in Fiji. There is no evidence that it cannot pay any damages. I am satisfied that if the injunction were refused then there is reasonable prospect that the defendant would be in a position to pay damages to the plaintiff if the plaintiff succeeds at trial.

(14) I turn, then, to consider whether damages would be an adequate remedy to the defendant in the event that an injunction is granted at this stage, but the plaintiff fails at trial. The primary difficulty would be in **quantifying** that claim. As the affidavit evidence shows, tensions have already flared between the plaintiff's directors /employees and Radisson's Managers/employees. The defendant says that they have now obtained alternative services from water sporting service provider and says that they no longer required the services of the plaintiff. The mandatory injunctions sought required the Radisson to re-engage the services of the plaintiff. **It is quite true and I agree** that the re-engagement would mean more disturbances to Radisson's operations. Radissons will incur reputational risks and possible exposure to legal action. Damage to Radisson's reputation and business disruptions cannot be quantified.

No permanent injunction sought

(15) In Goundar v Fiesty Ltd[21] Amaratunga JA in the court of Appeal (with whom Chandra and Muthunayagam JJA concurred) held:

> *"32. **The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim**. The only*

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[20] **[1997] EWCA 2317**

[21] **[2014] FJCA 20; ABU0001.2013 (5 March 2014)**

claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] 1 All ER 504 at 510 Lord Diplock held;

> *"...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any* ***real prospect of succeeding in his claim for a permanent injunction at the trial,*** *the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
>
> *As to that, the governing principle is that the court should first 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' (emphasis is mine)*

33. ***How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected in limine****."*

(Emphasis added)

Upon the perusal of the plaintiff's statement of claim, it is clear to me that the plaintiff is suing for breach of the Contract and seeks *inter alia* damages in the sum of $110,000.

There is no claim for permanent mandatory injunctions in the statement of claim.

In the words of Lord Diplock in **American Cyanamid** (at p. 510), the plaintiff must have a "real prospect of succeeding in his claim for a permanent injunction at the trial" and here the plaintiff seeks no permanent injunction.

Therefore, the application should be dismissed *in limine* as there are no permanent injunctions sought in the statement of claim. This complication weighs, and in my judgment, weighs quite significantly, against the grant of the interlocutory relief that is sought.

CONCLUSION

Due to the reasons which I have endeavored to explain above, I see no ground on which the court can grant a mandatory injunction to interfere with the rights of the defendant. For the preceding reasons I do not consider that plaintiff has made out a case for interlocutory mandatory injunctions (prayer one and two in the plaintiff's notice of motion filed on 28-08-2019.) The prayer three is for a prohibitory injunction contingent upon the mandatory injunction prayed for.

Costs

(16) The defendant seeks indemnity costs on the following grounds;

Radisson through its lawyers on 13th September 2019, (annexure DAT 5 of the affidavit in opposition) wrote to the plaintiff's lawyers outlining the flaws in this application and requesting them to withdraw the application. The plaintiff was put on notice for indemnity costs.

Despite notice of the defects in its application and that damages would be an adequate remedy, the plaintiff insisted that this application be heard which we submit amounts to abuse of process and a waste of the court's time.

(17) I turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs".**

Order 62, rule 37 of the High Court Rules, 1988 empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, rule 37 is reproduced below.

Amount of Indemnity costs (0.62, r.37)

37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.

The following passage is illuminating;

G.E. Dal Font, on "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules -

which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis'-the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule ', indemnity costs in one sense, an order for 'indemnity costs' or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

I will pause here to consider the principles underlying the exercise of the courts discretion when considering whether or not to award indemnity costs.

The principles by which courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in **"Prasad v Divisional Engineer Northern (No. 02)[22]"**,

As to the **"General Principles"**, Hon. Madam Justice Scutt said this:

- *A court has 'absolute and unfettered' discretion vis-a-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission** v. **Nicholas Enterprises** (1979) 28 ALR201. at 207*

- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party ': **Colgate-Palmolive Company** v. **Cussons Pty Ltd** [1993) FCA 536: (1993) 46 FCR 225. at 234, per Sheppard J*

- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company***

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[22] **(2008) FJHC 234.**

Australia Limited* v. *International Cools Australia Ltd *(1995) NSWLR 242*

- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases:* ***Sayed Mukhtar Shah* v. *Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Mod Tikaram, P. Casey and Barker, JJA*

- *'....neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable':* ***State* v. *The Police Service Commission; Ex parte Beniamino Naviveli*** *(Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*

- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so':* ***Colgate-Palmolive Co.* v. *Cussons Pty Ltd*** *at 232-34;* ***Bowen Jones* v. *Bowen Jones*** *[1986] 3 All ER 163;* ***Re Malley SM; Ex parte Gardner*** *[2001] WASCA 83;* ***SDS Corporation Ltd* v. *Pasonnay Pty Ltd & Anor*** *(2004) WASC 26 (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way':* ***Preston* v. *Preston*** *[1982] 1 AER 41, at 58*

- *Indemnity costs can be ordered as and when the justice of the case so requires:* ***Lee* v. *Mavaddat*** *[20051 WASC 68 (25 April 2005), per Roberts-Smith, J.*

- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings':* ***Harrison* v. *Schipp*** *[2001] NSWCA 13, at Paras* ***[1], [153]***

- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":* ***MGICA (1992) Ltd* v. *Kenny & Good Pty Ltd (No. 2)*** *(1996) 140 ALR 707. at 711. per Lindgren J.*

- *'....it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order':* ***Dillon and Ors* v. *Baltic Shipping Co. ('The Mikhail***

Lermontov') *(1991)2 Lloyds Rep 155. at 176, per Kirby, P.*

- *Solicitor/client or indemnity costs can be considered appropriately whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success ':* ***Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors*** *[1988) FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*

- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion':* ***Fountain Selected Meats,*** *at 401, per Woodward, J.*

- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate:* ***Baillieu Knight Frank (NSW) Pty Ltd*** **v.** ***Ted Manny Real Estate Pty Ltd*** *(1992) 30 NSWLR 359, at 362. per Power, J.*

- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences:* ***Baillieu Knight Frank,*** *at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court':* ***Willis v. Red bridge Health Authority*** *(I960) 1 WLR 1228, at 1232, per Beldam, U*

- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties. A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties':* ***Ranjay Shandil v. Public Service Commission*** *(Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?'(1996)* ***NLJ*** *710 (May 1996)*

- *'It is sufficient ...to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on*

*proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd** v. **Australian Builders Labourers Federation Union of Workers (WA Branch) (No. 2)** (1993) 46IR 301, at 303, per French, J.*

- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost persisting in a case which can only be characterised as "hopeless"... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full ': **Quancorp Pty Ltd &Anor v. MacDonald & Ors** [1999] WASC101. at Paras [6]-[7], per Wheeler, J*

- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain ' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd and Anor** v. **MacDonald & Ors** [1999] WASC 101, at Paras [6]-[7], per Wheeler, J.*

- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf** v. **Weather ill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*

- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis** v. **Redbridge Health Authority**, at **1232**, per Beldam, **LI***

- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions) do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... Regardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs]in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No.HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*

Indeed, as was set out in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler) (Bailii: [2005] UKSPCSPC00468, http:/www.bailii.org/cgibin/ markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.HTML), ***"reprehensible conduct"*** requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

The crucial question is whether the plaintiff's conduct has reached this threshold? The answer to this question is in the negative. Is it a correct exercise of the court's discretion to direct the plaintiff to pay costs on an indemnity basis to the defendant for not paying attention to the defendant's letter (DAT -5) outlining the infirmities in the plaintiff's application? I venture to say that neither considerations of hardship to the defendant nor the **over optimism** of the unsuccessful plaintiff would by themselves justify an award beyond party and party costs. In the result, I am constrained to hold that the ground adduced by the defendant does not warrant me to depart from the normal rule and invoke my discretion to award indemnity costs. In my view, the plaintiff has done no more than to exercise its legal rights to **apply for an interlocutory relief**. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The plaintiff is not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalized by having to pay indemnity costs. **There has been no reprehensible conduct by the party liable.**

In light of the above, I have no hesitation in holding that an award of indemnity costs is not warranted.

ORDERS

1. The plaintiff's notice of motion filed on 28-08-2019 seeking injunctions is dismissed.

2. The plaintiff to pay costs of $3,000.00 (summarily assessed) to the defendant within seven days from the date of this ruling.

HIGH COURT OF FIJI
LAUTOKA

24/01/2020

Jude Nanayakkara
Judge

At Lautoka
Friday, 24th January, 2020