

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

CIVIL JURISDICTION

Civil Action No. HBC 332 of 2019

BETWEEN : **BIJU INVESTMENTS PTE LIMITED**, a duly incorporated company
having its registered office at 1 Valetia Street, Lautoka. **PLAINTIFF**

AND : **TRANSFIELD BUILDING SOLUTIONS (FIJI) LIMITED**, a duly
incorporated company having its registered office at Lot 19, Wilfred
Sugrim Road, Lautoka. **DEFENDANT**

Appearances : (Ms.) Setaita Ravai for the plaintiff
Mr. Ashnil Narayan for the defendant

Decision : **Tuesday, 10th November 2020 at 9.00 am**

DECISION

(01) The matter before me stems from an application filed by the plaintiff seeking the grant of the following orders;

(a) That leave be granted to the Plaintiff's Counsel to conduct this hearing via Video Conferencing, that is, either by Skype or preferably via zoom.

(b) Such further or other relief as may seem fit.

(02) The application was made by summons dated 04.09.2020 and supported by an affidavit sworn by (Ms) Marica Tavakuru, a Barrister and Solicitor of Messers Vijay Naidu & Associates, the Solicitors on record for the plaintiff.

(03) (Ms) Marica Tavakuru deposed;

1. *THAT I am employed as a Barrister and Solicitor of Messers Vijay Naidu & Associates whose address is at 1 Valetia Street, Lautoka who are the Solicitors on record for the plaintiff.*

2. *THAT the matters which I depose to in this Affidavit are within my personal knowledge except where stated to be on information and belief and where so stated I verily believe the same to be true.*
3. *THAT I am a Senior Associate of the Plaintiff's Solicitors in this matter and have a brief background knowledge of this matter together with Ms. Ravai where we have assisted the Counsel in carriage of this matter, Mr. Stephen Stanton (hereinafter referred to as 'Mr. Stanton'), in attending to this matter on his behalf on mention dated whilst he is away overseas.*
4. *THAT I have been duly authorized by the Plaintiff to depose this Affidavit on its behalf and annexed hereto and marked as annexure "MT-1" is a copy of the said authority.*
5. *THAT this matter was last called before Justice Tuilevuka on 18th June 2020 whereby directions were given for the filing of pleadings and the matter was therefore set down for Hearing on 3rd August 2020.*
6. *THAT when this matter was last called before this Honourable Court, one of our Senior Associates that had appeared before this Honourable Court, Ms Ravai, had relayed to the court Mr. Stanton's intention of conducting this Hearing himself and as such we may have to file an application for the said Hearing to be conducted by way of Video Conferencing.*
7. *THAT after relaying the same to Mr. Stanton, Ms. Ravai and I have now been instructed by Mr. Stanton to have this application filed seeking the leave of this Honourable Court to have the Hearing conducted by Mr. Stanton via video conferencing either by Skype or preferably zoom.*
8. *THAT we do understand that application such as this usually applies only to the giving out of evidence from witnesses who are overseas and is rarely granted by the Court, however the circumstances surrounding this pandemic and current travel restrictions deem it appropriate to file this application seeking leave for Mr. Stanton to conduct this Hearing through Video Conferencing either through Skype or Zoom.*
9. *THAT there will be no prejudice should our application be allowed as it would be in the interest of justice and within the rules of natural justice and fairness for this Honourable Court to allow our application especially in the face of this current pandemic crisis.*
10. *THAT further to the above, although this application can be disposed via written submissions, I have been instructed by Mr. Stanton that it would be best if both Counsels orally argue before this Honourable Court in addition to written submissions being filed prior to the Hearing so as to assist the Court better in determining our application.*
11. *THAT the Pandemic which has gripped Fiji is equally felt in the neighboring region where the Director of the plaintiff is currently located and is incapable of returning.*

12. *THAT further, Counsel retained, Mr Stephen J Stanton is also situated in Sydney Australia and is briefed to appear in this matter. It is the Plaintiff's constitutional right to have Counsel of his choice and that equally more the Plaintiff entitled to a fair trial to have both its Counsel and Director appear and conduct the proceedings.*
13. *THAT courts in the South Pacific including but not limited to Fiji as well as in Australia, NZ and Tonga have adopted a protocol to enable hearings being conducted via the internet utilizing programme like the Zoom which is the preferred option of the Plaintiff. It is sought and respectfully submitted that interests of justice would suffice to resort to the application of zoom programme to enable the Plaintiff and its Counsel to appear from Sydney. If so minded, the Court is requested to send the Zoom invitation to Mr Stanton's email which is sstanto 1@bigpond.net.au.*
14. *THAT Mr. Stanton is ready and willing to orally argue this application before this Honourable Court should leave be granted.*

- (04) The application was opposed. The defendant did not file an affidavit in opposition. The defendant raised legal objections to the application. The defendant contends that there is no principle or provision in the law that supports the application. Both parties consented to dispose the matter by way of written submissions. Counsel for both parties has tendered written submissions for which I am grateful.
- (05) Let me go back in time for a moment, on 16 December 2019, shortly after the start of legal vacation, Transfield Building Solutions (Fiji) Limited ("TBSFL") served Biju Investment Pte Limited ("BIPL") a statutory demand to the sum of FJ\$115,073.80 (One Hundred Fifteen Thousand Seventy Three Fijian Dollars and Eighty Cents).
- (06) On 20 December 2019, four days after the service of the demand, BIPL filed an urgent ex-parte Summons seeking the following orders:
 - (a) *An order setting aside the Statutory Demand issued by Transfield Building Solutions (Fiji) Limited to Biju Investments Pty Ltd dated 16 December 2019 insofar as it is a Statutory Demand not able to be served on the basis, that the debt the subject of the Statutory Demand is genuinely disputed and as such incapable of being relied upon pursuant to Section 515 of the Companies Act.*
 - (b) *An order pending determination of these proceedings that the Defendant not be at liberty to act upon or issue any consequent process on the alleged basis that the Statutory Demand has not been complied with.*
 - (c) *An order in the circumstances restraining the Defendant from taking any actions to enforce the purported debt subject of the Statutory Demand by issuing a Petition to wind up the Plaintiff.*
 - (d) *An order that the matter be expedited on the basis that it is a matter occurring in vacation and is requisite of urgent relief in the circumstances.*
 - (e) *Such further or other relief as may seem fit.*
 - (f) *Costs, including indemnity costs, be awarded to the Plaintiff.*

- (07) The summons is supported by an affidavit of Mr. Vijay Chand Naidu, a director of BIPL and a solicitor – and a supplementary affidavit of Mr. Nemias Taginasedrau, a civil engineer. These were both filed within the 21 day period stipulated under section 516 (3) of the Companies Act 2015.
- (08) Hon. J. Tuilevuka granted order in terms of the summons and directed the plaintiff to serve the documents on the defendant within 14 days and then adjourned the case to 22 January 2020.
- (09) The plaintiff went on to file the following supplementary affidavits:
- (a) of Vijay Chand Naidu sworn on 06 January 2020
 - (b) of Vijay Chand Naidu sworn on 12 February 2020
 - (c) of Manoj Kumar Sharma sworn on 12 February 2020
 - (d) of Vijay Chand Naidu sworn on 03 July 2020
 - (e) of Nemias Taginasedrau sworn on 06 July 2020
 - (f) of Nemias Taginasedrau sworn on 14 August 2020
- (10) The defendant has only filed one affidavit in opposition which is sworn by Mr. Viren Kumar on 23 June 2020 and filed on the same day.
- (11) The application to set aside the statutory demand was heard before Hon. Justice Tuilevuka. But His Lordship refrained from pronouncing the prepared ruling formally in court in view of the allegation of ‘bias’ and the matter was referred to Deputy Registrar for allocation before another Judge. On 25.08.2020, this matter was allocated to me by the Deputy Registrar.
- (12) The case is fixed to be heard on 13.11.2020 at 9.00 am. The pleadings (filing of affidavits) were closed on 23.06.2020.
- (13) Everything is ready for hearing. Now the plaintiff applies to the court to conduct the hearing by their Counsel Mr. Stephen Stanton, via skype or zoom since Mr. Stanton is residing in Australia and he is unable to travel to Fiji due to restrictions on overseas travel due to Covid - 19 pandemic. Counsel for the plaintiff contends that Mr. Stanton should be availed the right to appear for his client Mr. Vijay Naidu. Mr. Naidu and Mr. Stanton are currently in Australia and unable to travel to Fiji for the hearing because both Australia and Fiji’s borders are closed to international travelers except for repatriation and/or compassionate exemption.
- (14) The court has power to permit a departure from the usual practice (see Order 38, rule 1) and to permit testimony to be given on the platform of video link, skype or zoom. This is not such a case. The crucial question for the court is whether the interest of justice requires the use of audio-video link, skype or zoom to receive oral submissions from overseas Counsel. Needless to say, there is no principle or provision in the law that supports the plaintiff’s application.

- (15) **The substantive matter pending before me, i.e. the application for injunction and setting aside the statutory demand, is based on summons and the evidence is adduced by way of affidavits. No application was made by either party to 'cross-examine' any of the witnesses who adduced evidence by way of affidavits.**
- (16) There is no requirement that the witnesses should be present at the hearing. I cannot accede to the plaintiff's argument that Mr. Naidu has a right to "participate" at the hearing.
- (17) The plaintiff is represented by "Vijay Naidu & Associates". The firm has a number of solicitors. Therefore, the insistence by the plaintiff to have Mr. Stanton argue the case is unreasonable.
- (18) None of the decisions cited by the plaintiff in its written submissions supports the plaintiff's application to conduct the hearing via audio-video link, skype or zoom.
- (19) As noted above, the firm 'Vijay Naidu & Associates' have a number of solicitors. It does not appear from the affidavit of (Ms). Marica Tavakuru, the significance the plaintiff may have and its importance in relation to the issue in this case if this matter is argued by Mr. Stanton by video-link or zoom.
- (20) No litigant, particularly a litigant involved in court proceedings, should apprehend that they will be materially prejudiced by reason of the mode by which a hearing be conducted.
- (21) I am not satisfied that the plaintiff will be materially prejudiced if the court do not accede to the plaintiff's application to permit Mr. Stanton to argue the case and present oral submissions by video-link or zoom in Australia. **The case is resolvable on the affidavits already filed by the parties.**
- (22) Generally, a case should be argued by Counsel directly and in the presence of the court. The courts insist upon the physical presence of Counsel for argument and presentation of oral submissions. I fail to see a justifiable reason for departure from the usual practice.
- I would not accede to the application because I am not satisfied that the usual practice and procedure in presenting oral submissions is causing unfairness to the plaintiff.
- (23) The overarching purpose of the civil practice and procedure provisions, of course, is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Despite all the technological advances, presenting oral submissions by video-link or zoom has significant limitations.
- (24) In all the circumstances, I have very reluctantly come to the conclusion that the appropriate course is to decline the application.
- (25) Counsel for the defendant submits in paragraph 3.2 of the written submissions filed on 06.11.2020;

3.2 *This now the second application for leave to conduct the hearing via skype. The insistence by the Plaintiff to have this application determined (when the former presiding Judge was of the view the application was misconceived) is in itself reprehensible. The ex-parte injunction has now been in place for almost a year to the detriment of the Defendant.*

(26) This submission is erroneous and misleading.

(27) The application for skype hearing came before Hon. Justice Tuilevuka on 03.08.2020. The following orders were made on 03.08.2020.

Orders

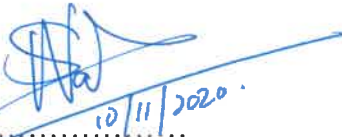
- (1) *7 days to Plaintiff to file and serve submissions and amend statement of claim.*
- (2) *7 days thereafter to Defendant to reply.*
- (3) *Costs to be reserved.*
- (4) *Adjourned to 19/08/20 for Ruling on injunction and setting aside of statutory demand.*

(28) Therefore, it is not right to say that Hon. Justice Tuilevuka refused to hear the plaintiff's application as it is misconceived.

Orders

- (1) I decline leave for the plaintiff's application to conduct the hearing via audio-video link, skype or zoom.
- (2) I formally dismiss the summons filed on 03.09.2020.
- (3) There will be no order as to costs.




10/11/2020
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Jude Nanayakkara
Judge

**High Court – Lautoka,
Tuesday, 10th November, 2020**