

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 317 of 2019

BETWEEN: **SUPREME MULTIMEDIA SOLUTIONS PTE LIMITED** a limited liability company having its registered office at 181 Mead Road, Nabua, Fiji.

FIRST PLAINTIFF

AND: **KALPESH KUMAR PATEL** of 29 Lekutu Street, Samabula, Fiji, Director.

SECOND PLAINTIFF

AND: **RAJESH KUMAR PATEL** of 75 Pathick Crescent Road, Tamavua, Fiji, Director.

THIRD PLAINTIFF

AND: **FIJI REVENUE & CUSTOMS SERVICE** a statutory authority governed by the Income tax Act, Tax Administration Act, The Customs Act and various other subsidiary legislation.

DEFENDANT

BEFORE: **Justice Vishwa Datt Sharma**

COUNSELS: **Ms. Ghandhi** - for the Plaintiffs
 Mr. Haniff F. -for the Defendant

DATE OF RULING: **20th January, 2021 @ 9.30 am**

RULING

[Amended Inter Parties Summons seeking an Interim Injunctive Order pursuant to Order 29 of the High Court Rules 1988, Section 28 of the Tax Administration Act 2009 and the Honourable Court's Inherent Jurisdiction]

INTRODUCTION

1. The Plaintiffs' filed an **Amended Inter-Parties Summons** and sought for the following orders:
 - (i) *An Interim Injunction against the Defendant and its servants or agents from taking any enforcement or recovery action against the 2nd or 3rd Plaintiffs or their personal properties pursuant to its Assessment dated 31 January 2019 as well as its letter dated 9 October 2019 until further order of this Court or final determination of this action;*
 - (ii) *Costs of this application.*
 - (iii) *Such further directions or other relief as the Court may deem just.*
2. The Plaintiffs relied on the Affidavit in Support deposited by (2nd Plaintiff) Kalpesh Kumar Patel.
3. The Application is made pursuant to *Order 29 of the High Court Rules 1988, section 28 of the Tax Administration Act 2009* and the *inherent jurisdiction of this Honourable Court*.
4. The Defendant has opposed the Plaintiff's application and sought not to file any affidavit in response. He intended to file an application seeking to strike-out the substantive Writ action filed by the Plaintiff herein.
5. Both parties to the proceedings furnished court with written submissions.

THE LAW

6. *Order 29 of the High Court Rules 1988* provides as follows:-

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, counterclaim or third party notice, as the case may be.

7. *Section 28 of the Tax Administration Act 2009* provides-

Tax a Charge on Property

28. — (1) Tax payable by a taxpayer is a lien and charge upon the property, real or personal, of the taxpayer.

BACKGROUND

8. The 1st, 2nd and 3rd Plaintiffs have filed a Writ action against the Defendant. Four (4) causes of action are pleaded in the Writ.
 - (i) The Plaintiffs challenges the allegation of breach of the Tax Free Region License (TFR License) and the purported revocation under the Customs act 1986 of a TFR Licence granted to the First Plaintiff to manufacture and sell high end DVD-R discs in Fiji.

- (ii) The Plaintiffs seeks to set aside the imposition of Customs duties in the sum of \$1,831,092.91 on the basis that a Time to Pay Agreement was signed by the Second Plaintiff under duress.
 - (iii) 3rd Cause of action alleges that the Defendant ("FRCS") has unlawfully imposed further customs duty against the First Plaintiff without proving their case and without complying with the provisions of the Customs Act.
 - (iv) 4th cause of action alleges that the Defendant had discriminated against the First Plaintiff.
8. The Defendant filed a Statement of Defence denying all the allegations and intended to file a Summons to seek a Striking-out Order of the Plaintiffs Writ action which was later filed on 21st October 2019.
 9. Currently, this Court only proceeded with the hearing and determination of the Plaintiffs application seeking orders on the Amended Inter- Parties Summons filed on 5th December 2019 accordingly.

CONSIDERATION OF THE APPLICATION

10. The issues for this Court to determine are "**whether to grant Orders sought as enumerated at paragraph 1 (i) to (iii) inclusive hereinabove by the Plaintiffs in its Amended Inter Parte Summons filed on 5th December 2019**".
11. All affidavit evidence coupled with written and oral submissions have been perused and taken into consideration in order to arrive at the hereunder result.
12. After a careful perusal of the Orders sought by the Plaintiff, it can be ascertained that the Orders sought are of restraining nature.
13. The extent of the court's duty in considering an interlocutory injunction is to be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.
14. Reference is made to the case of *Hubbard & Another v Vosper & Another* [1972] 2 O.R. 84 Lord Denning 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 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. 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.

In *American Cyanamid Co. v Ethicon Ltd* [1975] 2 W.L.R 316, [1975] A.C. 396

The appellant, American Cyanamid Co., an American company, owned a patent covering certain sterile absorbable surgical sutures. The respondent, Ethicon Limited, also an American Company, manufactured in the United States and were about to launch on the British market a suture which the appellant claimed infringed their patent. The respondent contested its validity on diverse grounds and also contended that it did not cover their product. In an action for an injunction the appellant applied for an interlocutory injunction

which was granted by the judge at first instance with the usual undertaking in damages by the appellant. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out and the appellant appealed.

In this case Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as the leading source of the law on interim injunctions. They are:

- 1. Whether there is a serious question to be tried at the hearing of the substantive matter;*
- 2. Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
- 3. In whose favour the balance of convenience lie if the injunction is granted or refused.*

Whether there is a serious question to be tried ?

15. It will be noted that the Plaintiffs Amended Inter Parte Summons is seeking for an Interim Injunction Order against the 2nd and 3rd Plaintiffs on their personal properties pursuant to its Assessment dated 31st January 2019 and its letter dated 9th October 2019 until the final determination of this action.
16. Notably, no Order for an Interim Injunction is sought against the 1st Plaintiff, Supreme Multimedia Solutions Pte Limited.
17. The 1st Plaintiff applied for a TFR Licence on 22nd January 2015 and full details of the manufacturing process were provided to FRCS.
18. On 23rd February 2015, the 1st Plaintiff was issued with a TFR Operating Licence to undertake manufacturing and production of high-end DVD-R Discs with the condition that the capital investment was above a sum of \$250,000.
19. Intel team received information that the 1st Plaintiff was suspected of having imported blank DVDs from Taiwan with possible Tariff Classification, under valuation and other breach of Customs Prohibited (Imports and Exports) regulations.
20. On 2nd November 2015, FRCS executed a search warrant on the 1st Plaintiff's premises on the 1st Plaintiff's premises.
21. The investigating officer with FRCS concluded that the 1st Plaintiff had not made honest submissions to FRCS in the first place at the time of the application of the TFR Operating Licence. However, this was disputed by the 1st Plaintiff.
22. According to the 1st Plaintiff, he did not evade Customs Duty as alleged by FRCS.
23. The Plaintiffs contention is that all four causes of actions pleaded in the Plaintiffs Statement of Claim raises serious issues and require a factual inquiry into the matter.

24. However, the Defendant's contention is that the 2nd and 3rd Plaintiffs have not identified any serious issues to be tried.
25. The Interim Injunction is sought against the 2nd and 3rd Defendants pursuant to its **Assessment dated 31st January 2019 and letter dated 9th October 2019**.
26. Upon perusal of the Plaintiff's Inter-Parties Summons and the supporting Affidavits, **no Assessment dated 31st January 2019** has been annexed in the Affidavit or Supplementary Affidavit deposed by Kalpesh Kumar Patel. The only **Assessment Notice** annexed to the Supplementary Affidavit filed on **11th December 2019 is dated 30th November 2015** addressed to the 1st Plaintiff Supreme Multimedia Solutions Pte Limited. However, only a **credit payment receipt in the sum of \$200,000** is delivered to the 1st Plaintiff Supreme Multimedia Solutions Pte Limited.
27. Reference is made to the Fiji Revenue and Customs Service (FRCS) **correspondence dated 9th October 2019** addressed to the Director of Supreme Multimedia Solutions Pte Limited. The contents of the letter addresses a Final Notice issued in terms of the outstanding penalty arrears on duty shortfall for Supreme Multimedia Solutions Pte Limited. Further, **FRCS has registered a charge on the property** for unpaid penalties and the requirement to pay the sum of FJD\$3,759,426.01 being the amount due and owing for unpaid penalties on the duty shortfall on or before 16th October 2019. The correspondence also puts the Director on notice that on his failure to meet the obligation therein an application will be made to the High Court for the enforcement of these charges pursuant to section 95(6) of the Customs Act of 1986.
28. As a result of the FRCS's correspondence dated 9th October 2019, the 1st Plaintiff and the Defendant to the proceedings eventually signed the **'Time To Pay Agreement'**.
29. Reference is also made to Annexure "I" within the Affidavit of Kalpesh Kumar Patel regarding a correspondence from FRCS on the subject matter of **"Time to Pay Agreement"**. The parties therein mutually agreed on the **liability in the sum of \$1,831,092.91. This sum constituted the final settlement of the outstanding duties to FRCS by Supreme Multimedia Solutions Pte Limited.**
30. It is evident from the file records that the 1st Plaintiff had not lodged any objections to the Notice of Assessment in terms of **section 16 of the Tax Administration Act 2009** nor taken any action within the **Tax Tribunal** in respect of the Assessment.

Section 16 clearly states as follows-

Objection to Tax Decision

16. — (1) A person dissatisfied with a tax decision may lodge an objection to the decision with the CEO...

31. Further, the Interim Injunction sought by the Plaintiff pursuant to **Notice of Assessment dated 31st January 2019** has not been annexed as evidence by the 2nd and 3rd Plaintiffs herein. However, only the Assessment Notice dated 30th November 2015 has been annexed with a credit payment receipt in the sum of \$200,000.

32. FRCS a statutory Authority governed by the Income Tax Act, Tax Administration Act , the Customs Act and various other subsidiary legislation are empowered with the statutory duty to collect tax: Section 3 of the Act. All tax, penalties assessed are treated as a debt due to the State and are recoverable by action in a court of law: Section 76 (1) and (2) of the Act.
33. In the current case the Plaintiffs have been assessed for tax. The balance sum outstanding in terms of "Time To Pay Agreement" is **\$1,831,092.91, which sum the Plaintiffs are now disputing to pay and are now asking Court to grant an Interim injunction against the FRCS to take any enforcement or recovery.**
34. The scheme in terms of the Act herein is simple. Once a notice of Assessment has been served on the taxpayer (in this case the 1st, 2nd and 3rd Plaintiffs), it creates a legal liability on the tax payer to pay tax he has been assessed with to pay unless it is set aside on objection or by a Tribunal. The procedure to challenge the accuracy of assessment or liability is provided for in the Act. Until the assessment is set aside, this court must take the view that the tax is due and owing: *Winter v. Federal Commissioner of Taxation 16 Australian Tax Reports 977.*
35. Taking above into consideration, **I find that there are no serious Questions to be tried at this Interlocutory stage of the proceedings.**

IRREPARABLE HARM AND UNDERTAKING AS TO DAMAGES

36. The Plaintiffs contention is that if the Defendant continues to pursue recovery action for Customs Duty and penalties against the Plaintiffs will tent amount to an arbitrary fashion (DPO & Garnishee). This will lead to irrecoverable damage and financial ruin of the Plaintiffs.
37. Damages cannot be an adequate remedy if the business and livelihood of the Plaintiffs is ruined by FRCS's actions and if the Plaintiffs Bankers call for a Mortgagee sale and sell their properties.
38. If FRCS prevails in the High Court, it will still retain a right to pursue the recovery of Customs Duty and penalties.
39. The Plaintiffs have agreed to pledge two properties to support their undertaking as to damages. FRCS has already registered a Charge over these properties.
40. On the other hand, the Defendant's contention is that the undertaking as to damages provided by the 2nd and 3rd Plaintiffs is wholly inadequate.
41. The 2nd and 3rd Plaintiffs application for Interim Injunction must fail on this ground alone.
42. However, the Court should go on to consider whether and if the claimant (1st, 2nd and 3rd Plaintiffs) were to succeed at the trial in establishing his right to a permanent injunction, they would be adequately compensated by an award of damages for the loss they would have sustained as a result of the Defendant's (FRCS's) continuing to do what was sought to be enjoined between the time of the application and the time the trial.

43. If the Damages would be an adequate remedy and the Defendant (FRCS) would be in a financial position to pay them, no interim injunction should normally be granted.
44. The Plaintiffs may be adequately compensated in damages whereas the Defendant would not be since the Plaintiff has not disclosed to Court of any sufficiency of evidence in terms of assets owned within the Fijian Jurisdiction and/or its current financial position. This Court notes that the Plaintiffs have agreed to pledge two properties to support their undertaking as to damages. However, the Defendant, FRCS has already registered a Charge over these properties. The Question arises herein is -Whether the two (2) properties already registered with a charge by the Defendant, FRCS, has the market value of \$2,300,000 each as deposed at paragraph 90 of the 2nd Plaintiff's affidavit?
45. Further, whether the Plaintiffs have already paid the balance outstanding sum of \$ 1,831,092-91 duty to FRCS as deposed in the 2nd Plaintiffs affidavit at paragraph 89? There is no evidence before this court in respect of the balance payment. Any official receipt at hand?
46. The Plaintiff has not shown to this court what irreparable harm (if any) will be caused or suffered if this court fails to accede to the grant of their application for an Interim Injunction. The two (2) properties are already under a registered charge with FRCS and therefore, the same cannot constitute as sufficient Security to satisfy an undertaking as to Damages by the Plaintiffs.
47. I find that the Plaintiff has failed to show any cause in terms of any undertaking as to damages and/or will suffer any irreparable harm.

BALANCE OF CONVENIENCE

48. The Court always needs to consider in determining where the balance of convenience lies. Whether the Applicant (1st, 2nd and 3rd Plaintiffs) have furnished sufficient evidence to support its undertaking as to damages. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.
49. I make reference to the case of Honeymoon Island [Fiji] Ltd v. Follies International Ltd Civil Appeal No. ABU 0063 of 2007S (4 July 2008)- wherein the Court of Appeal stated-

"[16] Applicants for interim injunctions who offer an undertaking as to damages must also proffer sufficient evidence of their financial position. "The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy; Natural Waters of Viti Limited v Crystal Clear Mineral Water [Fiji] Ltd [2004] ABU 0011 at p12."

[17] The opposing party is able to test or challenge any such financial information...;

[18] ...However in every case involving an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that it can meet its undertaking as to damages whether or not the Court specifically directs the applicant's attention to the matter or not."

50. The Plaintiffs submitted that they have an arguable case; the relief sought is only an interim relief and have shown commitment by already filing a substantive Writ in the High Court. FRCS will be given an equal opportunity to defend the action and cannot just levy demands payment of customs duty in a case where the Taxpayer has objected to the assessment of customs duty. FRCS has

already seized the pre-write raw discs and through its own Demand letter made it clear that if the Taxpayer objected then FRCS has to prove its case in a competent Court.

51. The Plaintiffs herein have failed to provide its **undertaking as to damages**. They have not satisfied this court with any sufficiency of evidence that it can meet its undertaking as to damages.
52. Thus, the Plaintiff has failed to meet the test in *Honeymoon* (Supra) and *Natural Waters* (Supra) as stated hereinabove respectively.
53. I find that the **balance of convenience** favours the **Defendant** in the given circumstances accordingly.
54. ***Injunction is an equitable remedy*** granted at the ***discretion of the court***. Any party seeking court to exercise its discretion in his favour, must **establish that the court has sufficient grounds for such an exercise**. The party seeking the **remedy must establish that there are sufficient grounds for the court to exercise its discretion and make necessary orders**.

IN CONCLUSION

55. The Plaintiffs seeking for the Interim Injunctive orders in terms of their Amended Inter-Partes Summons have failed to satisfy this court with the following guidelines as provided for In *American Cyanamid Co. v Ethicon Ltd* [1975] 2 W.L.R 316, [1975] A.C. 396-

1. *Whether there is a serious question to be tried at the hearing of the substantive matter;*
2. *Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
3. *In whose favour the balance of convenience lie if the injunction is granted or refused.*

56. On the balance of probability, I find that there are no serious questions to be tried at this Interlocutory stage of the hearing.
57. The 1st, 2nd and 3rd Plaintiffs will not suffer any irreparable harm and would be adequately compensated for any Damages by the Defendant.
58. Further, the balance of convenience favours the **Defendant** in the given circumstances accordingly.
59. The Plaintiff's amended Inter-Parte Summons seeking for an Interim Injunction against the Defendant and its servants or agents from taking any enforcement or recovery against the 2nd and 3rd Plaintiffs or their personal properties pursuant to its Assessment dated 31st January 2019 and the letter dated 9th October 2019 until further orders of this Court or final determination of this action fails and is accordingly dismissed herein.

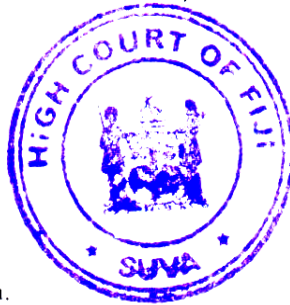
60. Since the matter proceeded to a full hearing at the Interlocutory stage it is only just and fair that the Defendant is entitled to costs summarily assessed @ \$1,000 to be paid within 14 days' time frame.


61. For the aforesaid rationale, this Court makes the following orders-

FINAL ORDERS

- [1] An Interim Injunction sought against the Defendant and its servants or agents from taking any enforcement or recovery against the 2nd and 3rd Plaintiffs or their personal properties pursuant to its Assessment dated 31st January 2019 and the letter dated 9th October 2019 until further orders of this Court or final determination of this action is hereby declined and accordingly dismissed.
- [2] The 1st, 2nd and 3rd Plaintiffs to pay the Defendant summarily assessed costs of \$1,000 within 14 days' timeframe accordingly.

Dated at Suva this 20th Day of January 2021.




VISHWA DATT SHARMA
JUDGE

cc: Neel Shivam Lawyers, Suva.
Haniff Tuitoga Lawyers, Suva.