

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 193 of 2021

Pacific Energy (South-West Pacific) Pte Limited

Plaintiff

v

Akshay Amar Chaudhary

Rajan Rahul Chaudhary

Sharmila Devi

First defendants

Farmer Fish And Chips Holdings Pte Limited

Second defendant

Mobil Oil Australia Pty Ltd

Third defendant

Counsel: Mr W. Clarke with Ms S. Lodhia for the plaintiff
Mr A. Pal for the first and second defendants
Mr V Singh for the third defendant

Date of hearing: 15th October,2021

Date of Ruling: 23rd November,2021

RULING

1. The plaintiff seeks to restrain the defendants from acting in breach of the Supply Agreement,(Agreement) entered into between the plaintiff and Ramendra Prasad (deceased).

2. The plaintiff seeks:

A. An interim injunction restraining all the defendants from:

- i. *removing, dismantling and otherwise moving any fuel pumps, equipment, machinery, signage and other assets of the Plaintiff from the premises known as Farmers Freeway Service Station;*
- ii. *installing, erecting, constructing and affixing fuel pumps, equipment, machinery, signage and other assets other than those of the Plaintiff at Farmers Freeway Service Station, Lot 3 Princess Road, Sawani, Naitasiri; and*
- iii. *carrying on any business and/or operations of a service station other than under the Plaintiff's name, branding and signage at ...Farmers Freeway Service Station....:*

B. **A MANDATORY INJUNCTION** ordering all of the Defendants to reinstate, restore and reinstall all of the Plaintiff's equipment, machinery, signage and other assets to their original state and operation under the supervision of the Plaintiff and at Defendants' expense at the premises known as Farmers Freeway Service Station,.. under the Plaintiffs' branding.

C. **AN INTERIM INJUNCTION** until further order restraining all of the Defendants and any other person from interfering in any way whether directly or indirectly with the Plaintiff's contractual rights to exclusive use and supply fuel; and other petroleum products to the service station known as Farmers Freeway Service Station.. under the Plaintiffs' branding.

3. **The grounds**

The plaintiff states that the defendants must be restrained from acting in breach of the Supply Agreement,(Agreement) of 31 January, 2017, "*adopted and affirmed by the first defendants as executors and trustees of the Estate of Ramendra Prasad*", in order to be protected from contemplated damages and future losses of revenue. In terms of the Agreement, the first defendants are bound to purchase petroleum products from the plaintiff including, but not limited to Farmers Freeway Service Station,(FFSS) operating under the plaintiff's branding. The first defendants purported to terminate the Agreement and have allowed a third party to enter, dismantle, remove petrol pumps, other equipment and assets of the plaintiff with the intention to operate a service station works at the FFSS site under the "*Mobil*" branding, a competitor of the plaintiff.

4. Julien Leraille, Chief Financial Officer of the plaintiff in his affidavit in support states that the plaintiff and Ramendra Prasad, (Prasad) trading as FFSS entered into a petroleum products supply Agreement. It “*was a term of the Agreement that payments must be made by Prasad*”, the plaintiff has the exclusive right to supply fuel and other petroleum products to FFSS and. FFSS can only operate under the plaintiff’s branding, “*Pacific Energy*”. Prasad passed away on 27 January, 2019. On 9 August,2019, the first defendants were appointed as the Executors and Trustees of the Estate.
5. On 29th July, 2021, the first defendants wrote to the plaintiff purporting to terminate the Agreement. At that time, the first defendants “*trading as FFSS*” had failed to purchase the minimum quantity of fuel and other petroleum products under the Agreement since 16 December, 2020, and accumulated a debt of \$20,848.56 to the plaintiff from products supplied and subsequently sold by the defendants.
6. On 5 August, 2021, the plaintiff’s solicitors responded to the termination letter stating that the Estate is legally bound by the Agreement,” *as the Executors have confirmed the contract by continuing performance*”. On 25 August, 2021, the first defendants replied that they are not bound by the Agreement. A search reveals that the business name “*Farmers Freeway Service Station*” is registered and owned by the first defendants. On 9 September,2021, the first defendants’s solicitors confirmed that the Estate has entered into a lease agreement with a supplier another .
7. The affidavit continues to state that works are being carried out at the first defendants’ FFSS site. Fuel pumps, equipment, machinery, signage and other assets installed by the plaintiff have and are being removed in breach of the Agreement. The “*Third Defendant*” has been erected on the roadside of the FFSS site. The actions of the defendants are causing serious irreparable harm to the plaintiff’s commercial interests. The plaintiff gives an undertaking as to damages. The plaintiff has been in business since 1948. It is one of largest fuel suppliers in Fiji and has sufficient funds to meet any award of damages.

8. On 29th September,2021, I directed the defendants to file affidavits in opposition on 6th October,2021, and the plaintiff to reply on 13th October,2021.
9. Shamila Devi, in her affidavit filed on 7th October,2021, states that Prasad agreed to purchase fuel exclusively from the plaintiff. She denies that the exclusively extended to other petroleum products. There is no provision in the Agreement that the Service station can only operate under the plaintiff's branding "*Pacific Energy*". The Notice of 29 July 2021 issued by the Estate to the plaintiff was not a termination letter. The plaintiff had stopped the supply of fuel since 21 December, 2020. The service station had not stopped purchasing. The Estate had acknowledged that it owed monies and resolve the outstanding sum.
10. Clause 11.6 of the Agreement provides that "*if the Buyer terminates this Agreement without reasonable cause prior to the expiry date, the Buyer shall ...Compensate the Seller the full monetary value and shall reimburse the Seller all costs of the construction of any fixtures (and) ..Be liable to pay any special or general damages for breach of the agreement by an early termination*". The letter from the plaintiff's lawyers clearly shows that the plaintiff accepts that their remedy for an alleged breach of the Agreement, (if the Estate is bound by the Agreement), lies in damages and not injunctive relief.
11. The Agreement does not bind the Estate nor "*Rajan*" and her personally. The Estate has three executors and trustees. Akshay Chaudhary has been the principal point of contract between Pacific Energy.
12. The Service Station was primarily operated and managed by Prasad. He had been in the service station business since 1997. The executors and trustees in the administration of the Estate took on all business operations of the Estate, settlement of the debts and subsequent distribution. The Estate decided that it was financially prudent to lease the premises, as it did not have the requisite manpower and resources to operate and manage the business.

13. Shamila Devi concludes that the plaintiff engaged in extensive communications with the Estate on leasing the premises, which has not been disclosed. The plaintiff was informed that the Estate had leased the premises to generate revenue to service its debts.
14. Rajan Rahul Chaudhary, Director of the second defendant in his affidavit in opposition filed on 7th October,2021, supports the affidavit made by Sharmila Devi and Adi Jaya Tamara for the third defendant. He states that the second defendant entered into a bona fide lease agreement with the third defendant for the service station premises. The plaintiff is attempting to interfere with these commercial relationships and contractual obligations.
15. Adi Jaya Tamara, Country Manager of the third defendant in his affidavit in response filed on 8th October,2021, states that the third defendant was not a party to the Agreement between Prasad and the plaintiff. On 1 August, 2021, the second and third defendants entered into a valid and binding fuel supply agreement. The third defendant was not aware of any contractual relationship or dispute between the plaintiff and the first and second defendants. It is not carrying out any of the works that the plaintiff complains of at the service station. Its major obligation is to supply fuel. The plaintiff is seeking orders that will disrupt the contractual relationship between the second and third defendants.
16. Julien Leraille, in his affidavit in response states that the plaintiff has more than sufficient assets to meet an award of damages in the event the court decides later that an injunction should not have been granted. The plaintiff is unable to provide any further financial data as such information is commercially sensitive and cannot be disclosed to its competitors, including the third defendant. The first and second defendants do not have the means to meet any award of damages under clause 11.6 of the Agreement. The plaintiff has invested substantial sums of money in the installation of its equipment and construction works to prepare the service station site. The plaintiff was focusing on leasing the property to assist the Estate and maintain its presence at the site.

The determination

17. I will at the outset deal with the several objections raised by counsel for the defendants .
18. Mr Pal, counsel for the first and second defendants takes issue with the three affidavits filed on behalf of the plaintiff. He submitted that Julien Leraile in his affidavit in support does not state that he had the authority to depose on behalf of the plaintiff, in terms of section 53 of the Companies Act. All three affidavits do not state the place of residence of the deponents, as required by Or 41, r(4).
19. The riposte of Mr Clarke, counsel for the plaintiff was that the contention on section 53 of the Companies Act is misplaced. The title of the affidavits gives the address of the plaintiff's office as required by Or 41, r(4).
20. I find that Julien Leraile does not state that he was authorized by the plaintiff to depose. However, no prejudice has been caused to the defendants. The "*defect is of little consequence to the actual litigation*" as Gates J(as he then was) stated in ***Koroi v Commissioner of Inland Revenue***. [2011]FJHC 138(24 August 2001).
21. In my view, the answer to the second objection is contained in Or 41, r. 1(4)., which goes on to state that in "*the case of a deponent who gives evidence in a professional business or other occupational capacity the affidavit may, instead of stating the deponent's place of residence state the address at which he works*".
22. Next, Mr Pal submitted that the affidavit in response filed on behalf of the plaintiff contains new evidence, viz that the defendants do not have the means to meet an award of damages, the plaintiff's undertaking as to damages, its investment and negotiations with the first defendant

23. Mr Pal relied on the case of *Faber v Nazerian*, (2012/42735 of 15 April 2013) where the High Court of South Africa stated :

The general rule which is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit.⁶ This rule is based on the principle that the applicant stands or falls by his or founding affidavit.⁷ The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit.⁸

The exception to this rule is found in Body Corporate, Shaftesbury Sectional Title Scheme, (supra) where the Court in upholding what was said in Shephard v Tuckers Land and Development Corporation (Pty) Ltd [1978 (1) SA 173 (W) at 177G–178A] and after confirming the general rule applicable in motion proceedings, held that the rule was not absolute and that the Court has a discretion to permit new material in the replying affidavit.

24. I find that the affidavit in response does contain new grounds to support of this application, (in particular, that the first defendants do not have assets to meet an award of damages) and for that reason cannot be considered.

25. Mr Pal and Mr Singh, counsel for the second defendant submitted that there is no statement of claim before Court and accordingly, no threatened invasion. The plaintiff has not filed statement of claim within 14 days of filing writ and instead filed a writ in Civil Action No. 204 of 2021 against the same parties with additional reliefs. The Indorsement of claim in the instant case does not seek any final relief nor a claim for damages.

26. Mr Clarke stated that the statement of claim was filed by the plaintiff with writ in another case, viz Civil Action no. HBC 204 of 2021 by his office by error.

27. I note that the first defendant acknowledged service on 12th October,2021, and the second defendant on 8th October,2021. As at the date of hearing of this application, the defendants were aware that a statement of claim has been filed albeit under another case number.

28. I accept the statement of claim filed by the solicitors for the plaintiff by error in HBC 204 of 2021.

The application for interim relief

29. Mr Clarke submitted that there is a serious issue to be tried arising from the breach of the Agreement by the first defendants. The first defendants have affirmed and ratified the Agreement entered into between Prasad,(deceased) and the plaintiff. Mr Clarke referred to an averment in the affidavit in opposition of Shamila that the service station had not stopped purchasing and an email of 22nd December,2020, attached to the plaintiff's response.

30. The principles governing the grant or refusal of an interlocutory injunction are laid down in the *American Cyanamid.*, [1975]1 All E.R.504 at 510. Lord Diplock stated that in granting an interim injunction “ *the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.*”

31. The Agreement relied on by the plaintiff provided that the deceased Prasad trading as FFSS “ *shall.. exclusively purchase from (the plaintiff) for resale at or from the Site all fuel*”.

32. Prasad passed away on 27 January, 2019.

33. On 9 August,2019, the first defendants were appointed as the Executors and Trustees of the Estate.

34. On 29th July, 2021, the first defendants wrote to the plaintiff stating that:

We regret to inform you that the Estate has decided not to operate any service station business as part of the administration of the Estate.

The Supply Agreement dated 1 March 2016 did not bind the successors and assigns of Mr. Ramendra Prasad. The Estate is therefore not a party and is not bound by the agreement.

Thus kindly take note and remove all your equipment and brandings from the service station property upon submission of a list of all items on site within 30 days from the date of this letter.

Please note that the site must be de-branded and all Pacific Energy equipment removed within the given timeframe otherwise the Estate will have to get it removed and charge Pacific Energy for the cost of removal, transport and storage.

We also understand that the Estate's service station business may have some due account. Thus kindly email details of all dues to estateoframendraprasad@gmail.com and we will settle the dues after vetting.

Please feel free to contact us for any further information or clarification.

35. The plaintiff's solicitors responded stating that the Estate is legally bound by the Agreement," as the Executors have confirmed the contract by continuing performance".

36. The first question that has to be considered is whether there is an agreement between the plaintiff and the first defendants, as quite correctly submitted by the solicitors for the plaintiff in their written submissions.

37. In my view, the Agreement relied on by the plaintiff came to an end on the demise of Mr Prasad. There is no Agreement between the plaintiff and the first defendants.

38. It follows that the second and third questions posed by the plaintiff's solicitors whether the first defendant breached the Agreement, and clause 11.6 of the Agreement provides an adequate remedy for the plaintiff do not arise for consideration.

39. I refer to the following passage from **CHITTY ON CONTRACTS, GENERAL PRINCIPLES**, Vol 1,(29th Ed) paragraph 20-010, as contained in the plaintiff's bundle of authorities:

Executor carrying on business of testator. Unless empowered to do so by the testator's will, an executor is not entitled to carry on the testator's business except for the purpose of winding it up. ..
(underlining mine)

40. Lord Mansfield, CH.J in **Barker v Parker**, 1 TR 287 stated :

This is a very plain case. The service in the contemplation of the parties was the service to the testator. There are no idea then of carrying it farther.

A trade is not transmissible: it is put an end to by the death of the trader. Executors eo nomine do not usually carry on a trade; if they do so, they run great risk; and without the protection of the Court of Chancery they would act very unwisely in carrying it on..... If executors carry on a trade, they must do it as individuals for their own advantage. (emphasis added)

41. In my view, there is no serious issue to be tried in the present case.

42. Lord Diplock in **Siskina v Distos SA**,(1979) AC 210 at page 256 stated that a right to obtain an interlocutory injunction is “*ancillary and incidental to the pre-existing cause of action..(and) dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff.*”(emphasis added)

43. In **Chambers v Wakaya Ltd**, (Civil Appeal ABU0040 of 2010) Marshall JA stated:

... If the Plaintiff does not have an action to prevent the Defendant infringing a proprietary or other established legal right of the Plaintiff, there is no jurisdiction to entertain an application or grant an interim interlocutory injunction on a quia timet or any other basis. ..._(emphasis added)

In the same case, Izaz Khan JA said the first question is whether the respondent had the locus standi to obtain the injunction cited Gleeson CJ in **Australia Broadcasting Corporation v. Lenah Game Meats Pty**, (2001) 185 ALR 1:

..... *There could be no justification, in principle, for granting an interlocutory injunction here other than to preserve the subject matter of the dispute, and to maintain the status quo pending the determination of the rights of the parties. **If the respondent cannot show a sufficient colour of right of the kind sought to be vindicated by final relief, the foundation of the claim for interlocutory relief disappears.*** (emphasis added).

44. The Supreme Court in *Wakaya Ltd v Chambers*, (Civil Appeal No:CBV0008/11) upheld the finding of the FCA that the case "*did not come within the principles enunciated in the American Cyanamid v Ethicon [1975] UKHL 1; 1975 AC 396* regarding the granting of interim injunctions as there was no question of balance of convenience in the circumstances of the case as there was no **infringement of a proprietary or legal right**" (emphasis added).

45. In my view, the plaintiff has failed to show that it has a right to be vindicated. The application for interim relief is declined.

46. Orders

- a. The plaintiff's application is declined
- b. The plaintiff shall pay costs summarily assessed within 14 days of this Ruling as follows: to the first defendant, a sum of \$ 1000.00 ; to the second defendant a sum of \$ 1000.00 and to the third defendant a sum of \$ 1000.00.



A.L.B. Brito-Mutunayagam

JUDGE

23rd November, 2021