

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO - HBC 30 of 2022

BETWEEN: **JOSHIKA SAMUJH** of 14 Totoya Street, Samabula

PLAINTIFF

A N D: **CHAMPAK LAL PATEL** of Gaji Road, Samabula, Suva

DEFENDANT

Appearance : Mr. Ritesh Krishna Naidu for the plaintiff
 Mr. Devanesh Sharma and Mr. Subhash Parshotam for the defendant

Hearing : Wednesday, 15th June, 2022 at 2.30 p.m

Decision : Friday, 19th August, 2022 at 9:00 a.m

Decision

(A) INTRODUCTION

[1]. The matter before me stems from the summons filed by the plaintiff seeking the grant of the following orders:

- 1) *An order that the defendant Champak Lal Patel by himself and/or through his servants and/or agents or otherwise howsoever be restrained from communicating, contacting, abusing, pestering, harassing, annoying and interfering with the plaintiff in any manner or form until further order of this court.*
- 2) *The costs on this application be paid by the defendant.*
- 3) *Such other order maybe made in the premises as shall be just.*

- [2]. The application is made pursuant to Order 29 Rule (1) and (2) of the High Court Rules, 1988.
- [3]. The application is opposed.
- [4]. The following affidavits have been filed:
- 1) Affidavit of Joshika Samujh in support of the application sworn on 18th January 2022 and filed herein on 19 January 2022.
 - 2) Affidavit of Champak Lal Patel in response to the affidavit of Joshika Samujh sworn and filed herein on 04 February 2022.
 - 3) Affidavit of Ulamila Wati in response to the affidavit of Joshika Samujh sworn and filed herein on 04 February 2022.
 - 4) Affidavit of Joshika Samujh in reply to Champak Lal Patel's affidavit sworn and filed herein on 21 February 2022.
 - 5) Affidavit of Joshika Samujh in reply to Ulamila Wati's affidavit sworn and filed herein on 21 February 2022.
 - 6) Supplementary affidavit of Joshika Samujh sworn on 02 March 2022 and filed herein 03 March 2022.
 - 7) Affidavit of Fezel Haniff in reply sworn on 28 February 2022 and filed herein on 03 March 2022.

(B) BACKGROUND

- [5]. The plaintiff has been living in a de facto relationship with Dr. Bhagwat Rama (**Dr. Rama**) at 14 Totoya Street, Samabula, Suva.
- [6]. Dr. Rama has some mental health issues and he is under the plaintiff's care and management.
- [7]. Dr. Rama and the defendant have been close friends for many years.
- [8]. The plaintiff says that in November 2021, the plaintiff told the defendant not to enter the plaintiff's residence at 14 Totoya Street, Samabula and to cease communicating with her de facto partner because:

- The defendant tried to supply drugs to her de facto partner.
- The defendant attempted to brainwash her de facto partner to obtain a power of attorney from him.

[9]. The plaintiff says that the defendant was unable to accept that and has pursued the following course of conduct which the plaintiff claims amount to "harassment". [Reference is made to paragraph (6), (7), (8) and (9) of the plaintiff's affidavit in support sworn on 18.01.2022].

(6). *Since 29 November 2021 the defendant has been sending me vulgar and abusive text messages on my mobile phone number 999 0192. This continued until 5 December 2021 and then he stopped after my de facto partner told him to stop contacting and harassing me and reported the matter to the police. Following this the police warned the defendant.*

(7). *The defendant went silent for about 2 weeks and then persistently sent me text messages on My mobile phone number 999 0192 from 19 December 2021, at night or early hours of morning and this continues to date. In his text messages the defendant amongst other things stated the following:*

- *He said to take half of my de facto partner's "wealth and f...k off"*
- *He said i have been "f...g people for money"*
- *He accused me of wanting to drug and kill my de facto partner and take all the wealth.*
- *He said the house belongs to Mr. Hari Rama, not to me and my de facto partner.*

There is now produced and exhibited herewith marked "JS1" a bundle of printed text messages from the defendant.

(8). *In his text messages to me the defendant has been very abusive towards. He has called me:*

- *a wicked person*
- *an evil person*
- *a gold digger*
- *a big slut*
- *a prostitute*
- *a bitch*
- *a disgraced an ex-lawyer*

- (9). *The defendant has sent me terrifying text messages in which he has threatened to "expose" me and wrote that he has "high connections and good intelligence".*
- [10]. The essence of the plaintiff's complaint is that she has been the victim of repeated harassment since 29.11.2021. The plaintiff says that as a result of the defendant's tortious conduct she was under enormous stress; [Reference is made to paragraph (10) and (11) of the plaintiff's affidavit in support sworn on 18.01.2022].
- (10) *having sleepless nights expecting to receive text messages from the defendant any minute. The defendant's conduct has become unbearable and I am in constant fear of him intervening in my daily life.*
- (11) *The behaviours as aforesaid has made myself very nervous. I am very disturbed. This has caused me stress and interference in my sleep, daily enjoyment of my liberty to movement and enjoyment of my privacy. For instance the defendant was aware of my movement on 6 November 2021 when I went to Shreedhar Motors Limited at Vatuwaqa in Suva to purchase a car the defendant has been stalking me. I am also apprehensive that unless the defendant is restrained from continuing such behaviour, he will continue his campaign of threats, intimidation and harassment.*
- [11]. The defendant admitted sending text messages to the plaintiff [Marked and exhibited JS- 1.] The defendant has sworn an affidavit in opposition on 04.02.2022 framing a defence against the facts alleged by the plaintiff and making various allegations against the plaintiff. The defendant averred the followings in his affidavit in opposition : [Reference is made to paragraph (8), (9), (11), (12), (13), (14), (19) and (21) of the affidavit in opposition of the defendant sworn on 04.02.2022]
8. *As to paragraph 4:*
- i. *The allegations made by the Plaintiff are untrue.*
 - ii. *Dr Rama and I have been close friends for many years.*
 - iii. *Dr Rama was like a mentor to me.*
 - iv. *Dr Rama and I have never lost contact with each other.*
 - v. *There are no personal difference between Dr. Rama and me.*

- vi. *The plaintiff has tried her best to cause difference between Dr. Rama and me.*
 - vii. *Dr Rama had reached out to me to discuss private matters including the cruel and inhumane treatment and the lack of respect shown by the plaintiff to Dr.*
 - viii. *Dr. Rama was also concerned about the fact that the plaintiff had taken away his mobile phone and he was not able to contact his family and friends.*
 - ix. *Dr Rama was also concerned about the fact that the plaintiff has been able to use to obtain a half undivided share of Dr Rama's real property and control over his bank accounts.*
 - x. *I was informed by Dr Rama that the plaintiff has not contributed anything financially to Dr Rama's assets.*
 - xi. *Dr Rama is in a poor state of health but alert mentally but the plaintiff refused to let Dr Rama and me have a private conversation.*
9. *As to paragraph 5, I deny the allegations made by the plaintiff. I further say that:*
- i. *The allegations made by the plaintiff are grossly exaggerated and untrue.*
 - ii. *The plaintiff has tried to harass and intimidate me in order to keep me away from Dr Rama but I was invited by Dr Rama to visit him.*
 - iii. *I want nothing to do with plaintiff.*
 - iv. *I deny the allegations made by the plaintiff about supplying marijuana.*
 - v. *Dr Rama had requested me to provide him with certain drugs and supplements to help his pain and discomfort.*
 - vi. *As a friend I tried his best to accommodate Dr Rama's request by providing him with bottled water, Absorb Plus and fresh fruits.*

11. *As to paragraph 7, I ask the text messages be read in totality and in contact and not on a piecemeal basis. The text messages clearly set out the way the plaintiff blocked anyone from having any contact with Dr Rama. All I have asked for in my text messages is the ability to meet and talk to Dr Rama. I have no interest in having any contact with the Plaintiff.*
12. *As to paragraph 8, I am entitled to my personal opinions which are based on facts. The plaintiff does not set out what she has been saying to me and I have annexed a copy of the transcript of the last conversation that I had with the plaintiff. It shows the vulgar and intimidating manner in which the plaintiff talks. It also shows the threatening manner in which she talks to Dr Rama. The transcript is annexed and marked "A".*
13. *As to paragraph 9, the family of Dr Rama all know what the plaintiff is up to so there is no question of exposing the plaintiff. They all know that the plaintiff is seeking to usurp Dr Rama's wealth and assets.*
14. *As to paragraph 10, the plaintiff's demeanor in his recorded conversation with me clearly shows that she is the one who quickly alludes to making threats and intimidation. As I said I have no interest in the plaintiff at all. She keeps interfering in Dr Rama's private life.*
19. *As to paragraph 14 I opposed the grant of any restraining orders. The plaintiff is staying in the house that is owned by Dr Rama and in which she acquired a half share in July 2021. If the court grants a Restraining Order, then she will effectively succeed in completely locking me out of Dr Rama's life because the plaintiff stays with Dr Rama. I have no intentions of having any sort of communications with the plaintiff but since she has completely immobilized Dr Rama by taking away his mobile phone and not allowing anyone to visit him, she will be at liberty to continue her ill treatment of Dr Rama.*
21. *This matter is not about the plaintiff, in reality it is her attempt to prevent me and Dr Rama's family from having any contact with him. It is her attempt to discredit me and my reputation just because I have been asking some very difficult questions about the way the plaintiff has treated Dr Rama. I ask the court to see through the smokescreen and mirrors that the plaintiff seeks to create. I truly believe that Dr Rama's life is in danger because the plaintiff through her conduct and her Power of Attorney will seek to usurp all of Dr Rama's assets and wealth. I implore the court to make orders to protect Dr Rama.*

[12]. The defendant has a counter claim against the plaintiff alleging that the plaintiff has harassed and intimidated the defendant. The audio recording of last conversation the defendant had with the plaintiff is annexed and marked 'A' in the affidavit in opposition of the defendant sworn on 04.02.2022. The defendant says that it shows the vulgar and intimidating manner in which the plaintiff talks to the defendant and Dr. Rama. The defendant, in addition, has filed an affidavit from Vasemaca Tolotolo sworn on 09.06.2022 and an affidavit of Ulamila Wati sworn on 04.02.2022, caregivers of Dr. Rama. Vasemaca says in her affidavit that she has recorded plaintiff's conversations and submitted to court with her affidavit a USB confirming the conversations. She says in her affidavit that the plaintiff is torturing Dr. Rama and she believes that Dr. Rama needs protection. Ulamila in her affidavit says that she has observed the appalling manner in which Dr. Rama was being treated by the plaintiff and she believes that Dr. Rama is in dire need of outside assistance.

[13]. The plaintiff in her answering affidavit engaged and immersed herself with the defence framed and the version alleged by the defendant and his two witnesses and denies all the allegations levelled against her in opposing affidavits and says in reply that the defendant is levelling baseless and unfounded allegations against her with the assistance of Ulamila and Vasemaca with the hope of rescinding the existing power of attorney given to her in order to obtain a new power of attorney to appoint him as the attorney of Dr. Rama.

What does this all come down to? The court could adopt a robust approach, where there is indeed a real, genuine and bona fide dispute of facts.

[14]. The defendant may, as he is entitled to do in terms of the Rules of the High Court, refer such dispute to the hearing of oral evidence. However, the defendant failed to do so. In the result, the defence will fall on the facts averred in the affidavit in reply of the plaintiff. The effect of employing a robust approach does have the benefit of an expeditious disposal of the interlocutory application and a costs saving which would have otherwise been attributed to an oral hearing.

[15]. In American Cynamid Co v Ethicon Ltd¹ Lord Diplock said that "it is no part of court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

¹ 1975 (1) ALL.E.R 504

(C). THE LEGAL PRINCIPLES

[16]. 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".

[17]. The plaintiff's application is made pursuant to Order 29, Rule (1), (2) of the High Court Rules, 1988, which provides:

[18]. 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 on 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 to 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."*

[19]. 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" 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?

[20]. 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 him 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."

- [21]. In Hubbard & Another v. Vosper & Another² 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 defendant 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 copy right, 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".

(D). CONSIDERATION AND THE DETERMINATION

- [22]. Whilst most grateful for the benefit of written submissions and research of counsel for the plaintiff, I venture to state that I have given my mind to the written submissions and the judicial authorities referred to there in.

Whether there is a serious question to be tried

- [23]. The court must be satisfied that there is a "serious question to be tried".

- [24]. In American Cyanamid v Ethicon (supra) Lord Diplock at page 510 said:

² 1972 EWCA CIV 9; [1972] (2) WLR 389

"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."

[25]. Lord Diplock further held:

"It is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

[26]. In "Honeymoon Island (Fiji) Ltd v Follies International Ltd"³ Pathik JA, Powell JA and Bruce JA enunciated the following:

"The grant of interlocutory injunction relief is discretionary. The court must be satisfied that there is a serious question to be tried, in other words, whether the application has any real prospect of succeeding in its claim for a permanent injunction at the trial."

[27]. Therefore, it is necessary to consider what claims for substantive relief, or cause of action, the plaintiff has against the defendant. Let me pause here for a moment to consider the nature of the substantive proceedings before me.

[28]. The essence of the plaintiff's complaint is that she has been the victim of repeated harassment since 29.11.2021. The plaintiff's cause of action against the defendant is based on the tort of harassment.

[29]. The particulars of plaintiff's statement of claim contain the following allegations; (Reference is made to paragraph 5(a) to (e), paragraph (6) and (7) of the statement of claim.)

(a) *The defendant has persistently sent vulgar and abusive text messages to the plaintiff on her mobile phone number 999 0192 almost on a daily basis from 29 November 2021 at night and early hours of morning.*

(b) *The defendant has sent text messages to the plaintiff containing threats against her.*

³ [2008] FJHC 36

- (c) *The defendant has sent text messages to the plaintiff stating that he is stalking her.*
 - (d) *That defendant on numerous occasions said to the plaintiff to leave her de facto partner and "f..k off".*
 - (e) *The defendant has sent text messages to the plaintiff stating that he has his intelligence on the plaintiff (who have dug up her past) and he will release them as and when required.*
6. *The defendant in his text messages has been abusing the plaintiff. In particular:*
- (a) *He called the plaintiff a wicked person*
 - (b) *He called her an evil person*
 - (c) *He called her a gold digger*
 - (d) *He called her a big slut*
 - (e) *He said to her take half of her partners wealth and f..k off*
 - (f) *He called her prostitute*
 - (g) *He said the plaintiff has been 'f...g people for money'*
 - (h) *He called her a disgraced lawyer*
 - (i) *He called the plaintiff bitch*
 - (j) *He accused the plaintiff of wanting to drug and kill her de facto partner and take all the wealth.*
7. *The defendant has sent the plaintiff terrifying text messages in which he threatened to "expose her" and stating he has "high profile connections and very good intelligence".*
- [30]. The plaintiff says that the defendant's behavior caused her 'great fear, disturbance, anxiety, inconvenience annoyance and distress. She is said to be 'very scared and feels very frightened' by the defendant's behavior
- [31]. The plaintiff seeks the following reliefs in the substantive action:
- (1) An injunction restraining the defendant from communicating with, contacting, abusing, pestering the plaintiff and pursuing any conduct which amounts to harassment of her.
 - (2) Damages up to a sum not exceeding \$300,000.00.
 - (3) Exemplary Damages.
 - (4) The aforesaid interest.
 - (5) Costs on an indemnity basis.

(6) Further or other reliefs.

- [32]. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person, which is calculated to and does cause that person alarm, fear or distress⁴. One of the more egregious forms of harassment is the stalking of women.
- [33]. The harassment in this case is the persistent texting of the unwanted text messages, even apart from their contents. The contents are abusive, vulgar, threatening and objectionable. Therefore, harassment is greater. The stalking of plaintiff is the more egregious form of harassment. No inquiry is required to demonstrate the inconvenience and annoyance to the plaintiff caused by such text messages and stalking. The plaintiff in her affidavit refers to the defendant's conduct as putting her under an enormous weight of stress, alarm, fear and distress.
- [34]. This course of conduct is capable of amounting to harassment.
- [35]. Counsel for the defendant Mr. Sharma submitted that the defendant's conduct had not been as serious as the plaintiff had contended. Mr. Sharma says that the plaintiff has exaggerated the nature of the case.
- [36]. In this regard, where there is indeed a real, genuine and bona fide dispute of fact, the defendant may, as he is entitled to do it in terms of Rules of High Court, refer such dispute to the hearing of oral evidence. The defendant failed to do so. The defendant's case will fall on the facts averred in the plaintiff's affidavits in reply.
- [37]. In this case there is crucial, unchallenged and undisputed documentary evidence ,i.e printed text messages of the defendant sent to the plaintiff - exhibit marked JS -1 which were not called for cross -examination by the defendant and the court is satisfied as to the inherent credibility, which if examined, would prove intolerable history of harassment by text messages. The defendant's words in the text messages are calculated to cause and in fact causing alarm, distress and anxiety. He had threatened violence, he had abused her and had persecuted her with text messages. The defendant's course of conduct is capable of amounting to tort of harassment and private nuisance. Therefore, the plaintiff's accusations are not fanciful. They were substantially justified. The plaintiff's complaints were not a storm in a teacup. The plaintiff's claim is not frivolous or vexatious.

⁴ Thomas v News Group Newspapers LTD (2001) EWCA CIV 1233

- [38]. A person must not pursue a course of conduct which amount to harassment of another.
- [39]. The defendant admitted sending text messages (exhibits JS - 1) to the plaintiff. As a defence to the plaintiff's allegation of harassment, the defendant says that he has only responded to the threats, harassment and intimidation against him by the plaintiff.
- [40]. The first question at issue is whether the purpose of the defendant's course of action was reasonably or rationally connected to the protection of his legitimate rights. Did he not constitute a separate course of conduct capable of amounting to harassment? The next question is whether a notional hypothetically reasonable person in the defendant's position would have engaged in the relevant conduct for the purpose of protection of his rights? Was there any logical connection between his supposed purpose and his course of conduct? Whether the intrusions upon the plaintiff's privacy is unrelated to the protection of the defendant's rights? Was he predominantly activated by malice and resentment? Whether the mere existence of a belief, however absurd, in the mind of the defendant that he is preventing a possibly non-existent harm to Dr. Rama, could justify him in persisting in a course of conduct which the law characterizes as oppressive ?

These are issues for trial before the court in this action.

- [41]. In the present case, I am dealing with an interlocutory not a final injunction.
- [42]. I am satisfied that there is a serious question to be tried.

Are damages an adequate remedy?

- [43]. Once the court has found that there is a serious issue to be tried, it should go on to consider the adequacy of the respective remedies in damages available for either party. In this regard the following dicta of Sachs L. J in Evans Marshall & Ltd —v- Bertola S. A⁵ is apt:

"The standard question in relation to the grant of an injunction - 'Are damages an adequate remedy?' - might perhaps, in the light of recent authorities of recent years, be re written — 'Is it just, in all the

⁵ (1973) 1 WLR 349 at 379

circumstances, that a plaintiff should be confined to his remedy in damages.”

[44]. When considering the adequacy of the respective remedies in damages available for either party, the court adopts the following approach:

- (a) First, the court must consider the adequacy of damages as a remedy for the loss the plaintiff will have sustained if finally successful at trial;
- (b) Secondly, if damages would not provide an adequate remedy for the plaintiff in the event of the plaintiff succeeding at the trial, the court must then consider whether if the defendant were to succeed at trial he would be adequately compensated under the plaintiffs undertaking as to damages.

[45]. As was pointed out by counsel for the plaintiff, in Alstom Transport UK Ltd v London Underground Ltd⁶ Stuart-Smith J summarized the “modern approach’ to question of adequacy of damages:

- “(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so ...*
- (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances that the claimant be confined to his remedy of damages.”*

[46]. I refer to paragraph (9), (10) and (11) of the plaintiff’s affidavit in support. She deposes as follows:

- “9. The defendant has sent me terrifying text messages in which he has threatened to “expose” me and wrote that he has “high connections and very good intelligence”.*
- 10. I am having sleepless nights expecting to receive text messages from the defendant any minute. The defendant’s conduct has become unbearable and I am in constant fear of him intervening in my daily life.*

⁶ 2017 EWHC 1521 at para 22

11. *The behaviors as aforesaid has made myself very nervous. I am very disturbed. This has caused me stress and interference in my sleep, daily enjoyment of my liberty to movement and enjoyment of my privacy. For instance the defendant was aware of my movement on 6 November 2027 when I went to Shreedhar Motors Limited at Vatuwaqa in Suva to purchase a car. The defendant has been stalking me. I am also apprehensive that unless the defendant is restrained from continuing such behaviour, he will continue his campaign of threats, intimidation and harassment."*

[47]. In her affidavit in reply at paragraph 19 and 20 (a) and (j), the plaintiff deposes as follows:

"19. *As to paragraph 9(i) of Patel's affidavit, I do not accept that my allegations are grossly exaggerated and untrue. I assert that my allegations are genuine given two months of harassing, demeaning, intimidating and completely reprehensible text messages I endured from the Defendant. I escalated five complaints to the police and despite at least three police warnings, however their inaction to charge the Defendant for any criminal offence for annoying the modesty of a woman, I had to seek the court's intervention to protect my 'right to privacy and peaceful enjoyment of my home and private life with my sick husband. This action of the Defendant was no longer tolerable, it was affecting my health and wellbeing, mentally and psychologically. In turn, it was affecting Dr Rama who often was shameful and saddened with the Defendant's messages when he read them. At times he would cry and profusely apologize to me and this was upsetting for both of us and the new Caregivers.*

20. *I do not accept paragraph 9(ii) of Patel's affidavit, I further say as follows:*

- (a) *At no given time I have directly or indirectly harassed or intimidated the Defendant in any manner whatsoever. In fact it was the other way around and the text messages prove my position adequately. The Defendant started a tirade of disparaging attacks on my character, name, and reputation and further pried into my personal life with Dr Rama through sordid name calling including questioning my professional and financial standing between the period starting from 29th November 2021 till 22 January 2022;*

- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...

(j) *The Defendant's continued two-month crusade of direct harassment and intimidation, not only offended my modesty but mentally and psychologically put strain on my health and wellbeing as I am caring for a sick husband for more than a decade. This requires patience, perseverance and lots of stamina and goodwill for women like myself which do such act out of love and not money. Unlike caregivers like Ulamila Wati who are paid to do the work and allowed time off, for me this has been a 15 year difficult journey tackled alone and without expectation of anything from Dr Rama."*

- [48]. In the present case, the plaintiff in her affidavit evidence refers to the defendant's conduct as putting her under an enormous weight of stress.
- [49]. I find on the facts an obvious risk that the cumulative effect of continued and unrestrained harassment the plaintiff has undergone could subject the plaintiff to stress, physical or psychiatric illness, and nervous shock, and such damages cannot be quantified since they do not have an actual price tag. They tend to be difficult to measure.
- [50]. The allegations in the particulars of the claim and the affidavit evidence to which I have referred to in this decision, show a serious risk to her health, and if unrestrained, continue and impair the plaintiff's health and it is amply justified. The law does not expect young woman to bear, indefinitely a campaign of intolerable harassment which the defendant has subjected the plaintiff.
- [51]. As correctly pointed out by counsel for the plaintiff, the text messages from the defendant inclusive of the messages such as that she is 'a gold digger, big slut, a prostitute'. No discussion is required to demonstrate the substantive injury caused to the plaintiff.
- [52]. There are no guideline for determining the value of mental pain, humiliation and lost reputation. The court cannot look at the chart to figure out how much to

award for these types of damages. This is a case in which the plaintiff cannot be adequately compensated by damages.

The undertaking as to damages

- [53]. The defendant contends that the plaintiff has not provided any evidence that she has the means to pay damages, if the defendant was to succeed at the trial.
- [54]. In paragraph (13) of the affidavit in support sworn on 18.10.2022, the plaintiff says that she has means to pay the damages, in the event the defendant succeeds at the trial. She has filed her undertaking as to damages. She says in her undertaking dated 21.01.2022, that she jointly owned with her de facto partner the property comprised in Crown Lease No: 1994 situated at 14 Totoya Street, Samabula. [Annexure JS-3 is the copy of the Crown Lease No:- 1994.] I am of the view that the damages undertaken given by the plaintiff is sufficient in the circumstances. If at the substantive trial the plaintiff fails, then in addition to any other relief, the court is obliged to make an order for damages against the plaintiff for the loss, if any, that was sustained as a result of the grant of the interlocutory injunction by the court.

A quia timet injunction

- [55]. There is one other matter to which I should refer. Mr. Sharma counsel for the defendant submitted that grounds for an injunction do not exist because the alleged conduct of the defendant ceased on 03-02-2022.
- [56]. It is accepted by Mr. Naidu, counsel for the plaintiff that the alleged abusive conduct of the defendant ceased on 03-02-2022.
- [57]. It is of course clear to me that the court cannot properly grant an injunction unless the plaintiff can show an arguable cause of action to support the grant.
- [58]. First, based on the facts of the plaintiff's affidavit relating to persistent and unwanted abuse by telephone communication which were not ventilated accurately and comprehensively in the defendant's answering affidavit, the plaintiff has a sustainable claim in private nuisance. The private nuisance is

usually defined as act or omissions which is an interference with, disturbance or annoyance to a person in the exercise or enjoyment of his occupation of Land.⁷

- [59]. The inconvenience and annoyance to the plaintiff caused through abuse of telephone communication by persistent and unwanted text messages sent by the defendant during the period 29-11-2021 to 03-02-2022 constituted and actionable interference with her right to privacy in her house.
- [60]. Secondly, there is documentary evidence (Annexure JS-1) that the plaintiff has been the victim of repeated harassment since 29-11-2021 to 03-02-2022.
- [61]. The court recognizes a need to protect the legitimate interest of those who have invoked its jurisdiction and an injunction may only properly be granted to restrain conduct which is in itself tortious or otherwise unlawful.
- [62]. Ordinarily, a victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed.
- [63]. After being served with the injunction proceedings on 26-01-2022, the defendant continued sending threatening and abusing text messages to the plaintiff. (Paragraph (04) of the affidavit in reply of the plaintiff sworn on 22.02.2022). After being served with the injunction proceedings, the defendant also contacted the plaintiff's solicitors by email on 31.03.2022 and 03-02-2022. In his email on 03-02-2022, the defendant made threats against the plaintiff's solicitor. He wrote "*you may be following the instructions of some disgraced lawyer but I hope you don't end up in a similar situation*".

These allegations are not denied by the defendant.

Because of the defendant's previous harassing behavior (29-11-2021 to 03-02-2022) if the defendant approaches the plaintiff or makes any communication to the plaintiff whether by telephone or otherwise, he will succumb to the temptation to abuse or harass the plaintiff in a manner which might be highly stressful and disturbing to the plaintiff. I find on the facts that the defendant would not minimize the risk of further incidents. The defendant is not the spouse of the plaintiff. He is not the cohabitant. Since there is an obvious risk that the cumulative effect of continued and unrestrained further harassment would cause the plaintiff to suffer from physical, viz illness in the nature of nervous

⁷ Clerk and Lindsell on Torts, 6th Ed, 1989, paragraph on 24-01

shock or psychiatric illness, the court is entitled to look at the defendant's conduct as a whole and restrain the defendant on '*quia timet*' basis'. The past conduct of the defendant has suggested that if he does speak to her, it is usually for the purpose of intimidating, threatening or abusing her, all of which are capable of amounting to crimes or torts. On the facts of this case, the court is entitled to look at the defendant's conduct as a whole and restrain on a '*quia timet*' basis. The defendant has rendered himself liable to such an order because of his previous harassing behavior.

The telephone harassment, as indicted above, is an actionable interference with her ordinary and reasonable use and enjoyment of property where she is lawfully present, and thus on the past history, can be restrained *quia timet* without further proof of damages. The defendant did not assert that the harassment of which complaint was made was not by itself calculated to cause the plaintiff harm. Viewed as a whole, it is plainly calculated to cause the plaintiff harm, and can be restrained *quia timet* because of the danger to her health from a continuation of the stress to which she has been subjected

Where does the balance of convenience lie?

[64]. In American Cyanamid Co (supra) Lord Diplock said the following:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent of which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases. "

[65]. In Gounder v Padayachi⁸ the full bench, Hon. Justice. F. Jameel stated the following:

⁸ [2022] FJCA 16; ABU 109.2016 & ABU 008.2017 (4 March 2022)

"In exercising its discretion and deciding where the balance of convenience lies, the court must weigh the competing interests of the parties, consider the subject matter of the dispute, its significance to each party, and then be satisfied that the comparative mischief, hardship, or inconvenience which the applicant will suffer by refusing the injunction, will be greater than what is likely to be suffered by the defendant in granting it. In other words, the question whether the harm that the defendant will suffer, will be greater than the harm the plaintiff will suffer if the injunction is issued."

[66]. What was sought by the plaintiff was;

"An Order that the Defendant Champak Lal Patel by himself and/or through his servants and/or agents or otherwise howsoever be restrained from communicating, contacting, abusing, pestering, harassing, annoying and interfering with the Plaintiff in any manner or form until further Order of this Court".

[Emphasis Added]

[67]. The defendant in paragraph (19) of his affidavit in opposition filed on 04-02-2022 states;

"As to paragraph 14, I oppose the grant of any restraining Orders. The Plaintiff is staying in the house that is owned by Dr Rama and in which she acquired half share in July 2021. If the Court grants a Restraining Order, then she will effectively succeed in completely locking me out of Dr Rama's life because the Plaintiff stays with Dr. Rama. I have no intentions of having any sort of communications with the Plaintiff but since she has completely immobilized Dr Rama by taking away his mobile phone and not allowing anyone to visit him, she will be at liberty to continue her ill treatment of Dr. Rama".

[68]. The defendant has not produced any evidence as to how he is going to be affected by the Order sought by the plaintiff to restrain him from communicating, contacting, abusing, pestering, harassing, annoying and interfering with the plaintiff.

[69]. The defendant has no legitimate reason for wishing to speak to the plaintiff, a victim of tortious conduct. There is no topic on which there might be a need for

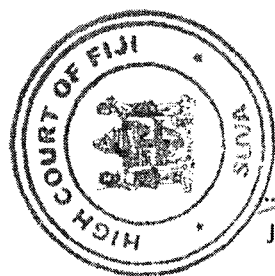
him to speak to her. The defendant is not the spouse of the plaintiff. He is not a cohabitant.

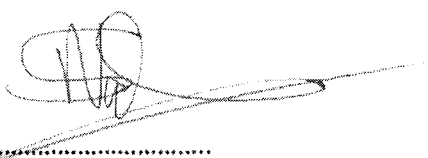
- [70]. There is no evidence before the court of any major loss or damage which the defendant might allegedly suffer if the injunction is granted.
- [71]. In the present case, the plaintiff in her evidence refers to the defendants conduct as putting her under an enormous weight of stress (see paragraph (46) and (47) above.)
- [72]. There is no medical evidence that the plaintiff is suffering from any physical or psychiatric illness. But there is, in my Judgment, an obvious risk that the cumulative effect of continued and unrestrained further harassment such as she has undergone for the period 29-11-2021 to 03-02-2022 would cause such illness. The law does not expect young woman to bear indefinitely such a campaign of persecution as that to which the defendant has subjected the plaintiff. She says in her affidavit *"I am having sleepless nights expecting to receive a text message from the defendant"*. She says further in her affidavit *"The defendant's conduct has become unbearable and I am in constant fear of him interfering in my daily life"*. She says *"the behavior as aforesaid has made myself very nervous. I am very disturbed. This has caused me stress....."*
- [73]. The allegations in the particulars of claim and the affidavit evidence to which I have referred show a serious risk to her health and in all the circumstances, an injunction to restrain conduct which it is reasonable to apprehend would, if unrestrained, continue and impair the plaintiff's health is amply justified.
- [74]. Therefore, when a balance is struck between conflicting rights and interests the scale comes down in favour of the plaintiff.

ORDERS

- [01]. An interlocutory injunction is granted as prayed for by the plaintiff's summons dated 18-01-2022 and filed on 19-01-2022.
- [02]. There will be costs regarding this application.
- [03]. The defendant is to pay costs summarily assessed in a sum of \$1000.00 to the plaintiff within seven [07] days here of.

[04]. The parties are directed to proceed with the pre-trial steps before the Master of the High Court on the substantive matter.




.....
Jude Nanayakkara
JUDGE

High Court - Suva
Friday, 19th August, 2022