

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 273** of **2021**

BETWEEN: **AMINISITAI TUIRABE** of Sawakasa Village, Sawakasa, Tailevu, Turaga na Ratu Sawakasa, Chairman of Sawakasa Tikina Council in a representative capacity for and on behalf of the 'Vanua o Sawakasa', the customary 'i qoliqoli' owners of the creeks and rivers at Sawakasa better known as Wailiko or Waivou Creek.

PLAINTIFF

AND: **STANDARD CONCRETE INDUSTRIES** a limited liability company having its registered office at Lot 1 Jai Hanuman Road, Bhindi Subdivision, Vatuwaqa, Suva.

DEFENDANT

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSEL: Mr Katia P. for the Plaintiffs/Applicants
Ms Devan S. for the Defendants/Respondents

Date of Decision: 03rd March, 2023 at 930am.

DECISION

[Inter-Parte Summons for an Interim Injunction pursuant to Order 7 Rule 2 and Order 29 Rule 1 of the High Court Rules 1988]

INTRODUCTION

[1] The Plaintiff filed a Substantive Writ of Summons and an Ex-Parte Summons coupled with an Affidavit in Support of Aminisitai T Tuirabe on 15 December 2021 [Later made Inter-Parte] and sought for the following orders:-

- (i) **That the Defendant and its agents, servants, employees in the interim is restrained from extracting, transporting, processing any sand, gravel, stones, rocks from and/or over the creek, river and/or land customarily owned by the Plaintiff until the final determination of this matter by this honourable Court.**
- (ii) **That the Defendant to immediately cease and desist from trespassing on the creek, river and/or land customarily owned by the Plaintiff until the final determination of this matter by this honourable Court;**
- (iii) **Costs of this application to be in the cause; and**
- (iv) **Any further or other order or relief as this honourable Court may deem fit in the circumstances.**

[2] Subsequently, the Defendant filed its statement of Defence and a Counter-Claim against the Plaintiff's Inter-Parte Summons.

[3] **The Plaintiff's Inter-Parte Summons is opposed by the Defendant and has accordingly filed an Affidavit in Opposition.**

[4] **The Defendant raised several valid matters in respect of non-existence of any credible evidence that the Defendant is Trespassing on Mataqali land and /or is illegally carrying out sand and gravel extraction from the river/creek. The Defendant further stated that the Plaintiff's legal action is filed against a wrong party as the Defendant is not the holder of any extraction licence.**

Plaintiff's Case

[5] The Plaintiff is the '*Turaga na Ratu Sawakasa*' and he represents the '*Vanua o Sawakasa*' who are the traditional owners of the '*i qoliqoli*' or **Wet Pit**.

[6] The Plaintiff is aware that the i'Taukei Land Trust Board has granted the Defendant's

application for an Extraction Licence for the land customarily owned by the Mataqali Ulugai.

- [7] The Plaintiff is aware that the Defendant has also been extracting sand and gravel from the **Wet Pit**, and they **do not have a licence** to do so.

Defendant's Case

- [8] The Defendant states its correct legal name as “**Standard Concrete Industries Pte Limited**” and that it is a division of Basic Industries Pte Ltd, and that it only provides operational support and infrastructure for the gravel extraction, and that we have initiated these proceedings against the wrong party.
- [9] The Defendant admits that it is Basic that has a licence to extract sand and gravel from the land owned by Mataqali Ulugai.
- [10] The Defendant denies sand and gravel extraction directly from the Wet Pit.
- [11] The Defendant further alleges that a minority faction of the mataqali headed by Sakiusa Boladai Waqa was supporting a competitor company, which is owned by a Chinese Investor who had attempted in the past to obtain injunctive orders against it, and this company was now causing a rift between the Mataqali members for financial gain and concocting allegations.
- [12] The Defendant whilst a Separate Legal entity is established as division of Basic Industries Limited.
- [13] Basic Industries Limited holds a licence no. 2018/012 for Extraction of sand and gravel issued to it by itaukei Land Trust Board.
- [14] That licence was first granted to Basic Industries Limited in 2017 and since has been renewed. The latest renewal was on 21st December 2020 for a period of 4 months.
- [15] Basic Industries Limited pursuant to its license has been Extracting Sand and gravel from the “**Dry Pit**” only.

- [16] The Defendant is not carrying out any Extraction from the river or creek as alleged.
- [17] The Defendant's Contention is that the Plaintiff's Legal action is filed against wrong party as the Defendant is not the holder of any extraction licence.
- [18] **The Defendant opposes the application raising several valid matters in respect of non-existence of any credible evidence that the Defendant is trespassing on Mataqali Land and/or is illegally carrying out sand and gravel extraction from the river/creek.**
- [19] **The Gravel extraction licence is held by Basic Industries Limited** which held a licence to enter upon the Mataqali Land to extract sand and gravel from the area demarcated (only the dry pit).
- [20] Since the **licence is held by Basic Industries Limited**, the property party against whom an **interim injunctive order(s) to be sought is Basic Industries Limited** and not the Defendant, **Standard Concrete Industries**.

Principles Relating to Grant of Injunction

- [21] It is trite law that injunctions (whether interim or perpetual) is a creation of the Courts of Equity and is **wholly an equitable remedy**. This means that injunctions are granted in conformity with principles of equity. This remedy which was later infused with common law Courts, has been adopted and applied in Fiji. With its lineage from the Courts of Equity, this remedy has remained discretionary to its broadest extent. The High Court in New Zealand noted in *Robertson v Auckland Council* that:

"...An injunction is a remedy of equity. All equitable remedies are discretionary..."

- [22] A remedy in injunction, as with any other remedy, **needs to be founded on a cause of action recognised by law**. This means that **no injunction will be granted where a cause of action does not exist against the Respondent**. It was held in *Paton-v – British Pregnancy Advisory Service Trustees*, that:

"The first and basic principle is that there must be a legal right enforceable in law or in equity before the applicant can obtain an injunction from the court to restrain an infringement of that right".

[23] Owing to the summary nature of proceedings, evidence taken on Affidavit and the fact that the Court does not fully examine on its merits, Courts, by principle **do not grant an interim injunction where it would effectively determine the matter in finality.**

[24] The law for grant of injunctions is well discussed in the leading case authority of **American Cyanamid v Ethicon Ltd** where it was stated:

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal rights is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do. 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 favour at the trial; but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial. The Court must weigh one need against another and determine where “the balance of” convenience” lies.”

[25] The *test in American Cyanamid v Ethicon* simple articulated into law as presently applicable can be summarized as follows:

- (i) Is there a **Serious Question** to be tried (Refer to Series 5 Software v Clarke [1996] 1 All ER 853);
- (ii) Whether **Damages would be an adequate remedy** for the Applicant;
- (iii) On whose favour does the **balance of convenience rest**;
- (iv) Whether the application falls under the purview of “**Special Cases**” and should be dealt with accordingly;

- (v) What is the requirement “**Overall Justice**” of the matter? (Referred from the test for interlocutory injunctions in New Zealand, viz . Klissers Farmhouse Bakeries Ltd – v – Harvest Bakeries Ltd [1985] 2 NZLR 140).

[26] It is trite law that if **damages would suffice to remedy the situation of breach or alleged breach of the Plaintiff’s rights, the Courts will not resort to injunct the Defendant** until determination of rights and liabilities of parties at trial.

[27] Courts exercise their equitable jurisdiction in cases that explicitly warrant its intervention. This stems from the function of equitable courts to remedy situations where common law damages would not suffice. For this reason, **any compensable breach or alleged breach, will not attract the Court’s intervention to injunct the Respondents where it has not made a determination at trial.**

[28] The law on how damages would suffice as remedy, is quiet clearly stated in *American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1* as:

“As to that, the governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the Plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.” (Per Lord Diplock) [Emphasis added].

DETERMINATION

[29] The substantive issue raised in the **Plaintiffs Inter-Parte Summon** is seeking an order

and/or relief together with other orders *‘whether or not the Defendant should be restrained from extracting gravel and sand from the creek bed or river, known as Wailiko or Waivou Creek referred to as Wet Pit?’*

[30] In order for this Court to determine the Plaintiff’s application, this Court must consider the principles as stated by Lord Diplock in *American Cyanamid –v- v Ethicon*:

- *Whether there is a Serious Question to be tried?*
- *Whether damages would be an adequate remedy?*
- *Whether Balance of Convenience granting or refusing of Interlocutory Injunction?*

[31] The Plaintiff referred Court to a number of documents provided in the Defendant’s affidavit, including but not limited to, the EIA [Environmental Impact Assessment Report] and its approval in which TLTB is informing the Defendants/ Standard Concrete Industries that its application for the renewal of its Extraction Licence has been approved for a term of 1 year from 1 May 2017.

[32] The initial consent by Mataqali Ulugai that enabled the issue of Extraction Licence by TLTB was to the Defendant, Standard Concrete Industries.

[33] The Defendant’s Contention is that Basic Industries the License cannot assign, sub-licence, transfer or deal with its rights under the license without the prior Written Consent of TLTB. The subsequent licence, commencing 1st July 2018 [*Annexure RD-2 refers*] was in the name of Basic, but there is no written consent from TLTB, and the Defendant’s Contention is that this is the ground for the Cancellation of the Licence.

[34] However, the **Defendants Contention**, all along has been that **Basic Industries Limited is the holder of the Licence and that the legal right to carry out the extraction licence was granted to the Basic Industries Limited and not to the Defendant, Standard Concrete Industries.**

[35] The Defendant further argued that if a cause of Action exists for trespass, then it must be asserted against Basic Industries Ltd for the simple reason that any enforcement of order must be against the holder of the Licence and not the Defendant/ Standard Concrete

Industries.

- [36] The Defendant claims that it merely provides infrastructure and manpower support for the extraction activity. All extraction are carried out pursuant to the licence and for the Benefit of Basic Industries Limited.
- [37] The Defendant denies extracting Gravel and Sand from the Wet Pit.
- [38] The Defendant argued that the Plaintiff was very well aware of the fact that the extraction **licence was issued to the Basic Industries Limited and not the Defendant Standard Concrete Industries**, yet the Plaintiff proceeded to file this action against the Defendant.
- [39] I make reference to annexures ***RD-11 and RD-15*** within the Defendants Affidavit in Reply deposed by Ritesh Dass. These annexures refer to '***Stop Work Notice***' issued by the Ministry of Lands dated 08th December 2020 and the '***Prohibition Notice***' by the Director of Environment dated 10th March 2021 respectively. Both were issued within the period when the EIA Report and Approval were both cancelled.
- [40] Above meant that the Defendant Continued in its operations until the Ministry of Environment became aware that the Defendant was operating without a Valid EIA Report and Approval.
- [41] However, the Ministry of Lands and Mineral Resources subsequently withdrew the **Stop Work Notice dated 8th December 2020, for illegal Extraction from Wailiko Creek on 11th December 2020.**
- [42] Further, the Department of Environment's '**Prohibition Notice**' issued on **10th March 2021 to the Defendant remained intact wherein the Defendant, Standard Concrete Industries Limited was instructed to cease all works at their site(s) along the Waivou and Wailiko Creeks.**
- [43] On 11th March 2021, the Defendant Standard Concrete Limited wrote back to the Director, Department of Environment **confirming that the Defendant have not been Extracting gravel from inside Wailiko Creek Channel at Sawakasa as alleged in the Prohibition Notice and that are activities at their Sawakasa operations have ceased completely and all workers sent home from the morning of 11th March 2021.**

[44] The Defendant's Contention is that despite the issuance of the '*Stop Work Notice*' to the Defendant, **Standard Concrete Industries Limited continued to inconspicuously extract gravel from the iqoliqoli resulting in significant damage to the iqoliqoli owner's fishing ground.**

[45] He further submitted that the Defendant does not have the required consent from the Plaintiff nor the Director of Lands to conduct any extraction work from within the said river system, creek and ultimately its fishing grounds, which is an interference and is intentional and as such is considered to be trespass ab initio.

IN CONCLUSION

(a) Serious Question to be tried

[46] The Defendant submitted that there are no serious issue to be tried based on the Affidavit Evidence before the Court because the Court is unlikely to find that:

- (i) There is sufficient evidence of trespass or illegal extraction.*
- (ii) There is evidence of damage caused to water waters or environment.*
- (iii) There is continuing non-compliance of EIA Conditions.*
- (iv) That the Defendant and or Basic Industries Limited do not hold EIA approvals.*
- (v) That the Defendant is required to obtain any waiver of fishing rights when no extraction is being carried out from the river or creek.*

[47] However, the Plaintiff alleges that the Defendant has been extracting gravel directly from the creek bed without an Extraction Licence for Wet Pit, and it has continued to extract sand and gravel even though its EIA Report and approval were cancelled, which is in breach of its '**Dry Pit**' Extraction Licence.

[48] I find that there is a Serious Question to tried by the Court and determine the Question '**whether the Defendant Standard Concrete Limited has been extracting sand and gravel from the Wet Pit, and that they do not have a licence to do so?**

(b) Balance of Convenience

[49] The Defendant's Contention is that the balance of convenience lies with the Defendant,

Standard Concrete Industries Limited since the Extraction operations are conducted by Basic Industries Limited lawfully pursuant to an Extraction Licence given to it by TLTB.

- [50] Granting an interim injunction would mean that Defendant/ Basic Industries Limited would no longer be able to conduct any Extraction resulting in loss, exceeding more than \$5.5 million.
- [51] The Plaintiff undertaking as to Damages in comparison with the loss and damages that the Defendant/Basic Industries Limited stands to suffer is inadequate.
- [52] Once the environment is negatively affected and/or people act with blatant disregard for the measures put in place to mitigate the impact on the environment, one can never replace or return the environment to the state that it existed herein before. The costs in time and finances in attempting to do so is unquantifiable.
- [53] I find that the Damages therefore will not be an adequate remedy for the Plaintiff accordingly.
- [54] Taking into consideration, the substantive issue raised within the Plaintiff's Inter-Parte Summons seeking for Interim Injunction against the Defendant, Standard Concrete Industries coupled with the affidavit evidence filed herein together with written and oral submission and bearing in mind the Nature of the application before this court, it is only appropriate at this juncture, that I immediately accede to the Plaintiff's application/ Inter-Parte Summons filed on 15th December 2021 and grant the Orders sought hereinabove in my Decision at paragraph 1 [i], [ii] and [iii] and in the **Plaintiff's Inter-Parte Summons at 1, 2 and 3** accordingly.

COSTS

- [55] The interlocutory Inter-Parte Summons proceeded to full hearing and parties to the proceedings furnished court with simultaneous written submissions.
- [56] I order that any costs against the Defendant, Standard Concrete Industries to be in the cause.

[57] Following are the Orders of the Court.

ORDERS

- i. That the Defendant and its agents, servants, employees in the interim is restrained from extracting, transporting, processing any sand, gravel, stones, rocks from and/or over the creek, river and/or land customarily owned by the Plaintiff until the final determination of the substantive Action and/or other orders of this honourable Court.
- ii. That the Defendant to immediately cease and desist from trespassing on the creek, river and/or land customarily owned by the Plaintiff until the final determination of the substantive Action and/or other orders of this honourable Court.
- iii. Any costs against the Defendant, Standard Concrete Industries to be in the cause.

Dated at Suva this 03rd day of March ,2023.



VISHWA DATT SHARMA
JUDGE

cc: Siwatibau and Sloan, Barristers & Solicitors, Suva
Messrs. Neel Shivam Lawyers, Barristers & Solicitors, Suva