

IN THE HIGH COURT OF FIJI AT ALUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 260 of 2022

BETWEEN

SHAUN ROSEN of Lot 2, Vunabaka, Malalo Island, Nadi.

PLAINTIFF

AND

VUNABAKA BAY FIJI LIMITED a limited liability company incorporated in
New Zealand and registered as a foreign company in Fiji.

FIRST DEFENDANT

AND

VUNABAKA BODY CORPORATE (FIJI) LIMITED a company limited by
guarantee and not having share capital.

SECOND DEFENDANT

SUSTAINABLE TOURISM HOLDINGS (BVI) LIMITED trading as

Six Senses Fiji.

THIRD DEFENDANT

AND

SEQUITUR RESORTS PTE LIMITED a company having its registered office at

C/- PKF Aliz Pacific, Level 3, Aliz Centre, 231 Martintar, Nadi.

FOURTH DEFENDANT

Counsel

Mr. Chang K. for the Plaintiff

Ms. N. Choo for the 1st & 2nd Defendants

Ms. R. Lal with Ms. M. Raga for the 3rd & 4th Defendants

Date of Hearing

25th October 2023

Date of Ruling

29th November 2023

RULING

(On an Application for an Injunction)

- [1] The plaintiff on 28th October 2022 filed summons seeking the following orders:
1. An injunction against the defendants, their servants and/or agents from interfering with the certification process with Lautoka City Council of the plaintiff's house at Lot being part of Lot 1 on SO 5817 known as Vunabaka (part of) comprised in Native Lease No. 28602.
 2. An injunction to restrain the defendants, their servants and/or agents from restricting the plaintiff, his family and guests to the quiet enjoyment of his marina berth in Vunabaka.
 3. An injunction to restrain the defendants, their servants and/or agents from harassing the plaintiff, his family and guests whilst in the Vunabaka Development.
 4. An order that the 1st defendant withdraw its objection(s) from Lautoka City Council to enable the Lautoka City Council to complete the house certification process.
 5. Costs on an indemnity basis.
 6. Such further or other relief as the court may deem just.

[2] At the commencement of the hearing the learned counsel for the plaintiff informed court that the plaintiff would not pursue the orders 1 and 4 sought in the above summons and he would pursue orders 2 and 3 only against the 3rd and 4th defendants.

[3] **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:

- (i) Whether there is a **serious question to be tried** at the hearing of the substantive matter;
- (ii) 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
- (iii) In whose favour the **balance of convenience** lie if the injunction is granted or refused.

In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 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.

Kerr LJ in Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 at 534 said:

It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

[4] In **Rosen v Vunabaka Bay Fiji Ltd [2020] FJHC 934; HBC62.2020** (6 November 2020) the plaintiff sought the following orders:

- (i) An injunction against the defendants, their servants and/or agents to restore the temporary power, restore the water connection and restore the gas connection to Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of) to until further order of this Court or final determination of this matter.
- (ii) An injunction to restrain the defendants, their servants and/or agents from preventing and/or interfering with Mr Rosen to complete the building at Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of).

- (iii) An injunction to restrain the defendants, their servants and/or agents from restricting Mr Rosen from the quiet enjoyment of his property at Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of).
- (iv) An injunction to restrain the defendants, their servants and/or agents from entering the land and premises described in Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 until further order of this Court or final determination of this matter.
- (v) Costs on indemnity basis.
- (vi) Such further and other relief this Court may deem just.

- [5] The court in its judgment granted orders 1, 2 and 3 above against the defendant who are the 1st and 2nd defendants in this matter.
- [6] Order 2 sought in the summons is an injunction restraining the 3rd and 4th defendants from the quiet enjoyment of the plaintiff, his family and guests while in his marina berth in Vunabaka.
- [7] In the affidavit in support of the plaintiff there is not a single allegation that 3rd and 4th defendants created any obstructions. In the affidavit in support the plaintiff states that the defendants wrote to the Lautoka City Council that the plaintiff is in breach of the Articles of Association of the 2nd defendant. As per the letter from the Lautoka City Council it had been written by the 1st defendant and there is no evidence that the 3rd and 4th defendant had any involvement in writing this letter. There is also no evidence of any form of harassment by the 3rd and 4th Defendants.

- [8] It is also important to bear in mind that injunctive relief being a discretionary remedy the party who seeks the court to exercise its discretion in his favour must come to court with clean hands and full facts.
- [9] The plaintiff has claimed damages as one of the substantive reliefs. Which means the plaintiff admits that award of damages would be an adequate remedy.
- [10] The 2nd and 3rd reliefs sought are declaratory reliefs. Therefore, there are no grounds for the court to justify granting the injunctive order sought by the plaintiff.

ORDERS

1. Orders 2 and 3 sought in the summons against the 3rd and 4th Defendants are refused.
2. The plaintiff is ordered to pay \$1000.00 (\$500.00 each) to the 3rd and 4th Defendants.


Lyone Seneviratne



JUDGE

29th November 2023