

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 300 of 2022**

BETWEEN : **PACIFIC MARINE & CIVIL SOLUTIONS PTE LIMITED** a limited liability company having its registered office at 9-12 Nukuwatu Street, Wailada Industrial Subdivision, Lami.

PLAINTIFF

AND : **PA GROUP (FIJI) PTE LIMITED** a limited liability company having its registered office at Level 1, RPA Building. Lot 1, Queens Highway, Wailekutu, Lami.

DEFENDANT

BEFORE : S. Banuve, J

COUNSEL : Gavin O'Driscoll for the Plaintiff
Feizal Haniff for the Defendant

Date of Hearing : 08 February, 2024

Date of Ruling : 22 February, 2024

RULING

A. Introduction

1. An Ex-Parte Notice of Motion was filed by the Plaintiff on 14th October 2022, which was directed to be heard Inter-Parte on 2nd November 2022 in which the following order was sought;

- i. That the motor vessel 'Viking Star' and the barge 'Mycon' be delivered to the Plaintiff and/or seized from the Defendant from wherever it maybe with police assistance, if necessary.*

Upon the grounds as set forth in the accompanying affidavit of Robert Peter Semaan sworn and filed herewith.

- ii. The Motion is made pursuant to Order 29, rule 2 of the **High Court** Rules, 1988.*
- iii. The following affidavits have been filed;*

(a) Affidavit in Support of Robert Peter Semaan filed on 14th October 2022.

(b) Affidavit in Reply of Rinesh Kumar filed on 22nd February 2023.

(c) Affidavit in Reply of Robert Peter Semaan filed on 19th April 2023.

B. Background

Plaintiff's Position

2. The Plaintiff was the owner of the motor vessel '**Viking Star**' and the barge '**Mycon**'.
3. On 17th March 2017 the parties executed a Sale and Purchase Agreement whereby the Plaintiff agreed to sell the vessel, barge and an "**Ice Vibro Piling Gear and Power Pack**" to the Defendant, subject to agreed terms which included, *but were not limited to a price for the vessels* were to be paid over a period of time . The Defendant paid part of the agreed amount however a balance of \$289, 626.77 remain unpaid, according to the Plaintiff, which the Defendant disputes.

4. A further term of the agreement between the parties under the 2017 Agreement was for interest to be charged for any outstanding balance at the rate of 15% per annum after the due date for payment had been reached, which the Plaintiff calculates to be \$299, 870.52 with further interest accruing from September 2022 until full payment was made with the total amount now standing at \$589, 497.29.
5. Since around 17th March 2017, physical possession of the said vessels had been given to the Defendant on the understanding that *the remaining outstanding provisions of the agreement* including payment of the balance of the purchase price, would be complied with.
6. Between June 2020 and November 2022 due to Covid-19 and the effect of a stay in HBE 18 of 2020 the Plaintiff did not take any action against the Defendant.
7. Pursuant to clause 10.2 of the Agreement, the Plaintiff deemed the Defendant to have defaulted with its obligation to pay the purchase price therefore it issued a Notice to retake the vessels together with a Notice to Terminate the 2017 Agreement, on failure to remedy the default, the Notice being served on the Defendant at its registered office on 11th October 2022.
8. The Plaintiff could not re-take possession of the said vessels at Lautoka and rather than allowing the dispute to escalate allowed the vessels to sail to Suva
9. The Plaintiff apprehends that the Defendant has no intention of paying off the balance under the 2017 Agreement to it, nor is it willing to surrender the vessels to the Plaintiff peacefully, thus it has lodged a complaint of theft against the Defendant, with the Police, although it acknowledges the Police may not investigate as the dispute was a civil one.
10. The Defendant by its actions have caused the Plaintiff loss which is continuing as the Defendant has failed to pay the outstanding balance and interest accruing from 16th September 2022 *and that the Defendant continues to use the said vessels for its own purpose without having complied with the terms of the payment under the 2017 Agreement.*

Defendant's Position (Defence and Counter-Claim)

11. Whilst it acknowledges executing the Sale and Purchase Agreement on 17th March 2017 the Defendant states that this Agreement has been varied over time as follows;
 - (i) Between December 2017 and February 2018 the parties agreed that the Plaintiff would hire an excavator from the Defendant for its Naisoso job site for \$25,000.00.
 - (ii) On or about December 2018, the parties agreed that the Defendant would salvage the Plaintiff's barge at Walu Bay for \$45,000.00. These additional sums amounting to \$70,000.00 were to be deducted from the balance owing under the 2017 Agreement.
 - (iii) On 24th May 2018, \$112,706.33 was credited to the payment of the vessels under the 2017 Agreement by Pacific Building Solutions –a company that was part of the Plaintiff, further reducing the amount owed by the Defendant to the Plaintiff.
 - (iv) On 28th September 2018, the Plaintiff and the Defendant entered into a sub-contractor agreement for the jetty re-furbishment at the Government Shipyard at Walu Bay for the sum of \$280,419.77, the amount which was to be a reduction of the price payable to the Plaintiff under the 2017 Agreement.
12. Despite the Defendant paying in full under the 2017 Agreement for the vessels and asset owned by the Plaintiff, the latter has refused to transfer the vessels to it, including the signing of registration papers transferring the title to the vessels to the Defendant.
13. The Defendant admits that it continues to use the vessel "Tua Viking" and the barge "Mycon" and various equipment it was to have purchased under the Sale and Purchase Agreement of 2017.
14. The Defendant by way of Counter-Claim seeks the following orders;

- (i) Judgment against the Plaintiff for the sum of \$58, 155.52.
- (ii) Pre-judgment interest of 10% per annum pursuant to section 3 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act Cap 27.
- (iii) Post judgment interest of 4% per annum from the date of judgment to the date of the payment pursuant to section 4 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act Cap 27 as amended by section 2 of the Law Reform (Miscellaneous Provisions)(Death and Interest)(Amendment) Decree 2011.
- (iv) Costs on indemnity basis.

C. The Plaintiff Case

Writ of Summons

15. On 14th October 2022 the Plaintiff commenced an action by way of Writ of Summons against the Defendant alleging that it had breached its payment obligations under a Sales and Purchase Agreement dated 17th March 2017 for the purchase of the vessel "Tua Viking", the barge " Mycon" and other equipment owned by the Plaintiff. The following relief are sought;
- (i) An order that the MV Viking Star and the barge Mycon be returned to the Plaintiff forthwith with Police assistance, if necessary.
 - (ii) Damages for loss of use of the said vessels from 8th October 2022 to be assessed.
 - (iii) Alternatively, judgment for \$589,497.29 (Five Hundred and Eighty Nine Thousand Four Hundred and Ninety Seven Dollars and Twenty Nine Cents)
 - (iv) Interest at the rate of 15% compounded from 16th September 2022 until the date of judgment pursuant to the agreement dated 17th March 2017.

- (v) Interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act as amended from time to time at the rate of 4% per annum from the date of judgment until the date of payment.

Motion

16. An Ex-Parte Motion was also filed by the Plaintiff on 14th October 2022 pursuant to Order 29, r 2 of the *High Court Rules* 1988 and supported by an affidavit deposed by Robert Peter Semaan. The Plaintiff seeks by motion;

“FOR AN ORDER that the motor vessel “Viking Star” and the barge “Mycon” be delivered to the Plaintiff and/or seized from the Defendant from wherever it maybe with police assistance, if necessary.”

17. Order 29, rule 2 provides;
Detention, preservation, etc., of subject matter , of cause or matter (O.29, r.2)
2-(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject of the cause or matter, or as to which any question may arise therein , or for the inspection of any such property in the possession of a party to the cause or matter
18. The interlocutory order sought is primarily termed a **mareva injunction** a sobriquet from *Mareva Compania Naviera S.A v International Bulkcarriers S.A* (1975) 2 Lloyds Rep .509 [HC]. The principle for its grant is settled in this jurisdiction - *FIRCA v. Interval Holidays (Fiji) Ltd* [2004] FLR 435; *Prasad v Carpenters (Fiji) Ltd* [2004] FLR 517.¹
19. The Court has reviewed the matters deposed in the affidavit filed in support of the motion filed on 14th October 2022, and is of the view that in a proper case for a mareva injunction, as a prohibitory order sought pending trial, the stringent test that there needs to be a real risk that the defendant might dissipate his assets would have disentitled the Plaintiff from obtaining the injunction sought. Mere assertion of belief by the Plaintiff, ²as here, without any solid supportive

¹¹¹¹ (a) It has a good and arguable case and (b) there are assets of the Defendant within the jurisdiction to which the orders can apply and (c) there is a real risk that the Defendant will dissipate or dispose of assets so as to render himself “judgment proof”.

²²² Paragraph 21 of the affidavit of Robert Peter Semaan filed on 14th October 2022 (“sincerely apprehend that the Defendant may attempt to take the said vessels out of Fiji jurisdiction”

evidence that the Defendant might dissipate the asset, would be insufficient – *Bank of New Zealand (BNZ) v Hawkins* [1989] 1 PR NZ 451.

20. As the mareva injunction is an interlocutory (prohibitory) injunction the governing principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, would apply to it.
21. The principles have been helpfully summarized in manifold cases such as the *Evolution Fiji* case.

- (a) Whether there is a serious question to be tried?
- (b) Whether damages would be an adequate remedy?
- (c) Whether balance of convenience favor granting or refusing interlocutory injunction?³

D. Form of the Order

22. Whilst the Ex parte Motion was filed on 14th October 2022 pursuant to Order 25, r 2 of the *High Court Rules* 1988 it clearly was not prohibitory in nature, but rather mandatory in form.

“ORDER that the motor vessel “ Viking Star” and the barge ‘Mycon’ be delivered to the Plaintiff and/or seized from the Defendant from wherever it maybe with police assistance, if necessary

23. As it was not prohibitory in form *prohibiting or requiring a party to abstain* from a pattern of conduct during the period between its grant and the trial proper, the general principles applicable to interlocutory injunctions settled in *American Cyanamid Co v Ethicon* [1975] 1 All ER 504, would not apply to it.
24. Rather, the applicable principles were pronounced in *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 348 (per Megarry J). It remains the leading authority in

³ There are different permutations of this test. In Australia there are only 2 issues that arise (1) whether a serious case has been made out and (2) where the balance of convenience lies (adequacy of damages is considered in the balancing process as to where the convenience lies)- *Active Leisure*-Qd Sup Court at p 14/

England⁴ and Australia⁵, despite some dissension on its scope⁶. It is good law in Fiji.⁷

25. A mandatory injunction requires the taking of positive steps as opposed to a prohibitory injunction which merely requires a party abstaining from a pattern of conduct pending the trial. The effect of the mandatory injunction, as sought on motion by the Plaintiff, in this case, is that there will be no further grant of a mandatory injunction at trial; and has been described "*what is done is done*".⁸
26. Due to its intrusive effect an interlocutory application for a mandatory injunction was one of the rarest cases that the court would entertain for it would not compel a man to do a serious thing as to undo what he had done except at a hearing.⁹
27. The Court found the written submissions provided by the Defendant during the inter parte hearing held on 8th February 2024 helpful in understanding its position. The Plaintiff chose not to provide written submissions despite indicating that it would do so.
28. The Defendant's written submissions were succinct in summarizing the jurisprudence relating to mandatory injunctions ;
 - (i) *A mandatory injunction is an injunction which directly orders the person to whom it is addressed to do something, as opposed to the prohibitory injunction which restrains the person to whom it is addressed from doing something.*
 - (ii) *Cases have made clear that a mandatory injunction is granted very sparingly by the Courts and only in exceptional circumstances.*

⁴ *Locabail Finance Ltd v Agroexport* [1986] 1 WLR 657

⁵ *Queensland v Australian Telecommunication Communication* [1985] HCA 25 (per Gibbs CJ)

⁶ *Films Rover International v Cannon Film Sales Ltd* [1987] 1 WLR 670 per Hoffman J however note *Active Leisure (Sports) Pty Ltd v Sportsman Australia Ltd; Steeden Sports (Australia) Pty Ltd* –Actions no 32 and 33 of 1990 per Cooper J (Supreme Court of Queensland)(Full Court)

⁷ *Evolution Fiji Ltd* –Civil Action 214 of 2019.

⁸ Per Megarry J in *Shepherd Homes Ltd v Sandham* (1971) 1 Ch 348

⁹ Per Megarry J

- (iii) *In Pati v Kamal [1987] FLR 1 (per Cullinan J) it was confirmed that it is exceptionally rare for a mandatory injunction to be granted and it would only be granted where the Plaintiff shows a strong possibility upon the facts that grave damage would accrue to him in the future. Similar potent comments were made in Krishnan v Fiji Revenue and Custom Service [2018] FJHC 487 (per Tuilevuka J)*
- (iv) *The standard that must be met before a mandatory injunction is granted is high compared to a prohibitory injunction. There must be a **high degree of assurance**¹⁰ that when the matter proceeds to that, the mandatory injunction was rightly granted.*

29. The Court's jurisdiction to grant an interlocutory injunction is vested on it under Order 29 of the *High Court Rules 1988*, however the *Cyanamid* principles which govern its grant, generally, do not apply to a mandatory injunction. As Megarry LJ clarified, in *N.W.L Ltd v Woods [1979] 1. W.L.R 1294*;

"My Lords, when properly understood, there is in my view nothing in the decision of this House in American Cyanamid Co v. Ethicon Ltd which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be satisfied to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

30. The court needs to be satisfied to a **high level of assurance** of the Plaintiff's claim before granting a interlocutory mandatory injunction. This is not a requirement which applies to interlocutory injunctions, in general, as spelt out in *American Cyanamid*. As cited by the authors of *Halsbury's Laws of England, 4th ed., vol 24, para. 948, :-*

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be

¹⁰ Per Megarry J

granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedieda mandatory injunction will b granted on an interlocutory application”¹¹

E. Consideration and Analysis.

Has the Plaintiff demonstrated “special circumstances” or a clear case for relief (a high level of assurance) in establishing its case?

31. It is necessary for the Court to assess the Plaintiff’s case.
32. An immediate feature noticeable in the Plaintiff’s pleadings is its general nature as opposed to that presented by the Defendant. The Court deems this feature critical in assessing whether the Plaintiff has demonstrated a high degree of assurance to warrant the grant of the mandatory order it seeks.
33. The primary dispute between the parties is whether the terms of the Sale and Purchase Agreement have been fully complied with. The Plaintiff contends that the Defendant have not complied with its payment obligations, whilst the Defendant maintains that it has done so fully as decreed under the Agreement (and with a variation in terms).
34. The Court does not have to make a determination on these competing issues, at this stage, and that will be a matter to be dealt with at trial, however the Plaintiff has a high threshold (a high level of assurance) to meet in order to obtain the mandatory order it seeks. The Court found it difficult from the outset to assess the Plaintiff’s case.
35. For example, it would appear from the manner the Plaintiff pleads its case that the custody of the vessels from March 2017, prior to contractual completion, were the consequence of a goodwill arrangement between the parties.

¹¹ The statement has been approved by the Court of Appeal in *Locabail Finance Ltd v. Auroexport* [1986] 1 W.L.R 657 and are to be applied notwithstanding the decision in *American Cyanamid* (per Cooper J in *Active Leisure* (Sports)—No 32/33 of 1990 (Qld Sup Ct)

36. The Court notes from a general review of the terms of the Sale and Purchase Agreement of 2017, however, a distinction in terms between the **Effective Date** (8th March 2017) and the **Completion Date** (13 months from the Effective date of this Agreement) of the respective obligations of the parties.. Clause 3.1 of the Agreement expressly states that the Defendant, as Buyer, was entitled to possession of the vessels and asset on the effective date (8th March 2017), 13 months *before* the Agreement was completed (Completion Date).
37. In addition, clause 2.3 (a) of the Agreement states that the title to and property in the vessels and included assets remain with the Seller (Plaintiff) *until completion*.
38. In summary, the parties have expressly agreed that the Defendant was entitled to possession of the vessels from 8th March 2017,(despite it not completing its payment obligations) and despite the Plaintiff remaining as the registered owner of the vessels and the asset. The Court finds these issue critical in its determination of the conduct that the Plaintiff seeks to injunct.
39. Further, the obligations of the Defendant (as Buyer) from the effective date of the Agreement when it took possession of the vessels are governed by clause 3.2;
- (a) *The Buyer must use the Vessels and Included Assets in the normal and ordinary course (having regard to past practice and so as to comply with all applicable laws)*
- (b) *A comprehensive Hull & Machinery Insurance policy covering destruction of the vessels for not less than FJD \$1, 200,000 and comprehensive Plant and Equipment Insurance Policy covering loss, damage and theft to the Included Assets for not less than FJD \$350,000.*
- (c) *a FJD \$1,000,000 worker's compensation insurance policy to insure all persons employed by the Buyer on the vessels and those using and working with the included assets.*
40. The Court presumes that apart from these specific obligations vested on the Defendant, (as Buyer), the Plaintiff, (as Seller), remains responsible for all other operational obligations expected from it, as owner of the vessels to be complied

with under relevant laws, to allow the Defendant to operate the vessels and use the asset, despite the completion date under the 2017 Agreement not being reached.

41. Pursuant to clause 4.1 the purchase price shall be \$1,200,000 VEP (\$1,308,000 VIP). The Buyer must pay the Purchase Price by way of a FJD \$500,000 deposit payable on the Effective Date with the balance of the Purchase Price of \$808,000 VIP payable in thirteen (13) equal, monthly installments of \$62, 153.85 VIP.

High Degree of Assurance¹²

42. The primary dispute between the parties revolve around the clauses discussed and their implementation. The Plaintiff's primary case is that the Defendant has failed to comply with its payment obligations as set out in the 2017 Agreement, and therefore it has terminated the Agreement and demands the return of the vessels. The Defendant maintains, on the other hand, that it has fully satisfied its obligations under the Agreement, (and varied as agreed with the Plaintiff), and it now owns the vessels..
43. The Court has to make an assessment of the Plaintiff's case given the high threshold it has to meet in order to succeed in obtaining the grant of the mandatory order. The Court had to conduct this review with difficulty, as little assistance was proffered by the Plaintiff.
44. The Court does not consider that the Plaintiff has met the threshold required of it to convince the Court of its case clearly or with a high degree of assurance of its case when bearing in mind the totality of the issues that the Court has to consider to warrant the grant of the interlocutory mandatory injunction sought.

Would damages be a sufficient remedy to the Plaintiff if the Court refuses the injunction sought and the Plaintiff succeeds at trial?

45. It appears from the Plaintiff's Affidavit in Support filed on 14th October 2022 that it makes an issue of the Defendant being the subject of separate winding up

¹² Per Diplock LJ in *Sheppard Homes*

proceedings, to cast doubt on its ability to provide an undertaking as to damages.

As stated in *American Cyanamid*¹³;

“If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction would normally be granted, however strong the plaintiff’s claim appeared to be at that stage”

46. On the appropriate approach to be taken, the Court respectfully, finds that taken by the Supreme Court of Queensland in *Active Leisure/ Steeden Sports(Aust) Pty Ltd v Sportsman Australia Ltd* – No 32 and 33 of 1990 of guidance;(although there the Court was dealing with an actual case of receivership);

*“The fact of receivership with the obvious question which such receivership raises as to the solvency of the respondent was a matter to be considered on the issue as to whether or not damages was an adequate remedy **as one matter amongst others to be considered on the balance of convenience.** However, it is not the practice to require undertakings of the type contended for. **The court cannot require undertakings or make injunctive orders simply to provide security to satisfy any judgment the appellants may obtain in the absence of some evidence of the respondent’s attempt to dissipate the assets in order to defeat a judgment of the court (see Jackson v Stirling Industries (1987) 162 C.L.R 612 at 625. There is no such evidence in this case.**”*¹⁴

47. The Court finds, on the pleadings as filed by the Plaintiff no indication that the Defendant will attempt to take the vessels and asset out of the jurisdiction in order to defeat a final judgment in this matter as the basis for alleging that the undertaking in damages provided by the Defendant would be inadequate.
48. The Court notes that the Plaintiff pleads damages as an alternative relief for the loss of use of the vessels in the Writ of Summons filed on 14th October 2022 and in this regard it adopts the finding of this Court in the *Evolution Fiji Limited* ¹⁵case

¹³ Per Diplock LJ at p 510

¹⁴ Per Cooper J at p 21-22

¹⁵ Per Nanayakkara j at p 35

that this is indicative that the Plaintiff itself considers damages to be an adequate remedy.

49. This finding affirms the finding of the Court that the grant of the mandatory injunction sought is not warranted,
50. The Plaintiff chose to enter into contractual arrangements with the Defendant, which allowed the latter to possess the vessels and assets before completing its purchase obligations under the 2017 Agreement. The commercial reality engendered by such an arrangement meant that the Defendant would use the vessels and the asset as part of its business enterprise (and not beholden solely to the Plaintiff) although the risk of non-compliance under the Agreement, by the Defendant, if it were so bound (which it disputes), was real

F. Conclusion

51. On the grounds discussed the Court does not consider that the Plaintiff has made out a case for interlocutory mandatory injunction as sought by motion filed on 14th October 2022 to interfere with the rights of the Defendant.

ORDERS

1. **The Plaintiff's Notice of Motion filed on 14th October 2022 seeking a mandatory injunction is dismissed.**
2. **The Plaintiff to pay costs of \$1,500.00 (summarily assessed) to the Defendant within seven days from the date of this ruling.**



A Banuve
Savenaca Banuve
Judge

**At Suva
22nd February, 2024.**