

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

**Civil Action No. HBC 380 of 2023**

**BETWEEN:**

**NORTHERN AIR SERVICES CHARTER PTE LIMITED**

a limited liability company having its registered office at Nausori International Airport Hanger 2, Nausori in the Republic of Fiji.

**PLAINTIFF/APPLICANT**

**ACK AIR PTE LIMITED** a limited liability company having its registered office at Ground Floor, Credit House, 10 Gorrie Street, Suva in the Republic of Fiji.

**DEFENDANT/RESPONDENT**

**Appearance:**

**Mr A. Pal: for the Plaintiff/Applicant (on instructions of Mr K. Singh).**

**Mr N. Prasad & Ms P. Verma Prasad: for the Defendant/Respondent (Mitchel Keil).**

**Date of Hearing: 6<sup>th</sup> March 2024**

**RULING**

[1] The Plaintiffs filed an Originating Summons on 28<sup>th</sup> December 2023 seeking the following:

- “1. *That the Defendant be ordered to specifically perform the Aircraft Sale Agreement, Aircraft Mortgage and Security Agreement and Secured Promissory Note executed between the Plaintiff and the Defendant on the 6<sup>th</sup> day of December 2023 or alternatively;*
2. *The defendant pay special and general damages to the Plaintiff... .”*

An Ex-parte Notice of Motion on the same day as the Originating Summons and the following orders were sought:

- “(a). *For an interim injunction restraining the Defendant by itself or by or through its servants and/or agents from entering into any dealings or transferring ownership of a used aircraft more particularly described as One Cessna C208 Grand Caravan EX bearing MS 208B5007 and registration mark DQ WPG until determination of this Ex-Parte Notice of Motion.*
- (b). *For an injunction restraining the Defendant by itself or by or through its servants and/or agents from entering into any dealings or*

*transferring ownership of a used aircraft more particularly described as One Cessna C208 Grand Caravan EX bearing MS 208B5007 and registration until determination of the originating summons filed herein.*

- (c). *For such further and other orders as this Honourable Court shall deem just:*
- (d). *Costs be in cause."*

The summons and the motion were accompanied by an affidavit in support of Florence Sandhiya Chand the Accountable Manager/Director in the Plaintiff Company.

- [2] Upon hearing Mr K. Singh on the Ex-Parte Motion on 28<sup>th</sup> December I delivered an ex-tempore Ruling granting interim injunction as per prayer (a) of the ex-parte notice of motion. The matter was adjourned to 15<sup>th</sup> January 2024. On 15<sup>th</sup> January 2024 I gave the Respondents 14 days to file a response and 14 days thereafter to the Plaintiff to reply and set a hearing date. An Affidavit in Answer of Naushad Ali, the Financial Controller, Company Secretary and a Director of the Defendant Company was filed on 31<sup>st</sup> January 2024. An affidavit in response of Florence Sandhaya Chand was filed on 14<sup>th</sup> February 2024. On 14<sup>th</sup> February 2024 an amended Originating Summons was also filed on behalf of the Plaintiff pursuant to **Order 20 Rule 3** of the High Court Rules.
- [3] A preliminary issue raised by Mr Prasad was the procedure adopted by the Plaintiff to amend the Originating Summons. His argument was that **Order 20 Rule 3** of the High Court Rules which is being used by the Plaintiff to amend the originating summons deals with amendments of pleadings arising out of a writ action that is, either an amendment to a statement of claim or statement of defence. The Plaintiff/Applicant ought to have relied upon **Order 20 Rule 6** (amendment of other originating process) of the High Court Rules. The Plaintiffs/Applicants lawyer did not respond to this issue.
- [4] **Order 20 Rule 6** provides that "*Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.*" **Order 20 Rule 5** (Amendment of writ or pleading with leave) in turn provides that "*(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his [or her] writ, or any party to amend his [or her] pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*" **Order 20 Rule 5** requires a party seeking to amend the originating summons to seek leave of the court. Mr Prasad is correct in his submission that **Order 20 Rule 3** of the High Court relates to amendment of pleadings arising out of a writ action, which is an amendment to a statement of claim or statement of defence. The amended originating summons are struck out for non-compliance with **Order 20 Rules 5 and 6** of the High Court Rules. Leave ought to have been sought and granted by the Court before the amendment could be made.
- [5] The principle to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in *American Cyanamid Co v. Ethicon Ltd* [1975] A.C 396; [1975] 1 All E.R. 504 H.L. They may be summarised as follows:
  - (i) The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect;

- (ii) The Court must not attempt to decide this claim on the affidavits; it is enough if the Plaintiff shows that there is a serious question to be tried.
- (iii) If the Plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.

[6] The submission for the Plaintiff's/Applicants on the issue if there is a serious question to be tried is that the matter goes to the "*root of the contract*" between the Plaintiff and the Defendant. The Plaintiffs note that the Defendants argue that agreement is invalid as not being executed pursuant to Section 53 (1) of the Companies Act. The Plaintiffs further argued that Section 53 (3) of the Companies Act does not limit the ways in which a company may execute its documents inclusive of a Deed. The position of the Plaintiff is that the agreement is a valid agreement. On the issues of damages, the position of the Plaintiff is that they are not able to calculate its losses due to the nature of their business. They further submit that "*the aircrafts valuation is determined from the hours it has flown and because the aircraft continues to fly with another company logo, the value of the aircraft continues to depreciate.*" The Plaintiffs also submitted that they will "*suffer irreparable harm if the interim injunction does not continue as it is necessary to protect the interest and rights of the Plaintiff.*"

[7] The submission for the Defendant is that there is absent from the originating summons a relief for permanent injunction. They cited **Cicia Plantation Co-operative Society Ltd v. Mokunitulevu & Ors [2022] FJHC 625** which relied upon **Goundar v. Fiesty Ltd [2014] FJCA 20; ABU0001.2013 95 March 2013)** which had held that the application for injunction need to be refused in limine, as there is no permanent injunctive relief sought in the claim. On the issue whether there is a serious question to be tried, the Defendants submit that the originating summons does not plead valid cause of action for any basis for specific performance and/or damages that is sought. They further state that the purported agreement and supplementary instruments are invalid and of no legal effects since both have not been executed in compliance with the provisions of the Companies Act 2015. The Defendants also submitted that with the Plaintiff asserting that the Aircraft being transferred to a third party and depreciating in value and seeking to purchase the aircraft at a reduced price, the Plaintiff cannot seek specific performance and seek that the terms of the purported agreement be varied. On adequacy of damages the Defendants argue that that the Plaintiffs have failed to provide adequate undertakings as to damages. They also submit that the balance of convenience lies with the Defendant.

[8] It is clear from the subsequent filing of the amended originating summons the Plaintiff's lawyer realised that he needed include in the claim an injunction at the trial. The originating summons that was initially filed did not include a claim for an injunction. The Plaintiff's lawyer had the option to seek leave of the Court to amend the originating summons pursuant to Order 20 Rules 5 and 6 of the High Court Rules. He did not do so. The amended originating summons which was filed without the leave of Court and for which no leave was sought and granted is struck out. Rules of the Court need to be complied with.

[9] I am bound by the superior courts, the Fiji Court of Appeal, in **Goundar v. Fiesty Ltd [2014]** (supra) stated as follows:

*“32. The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim. The only claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] 1 All ER 504 at 510 Lord Diplock held;*

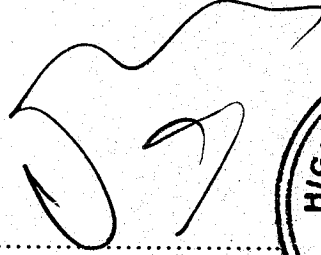
*‘...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

*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' (emphasis is mine)*

*33. How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected in limine.”*

- [10] The right to obtain an interlocutory injunction is an ancillary and incidental to the pre-existing cause of action. The injunctions sought in the summons **must be** part of the substantive relief to which the Plaintiff's cause of action seeks; and what is sought to restrain the Defendants from doing must amount to an invasion of some legal and equitable right of the Plaintiff and must be enforceable by the final judgment for an injunction. The application should therefore be dismissed in limine as there are no permanent injunctions sought in the originating summons.
- [11] After weighing all the relevant factors I have reached a conclusion that the balance of convenience lies in refusing an interlocutory injunction. The interim injunctive orders granted by this court on 28<sup>th</sup> December 2023 are dismissed. The Plaintiff is to pay the Defendant \$1000.00 as costs, within 14 days. The Costs have been summarily assessed.
- [12] The **Court Orders** as follows:
- (a) The amended originating summons filed on 14<sup>th</sup> February 2024 is struck out for non-compliance with the Order 20 Rules 5 and 6 of the High Court Rules.
  - (b) The application for interlocutory injunction is refused. The interim injunction granted on 28<sup>th</sup> December 2023 is dismissed.

- (c) The Plaintiffs are to pay the Defendant \$1000.00 as costs, with 14 days. The costs have been summarily assessed.
- (d) The parties are directed to proceed with the pre-trial steps before the Master of the High Court.



Chaitanya Lakshman  
Acting Puisne Judge  
2<sup>nd</sup> April 2024

