IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 256 of 2012

BETWEEN : Nanise Bola Trading as Adi Bola Hair Salon

PLAINTIFF

AND : Perfect Pieces Limited

DEFENDANT

COUNSEL : Mr Muloilagi for the Plaintiff
Mr Lajendra for the Defendant

Date of Judgment : 30 September 2013

INTERLOCUTORY JUDGMENT

1. This was an interlocutory application filed by the Plaintiff seeking injunctive relief by way of ex-parte Notice of Motion for orders restraining the Defendant from registering or settling or any transfer or other instrument to take place over Shop No. 4 Parekh's Arcade, 190 Renwick Road, Suva on CT No. 9593 Lot 286 on DP No. 2228 until the hearing and determination of this action and stay of execution of the Notice of Distress.

2. This court by its subsequent order made the ex-parte Notice of Notice inter-partes and granted time for both parties to file their respective affidavits.

3. The application of the Plaintiff was opposed by the Defendant and filed affidavit in opposition to the interim relief claimed by the Plaintiff.

4. The Plaintiff is one of the tenants of the Defendant and operates a Hair Saloon on the basis of payment of rent as month to month basis. There is no formal agreement between parties.

5. The Defendant is the registered proprietor of the property where commercial building was constructed and leased out to several tenants.

6. The Defendant has acquired the premises in the year 2006 and the Plaintiff had been an existing tenant at the time of purchase and continued paying a sum of $400 per month until year 2009.

7. The Plaintiff alleges that she has refurbished the said premises at her own expenses in August 2009, and after the refurbishment of the Saloon the Defendant increased the rent from $400.00 to $1,200.00 per month without any agreement between parties or without any notification.

8. The Plaintiff further alleges that the Defendant at no time notified the rental arrears and not issued a Demand Notice which is contrary to the proper procedure.

9. The Plaintiff in her subsequent supplementary affidavit submitted the receipt of payment made to Hardware companies to establish the refurbishment, the receipts for payment of rent for few months, notice of distress, letter of bailiff and the correspondence between the solicitors of the Plaintiff and solicitors of Defendant.

10. The Defendant, by the affidavit in opposition sworn by the Director, Mr Megan Patel on 25 October 2012, deposed that proper notice was issued on 22 May 2012, for the increase of monthly rental and after the rental was increased, the Plaintiff continued to pay the old rent which led to the balance of the rental to remain in arrears and accrued on the rental account of the Plaintiff. The rent receipts annexed to the affidavit clearly shows that the rent of $400.00 was accepted by the Defendant as part payment of the rent for the respective month.

11. The Defendant further deposed that the Demand Notice was issued to the Plaintiff on 9 March 2011, and three eviction notices were also issued to the Plaintiff to quit and deliver vacant possession.

12. The Defendant stated that the company exercised its rights pursuant to Distress Rent Act as the Plaintiff has failed to make arrangements to clear the outstanding rental arrears and rental increase was in accordance with the existing law governing commercial rent.

13. In relation to the refurbishment of the Saloon as alleged by the Plaintiff, the position of the Defendant was that no prior permission had been obtained by the Plaintiff for such improvements and thereby the Defendant is not responsible.

The Determination

14. The test as laid out in **American Cyanamid Co v Ethicon Ltd [1975] AC 396** for the granting of an Interlocutory Injunction:

(i) Whether there is a serious issue to be tried that must be established by the Plaintiff.
(ii) Whether damages would be inadequate to compensate the Plaintiff.
(iii) Whether the balance of convenience favours the Court exercising its discretion in favour of the Plaintiff.
(iv) Undertaking as to damages.

15. **Is there is series question to be tried**?
In the American Cyanamid case, Lord Diplock stated:

> *"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.*
>
> *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."

16. The contention of the Plaintiff to establish and satisfy the court, in this regard in nutshell as follows:

> *"[a] The exercise of the distress of Rent Notice by the Defendant was void on the basis that there was no agreement reached between the parties in respect of the increase of rent;*
> *[b] The Defendant breached or failed to comply with the legal processes established by law;*
> *[c] The increase was unreasonable in all circumstances;*
> *[d] The Defendant engaged in unconscionable conduct;*
> *[e] The increase was unjust and illegal contrary to Commerce Commission Decree, 2010 including waiver and estoppels."*

17. The Defendant in its affidavit and submissions argued that there was sufficient notice in advance for the increase of rent and the Plaintiff was aware of, and had knowledge of that. It is evident that all receipts issued after the increase of rental was subject to a notation "part payment of rent." The Plaintiff also has annexed several rent receipts to her affidavit which clearly demonstrate and the rent was accepted by the Defendant as part payment.

18. Even in the Supplementary affidavit filed by the Plaintiff deposed as follows with regard to the increase of rent.

> *"Rental Increase: On 21/09/12, Lajendra law also attached a letter from the Respondent to our client dated 22/05/2009 regarding the increase of the rent from $400.00 to $1,200.00 which I refused to pay because the same is about 300 percent increase and this occurred soon after I had refurbished the said premises by myself."*

19. The Affidavit in Support filed the Plaintiff also deposed as follows:

> *"That it was after I refurbished my salon that the Defendant wanted to increase the rent from $400 to $1200. I disagreed with him because it was unreasonable as it was almost a 300 percent increase."*

20. In view of the above circumstances it is clear that the Plaintiff was well aware of the increase of rent and continued to be in possession by paying only part of the rent as shown in the rental receipts.

21. The Plaintiff also alleges that the Defendant failed to comply with the legal process established by law. As required by law, the Demand Notice, Eviction Notices, Notices under Distress of Rent pursuant to Distress of Rent Act had been complied with. This court is unable to accept as alleged by the Plaintiff that she was not aware of the increase of rent and there was no outstanding rental. The Defendant has sent several notices which the Plaintiff has not responded to or failed to annex the responses to her affidavits.

22. The other grounds as stated by the Plaintiff to establish that there is serious question to be tried are unreasonableness, unconscionable conduct, unjust and illegal contrary to Commerce Commission Decree 2010.

23. On perusal on the material submitted to court, the rent was increased in July 2009 and counsel for the Defendant submitted the amendment made to the Counter Inflation Act to establish that commercial rent is not subject to the purview of Price and Incomes Board.

Paragraph 1, 2 and 3 of the directions to the Price and Income Board 2009 states as follows:

> "1. *That the increase in commercial rent shall no longer be controlled by the Board by order under section 12 of the Counter Inflation Act.*

2. *Any order issued under section 13 of the Act requiring the notification of increases in rent shall not be applied by the Board where the increases involved commercial rent.*

3. *The directive given to the Board as contained in Legal Notice No. 34 of 2009 is repealed.*

24. As the rent was increased in July 2009, and the Commerce Commission Decree 2010, came into effect after the rent was increased which has no respective effect, the unconscionable conduct and unjust and illegality, as it is appears has no bearing in this case.

Balance of Convenience and Adequacy of Damages

25. The consequence of granting injunctions and consequences of refusing injunctions needs to be assessed in this regard. As I have already dealt with in my earlier paragraphs, taking in account of all these matters, I think Balance of Convenience has heavily against granting the interim injunction sought by the Plaintiff. As it appears from material submitted to court, that there is no serious issue to be tried which warrants the issue of interim relief, the application of Balance of Convenience and damages being inadequate may not be relevant.

Undertaking as to Damages

26. It is noted that the Plaintiff has failed to give any undertaking as to damages. In my view, failure to give an undertaking as to damages in a case of this nature is fatal as it is a requirement for the court to consider interim relief as prayed for by the Plaintiff.

27. The Plaintiff relied on the judgment of **Wati v Wati** (2012) FJHC 1142, to establish that undertaking as to damages is not required in a case of this nature. It is my considered view, that undertaking as to damages is a

mandatory requirement especially in case of this nature where the arrears of rental is in dispute between parties.

28. The Supreme Court and the Court of Appeal in several Judgments not only emphasized the importance of undertaking as to damages but also the importance of providing the particulars of the financial position.

29. In the case of **Sailosi Saqalu & Others & TFI Bulldozing Company Limited v. Arula Investment Company Limited** ABU0067 of 2000 the Court of Appeal at page 3 stated:

> *"A party giving an undertaking as to damages needs to provide evidence of its financial position with reasonable particularity or run the risk of its undertaking not being regarded seriously."*

30. In view of the above, failure to provide an undertaking as to damages is fatal to the application for interim relief of the Plaintiff.

Orders

31. [a] The Plaintiff's application for interim injunction filed on 11 September 2012 is dismissed.

[b] The Plaintiff shall pay the Defendant's costs of $800.00 within 14 days.

Susantha N Balapatabendi

JUDGE