

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 30 of 2014

BETWEEN : **DIGICEL (FIJI) LIMITED**, a limited liability company
having its business address and its registered address at
Ground Floor, Kadavu House, Suva, Fiji Islands.

PLAINTIFF

AND : **FIJI RUGBY UNION**, a sports association having its
business address at Fiji Rugby Union House, 35 Gordon
Street, Suva, Fiji Islands.

FIRST DEFENDANT

AND : **VODAFONE FIJI LIMITED**

SECOND DEFENDENT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Dr J. Turner and Ms M. Muir for the Plaintiff/Applicant
Mr N. Lajendra for the First Defendant/Respondent
Mr S. Sharma for the Second Defendant/Respondent

DATE OF HEARING : 25 February 2014

DATE OF RULING : 13 March 2014

RULING

(Application for Interim Injunction)

1.0 Introduction

1.1 By Notice of Motion dated 31 January 2014 and filed on the same day
Plaintiff/Applicant sought following injunctive orders:-

- “(a) **INJUNCTIVE ORDER:** An order requiring the Defendant to acknowledge the Plaintiff’s Matching Offer as binding upon the Defendant;
- (b) **INJUNCTIVE ORDER:** An order for the Defendant to execute the memorandum of agreement with the Plaintiff;
- (c) **RESTRAINING ORDER:** An order restraining the Defendant and/or its directors, servants and agents from offering, contracting or concluding sponsorship agreements with any third party, including but not limited to Vodafone Fiji Limited, Fiji Airways, CJ Patel and or Fijian Holdings Limited, for the sponsorship of the Fiji 7’s team and or the National Provincial Championship for Senior and U20 (currently called the Digicel Cup) until final determination of the matter or further order of this Honourable Court;
- (d) **SUCH OTHER AND FURTHER ORDERS** as the Court may think just and equitable in the circumstances; and;
- (e) **Costs of this application in favour of the Plaintiff.”**

1.2 The said Notice of Motion was set down for hearing on 6 February 2014. Since Defendant had already entered with Sponsorship Agreement with Vodafone (Fiji) Ltd and its Consortium prayer (c) of the motion could not be dealt with.

1.3 Pursuant to leave granted on 6 February 2014, Plaintiff on 7 February 2014 filed Amended Notice of Motion dated 7 February 2014 seeking following Orders:-

- “(a) **RESTRAINING ORDER:** An order restraining the Defendant and/or its directors, servants and agents from performing, implementing, announcing, displaying, advertising [including but not limited to allowing Fiji 7s players to appear in commercials, advertisements or on billboards], amending, varying and or further concluding sponsorship agreements with Vodafone Fiji Limited, Fiji Airways, CJ Patel and or Fijian Holdings Limited [hereinafter referred to as the “Vodafone Consortium”] or any third party, for the sponsorship of the Fiji 7’s team and or the National Provincial Championship for Senior and U20 (currently called the Digicel Cup) until final determination of the matter or further order of this Honourable Court;
- (b) **RESTRAINING ORDER:** An order restraining the Defendant and/or its directors, servants and agents from outfitting the Fiji 7’s team with jerseys or any other gear or articles of clothing displaying the logos and or names, including trade names or shortened names, of the members of the Vodafone Consortium or any other third party;

(c) **SUCH OTHER AND FURTHER ORDERS as the Court may think just and equitable in the circumstances; and**

(d) **Costs of this application in favour of the Plaintiff.”**

1.4 On 10 February 2014 Vodafone Fiji Limited (hereinafter referred to as **“Vodafone”**) filed Application by way of Summons for Leave to intervene and be joined as Defendant solely for the purposes of determination of the Amended Notice of Motion dated 7 February 2014.

1.5 On 14 February 2014, Order joining Vodafone as Second Defendant as prayed for in its Summons was made by consent of the parties.

1.6 Following Affidavits were filed on behalf of the Parties:-

For Plaintiff/Applicant

- (i) Affidavit in Support of Maurice McCarthy sworn and filed on 31 January 2014 (hereinafter referred as **“McCarthy’s 1st Affidavit”**);
- (ii) Affidavit of Ronlyn Sahib sworn and filed on 5 February 2014;
- (iii) Affidavit in Reply of Maurice McCarthy in Reply sworn and filed on 12 February 2014 (hereinafter referred to as **“McCarthy’s 2nd Affidavit”**);
- (iv) Affidavit of Maurice McCarthy in Reply to Affidavit in Opposition filed on behalf of Vodafone Fiji Ltd sworn on 20th February 2014 filed on 25 February 2014 (hereinafter referred to as **“McCarthy’s 3rd Affidavit”**);
- (v) Affidavit of Pdraig Power sworn on 11 February 2014 and filed on 18 February 2014 (hereinafter referred to as **“Power’s Affidavit”**);
- (vi) Affidavit of Robert Smith sworn on 12 February 2014 and filed on 18 February 2014 (hereinafter referred to as **“Smith’s Affidavit”**);
- (vii) Affidavit of Chris Barnum sworn on 12 February 2014 and filed on 18 February 2014 (hereinafter referred to as **“Barnum’s Affidavit”**).

For First Defendant/First Respondent

- (i) Affidavit of Baljeet Singh sworn and filed on 6 February 2014;
- (ii) Affidavit of Dr. Berlin Kafoa sworn and filed on 11 February 2014 (hereinafter referred to as **“Kafoa’s Affidavit”**).

For Second Defendant/Respondent

- (i) Affidavit of Pradeep Lal sworn and filed on 10 February 2014;
- (ii) Affidavit in Opposition of Aslam Khan sworn on 18 February 2014 and filed on 19 February 2014.

1.7 Parties also filed Submissions and made Oral Submissions on the Injunction Application on 25 February 2014.

2.0 Background Facts

2.1 On or about 14 August 2009 the Plaintiff (hereinafter referred to as **“Digicel”**) and the First Defendant (hereinafter referred to as **“FRU”**) entered into a Sponsorship Agreement in respect to Fiji National Rugby Sevens Team for a term of three years commencing on 1st November 2009 and expiring on 1st November 2013 (hereinafter referred to as **“Digicel Sevens Agreement”**).

2.2 On or about 17 September 2009 FRU and Digicel entered into a Deed of Variation whereby Clauses 13 and 4 of Digicel Sevens Agreement was varied as stated therein (hereinafter referred to as **“Variation Deed”**).

2.3 On or about 6 November 2009 FRU and Digicel entered into a Sponsorship Agreement in respect to FRU’s Major Provincial Rugby Competition known as Digicel Cup Tournament which sponsorships was to expire on 31 December 2013 (hereinafter referred to as **“Digicel Cup Agreement”**).

2.4 On 31 January 2014 Digicel commenced this proceedings by filing:

- (i) Writ of Summons and Statement of Claim;
 - (ii) Ex-Notice of Motion for Interim Injunction;
 - (iii) Affidavit of Maurice McCarthy sworn and filed on 31 January 2014.
- 2.5 The Application for Interim Injunction was brought to my attention in the afternoon of 3rd February 2014 when I directed the Registry to issue the motion for inter-parte hearing on 7 February 2014.
- 2.6 At the request of Plaintiff's Solicitors I caused the Motion to be listed for hearing on 6 February 2014 at 2.30pm.
- 2.7 On or about 3 February 2014 FRU and Vodafone and its Consortium ("**Vodafone Consortium**") entered into a new Sponsorship Agreement in respect to FRU products including Fiji International Sevens Team and Provincial Tournament (hereinafter referred to as the "**Vodafone Agreement**").
- 2.8 On 6 February 2014 on Digicel's Counsel's application I granted leave for Digicel to amend the Notice of Motion and directed parties to file Affidavits and Submissions and listed the Application for Injunction for hearing on 13 February 2014 at 2.30pm.
- 2.9 On 7 February 2014 Digicel filed Amended Notice of Motion on terms stated at paragraph 1.3 hereof.
- 2.10 On 10 February 2014 Vodafone made application by way of Summons for an Order that it be granted leave to intervene and joined as a Defendant solely for the purpose of determination of the Plaintiff's Amended Notice of Motion filed on 7 February 2014 ("**Intervening Application**").
- 2.11 On 11 February 2014 FRU filed Stay Application.
- 2.12 On 13 February 2014, FRU and Digicel by their Counsel made Submissions on Stay Application and the Intervening Application was adjourned to 25 February 2014 for hearing subject to the outcome of the Stay Application.

- 2.13 At the request of Digicel this matter was listed to be called on 14 February 2014 at 2.30pm when Counsel for Digicel informed the Court that if the Stay Application is refused then Digicel has no objection to the Intervening Application as prayed for and as such applied that Application for Injunction be heard on 25 February 2014.
- 2.14 With consent of the parties I granted Orders in terms of prayers 1 and 2 of Intervening Application and gave directions for filing of Affidavits and Submissions in respect to Injunction Application.
- 2.15 On 21 February 2014 I delivered Ruling in respect to Application for Stay of Proceedings whereby I dismissed the Application.
- 2.16 All parties filed and served submissions and also made oral submissions on 25 February 2014.

3.0 Application for Interlocutory Injunction

- 3.1 Counsel for Digicel and FRU submitted that the principles to be applied in respect to Application before this Court is that stated by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 which are:-
- (i) whether there is a serious question to be tried;
 - (ii) whether damages would be adequate remedy; and
 - (iii) whether balance of convenience favour granting or refusing Interlocutory Injunction.
- 3.2 Counsel for Vodafone on the other hand submits that the proper test is to be applied as that for mandatory injunction whereby test to be applied is “far more stringent than that the test in ***American Cyanamid***.
- 3.3 Therefore the test to be applied will depend on whether the injunctive relief sought by Digicel is mandatory or prohibitory.

- 3.4 A mandatory injunction is where the Applicant is seeking Orders for the Respondent to carry out some positive act whereas prohibitory injunction is where the Court is being asked to restrain Respondent from doing any positive act or acts.
- 3.5 The injunctive relief sought by Digicel to is to restrain FRU from performing its obligations under the Vodafone Agreement.
- 3.6 Counsel for Vodafone submits that the manner in which the relief sought in the Amended Notice of Motion are worded and read together with the undertaking given by Digicel on the date of hearing makes relief sought by Digicel mandatory.
- 3.7 I have carefully analysed the relief sought by Digicel and I am of the view that the relief sought in the Amended Notice of Motion is prohibitory and as such the principles applicable are that stated in ***American Cyanamid***.
- 3.8 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.
- 3.9 Lord Diplock in **American Cyanamid v. Ethicon Ltd** [1975] AC 396 stated as follows:-

“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 right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgement 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 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 of 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."

- 3.10 In **Series 5 Software v. Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction:

"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases."

- 3.11 Another factor which Courts now take into consideration in addition to the above is "**overall justice**" as stated by His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd** [1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will

usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word “usually” deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.”

Serious Question To Be Tried

- 3.12 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.
- 3.13 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant’s claim is not frivolous, vexatious or hopeless.
- 3.14 In **American Cyanamid** Lord Diplock stated as follows:-

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination.” (p 406)

“It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” (p 407)

- 3.15 His Lordship further stated as follows:-

“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case.”

- 3.16 Digicel in its Statement of Claim has pleaded two causes of action as follows:-

“First Cause of Action - For Specific Performance of the 7’s Agreement and the Digicel Cup Agreement:

61. *The Plaintiff repeats and relies upon paragraphs 4 through 60, above.*

62. *By its inaction and refusal to negotiate exclusively with the Plaintiff, the Defendant has not complied with the terms of the Agreements.*
63. *By its refusal to disclose the full terms of all the third party tenders to the Plaintiff, the Defendant has not complied with and is in breach of the Agreements.*
64. *By its refusal to acknowledge the Plaintiff's Offer to Match, which matched the terms of the Vodafone Offer to the extent disclosed to the Plaintiff, the Defendant has not complied with and is in breach of the Agreements.*
65. *By its refusal to enter into the memorandum of agreement with the Plaintiff and negotiate a new sponsorship agreement with the Plaintiff after receiving its Matching Offer, the Defendant has acted mala fides and breached its contractual obligations to award the sponsorship to the Plaintiff if it matched a third party offer, and to negotiate in good faith with the Plaintiff.*
66. *Recognising that the specified time periods for exclusive negotiation has passed, the Plaintiff seeks an order from this Honourable Court requiring the Defendant to acknowledge the Plaintiff's Matching Offer as binding on the Defendant, as provided for in the Agreements.*
67. *The Plaintiff further seeks an order requiring the Defendant to execute the memorandum of agreement with the Plaintiff.*

Second Cause of Action - for Injunction:

68. *The Plaintiff repeats and relies upon paragraphs 4 through 60, above.*
69. *The Plaintiff seeks orders requiring the Defendant to acknowledge the Plaintiff's Matching Offer as binding upon the Defendant and to enter into the memorandum of agreement with the Plaintiff.*
70. *The Plaintiff seeks further orders restraining the Defendant from offering, contracting or concluding sponsorship agreements with any third party, including but not limited to the Vodafone Consortium, for the sponsorship of the Fiji 7's team and or the Digicel Cup, inasmuch as the Plaintiff has exercised its option to match and proffered its Matching Offer.*
71. *Allowing the Defendant to grant the sponsorship to a third party at this time, in derogation of the Plaintiff's rights to match any third party offers and retain the Sponsorships, would have a significant and detrimental effect on the Plaintiff's overall goodwill under these Sponsorships.*
72. *There is over seven (7) years of goodwill attributed to the Plaintiff's association with the Defendant. Further the breaches of contract herein have prevented the Plaintiff from negotiating the renewal of its Sponsorships in accordance with the agreed structure provided for under the Agreements.*

73. *In these circumstances, damages will not be an adequate remedy for the Plaintiff for the loss of the Sponsorships despite the Plaintiff matching the third party offer.*
74. *The Plaintiff undertakes to make payment for any damages the Defendant might suffer as a result of this application and any orders granted thereon, and confirms it has the means to make payment of the same as it has cash in account, has shown it has honoured its commitments to the Defendant to date and it has assets on hand as may be confirmed by:-*
- a. The Account balance of one of Plaintiff's accounts at the bank of the South Pacific, totalling around FJD\$3.0 Million, which should be more than sufficient to satisfy any damages claim resulting from this action;*
 - b. The Plaintiff's previous sponsorship of the FRU to date amounting to around F\$17 Million; and*
 - c. The Plaintiff's installation of Telecommunication Towers (assets) at more than FJD\$200,000 per tower with around 200 sites in Fiji meaning over F\$40 Million in infrastructure throughout Fiji.*
75. *The Plaintiff's action via injunction is not a matter which would cause damage to the Defendant as the Defendant is contractually bound to allow the Plaintiff to match any third party offer on equivalent terms, which means the Defendant will at no time be in any worse a position, having received a fair consideration for its properties as determined by the open market.*

3.17 FRU by its Counsel submits that Digicel has failed to show that there is a cause of action against FRU as causes of action pleaded in the Statement of Claim are in fact equitable remedies in form of relief for specific performance and injunctive orders.

3.18 The overall requirement for grant of injunction is that the Applicant must have a cause of action and I agree with FRU Counsel's submission that a relief for specific performance and injunction are not causes of action.

3.19 Whilst the contents of paragraph 68 to 75 of the Statement of Claim does not disclose any cause of action the contents of paragraphs 62 to 65 of the Statement of Claim does allege breach of Digicel Sevens and Digicel Cup Agreements by FRU which are causes of action.

3.20 Even though certain paragraphs in the Statement of Claim pleads evidence rather than facts and offend the rules of pleading there is enough facts

pleaded in relation to cause of action for alleged breach of the Agreements by FRU for determination by this Court.

- 3.21 If, FRU feels certain parts of the Statement of Claim offend rules of pleading than it should move the Court to strike out such parts by way of formal application.
- 3.22 Having held that there is cause of action I leave the issue of pleadings for a later date when and if any application is made in that regard.
- 3.23 FRU by its Counsel submitted that there is no serious question to be tried as Digicel has failed to match the offer by Vodafone Consortium.
- 3.24 FRU's Counsel referred to various correspondences between Digicel and FRU from the period 20th January 2014 to 29 January 2014 (Annexures BK9 to BK15 of Kafoa's Affidavit) in support of FRU's submission that Digicel by reducing the sponsorship amount from \$8m per annum to \$7,483,470.00 per annum has failed to match Vodafone Consortium's offer of \$8m.
- 3.25 At paragraphs 2 and 3 of Digicel by its letter dated 20th January 2014 to FRU (Annexure BK 9 of Kafoa's Affidavit) it states as follows:

“Based on the information you provided to us (reproduced in Attachment 1), we understand Vodafone offers the Fiji Rugby Union (“FRU”) a sponsorship package covering the 7's team and Digicel Cup (along with other assets) that is made up of a cash payment of F\$3.6 million per annum plus in kind benefits valued at \$4.4 million per annum. You have invited Digicel to confirm if Digicel will match the sponsorship package proposed by Vodafone.

Digicel is pleased to confirm that it will match the sponsorship package proposed by Vodafone. Specifically:

- *Digicel will offer the FRU a sponsorship package that is made up of a cash payment of F\$3.6 million pa plus in kind benefits valued at F\$4.4 million pa; and*
- *Digicel will also match other material terms of the sponsorship package offered by Vodafone, to the extent the FRU has notified Digicel of these terms.”*

3.26 On 24 January 2014 (Annexure BK10 of Kafoa's Affidavit) FRU wrote to Digicel and Vodafone which letters consisted of following paragraph:

"Since there are existing valid contracts for the sponsorship of the Fiji International Sevens Tournament and the Secondary School's Deans Trophy Tournament, the FRU Board and Marketing Sub-Committee wish to offer to Digicel as a Tier-Two Sponsor for the mentioned products the same amounts being proposed previously. We will meet and discuss with the existing contract owners to ensure that this arrangement is done."

"The sponsorship value has been adjusted accordingly, and our calculations are set out in Schedule 1 below ." (paragraph 4, page 2, second sentence).

3.27 On the basis of this letter Digicel on 29 January 2014 (the date it claims to have received FRU's letter dated 24 January 2014) wrote to FRU stating as follows:-

"With regards to your comments on the Fiji International 7's Tournament and the Deans Trophy Tournament, Digicel is happy to exclude these assets from the sponsorship package that Vodafone had included and match the Vodafone sponsorship proposal with regards to the remaining assets. We ask that the FRU exclude any sponsor that operates in the telecommunications brand sector from sponsoring these assets. We are also willing to accede to the FRU's preference for the sponsorship term to be reduced to three years."

3.28 It is not disputed that the Digicel in its revised offer excluded sponsorship of International 7's Tournament and Deans Trophy Tournament and adjusted the sponsorship amount from \$8m per annum to \$7, 483, 870.00 per annum.

3.29 FRU by its Counsel then submitted that Digicel had failed to match the sponsorship offer by Vodafone Consortium and therefore there is no serious question to be tried.

3.30 In response, Digicel by its Counsel submitted that pursuant to clause 13.7.3 of the Variation Deed, Digicel has deemed to have matched the offer by Vodafone Consortium.

3.31 Clause 13.7 of Variation Deed is in following terms:-

“13.7 Notwithstanding any other clause of this Deed of Variation and or the Sponsorship Agreement the Parties agree that if at any time prior to 1 February 2014, the FRU proposes to enter into any memorandum of understanding, arrangement, agreement or otherwise with any Third Party, including a Competitor, in relation to the grant of Rights, either individually or collective, or any similar rights the following terms apply:

13.7.1 **Right of Notification**

The FRU shall notify Digicel, in accordance with the notification procedure in clause 20 of the Sponsorship Agreement, of the terms of any proposed memorandum of understanding, arrangement, agreement or otherwise with a Third Party, which terms shall include but shall not be limited to, rights to be granted to and by FRU (‘the Proposed Sponsorship Terms’). Such notice must contain full disclosure of the Proposed Sponsorship Terms and include any change made in the Proposed Sponsorship Terms during the option period in clause 13.7.2.

13.7.2 **Option to Match**

The FRU shall grant Digicel an option to enter into a memorandum of understanding, arrangement, agreement or otherwise with FRU on terms equivalent to or better than the Proposed Sponsorship Terms, such option to be valid for 30 days from the time the notice to Digicel of the Proposed Sponsorship Terms is left at Digicel’s address in accordance with clause 20 of the Sponsorship Agreement.

13.7.3 **Deemed Matching**

It is agreed that Digicel shall be deemed to have matched the Proposed Sponsorship Terms if the financial and other material terms of the deal proposed by Digicel are the same as or better than the Proposed Sponsorship Terms.

13.7.4 **Digicel has the right to match subsequent proposed sponsorship terms**

If Digicel is offered and does not take up the option to match under clauses 13.7.2 and 13.7.3 above, FRU must not proceed at any time with memorandum of understanding, arrangement, agreement or otherwise containing Proposed Sponsorship Terms that are less favourable than the Proposed Sponsorship Terms contained in the original proposed agreement without providing Digicel with notice, an offer to match and the right with respect to deemed matching contained in clauses 13.7.1 - 13.7.3 above.”

3.32 Digicel by its Counsel submits that by its letter dated 20 January 2014 it matched the offer of Vodafone Consortium's which is acknowledged by FRU at paragraph 15 of Kafoa's Affidavit where the deponent states as follows:

*"15. **ON** 20 January 2014 the Plaintiff sent a letter to the Defendant matching the offer of Vodafone for \$8,000,000.00 (Eight Million Dollars) per annum. Annexed hereto and marked with letters "BK9" is a copy of the said letter."*

3.33 Digicel by its Counsel submits that the correspondence after 20 January 2014 letter from Digicel to FRU was not variation of the offer but the result of negotiation to formalise the contract after it was deemed to have matched the offer.

3.34 These are facts and issues which need to be tried at the substantive hearing and it may well be that subsequent correspondence between Digicel and FRU superseded the offer by Digicel in its letter dated 20 January 2014.

3.35 As appears from the Affidavits filed it is undisputed that:-

- (i) Digicel and FRU entered into Digicel Sevens Agreement, Variation Deed and Digicel Cup Agreement which expired on 1st November and 31st December 2013 respectively;
- (ii) Both Digicel Sevens and Digicel Cup Agreements granted Digicel option to enter into an agreement on terms similar to or better than proposed sponsorship;
- (iii) Digicel and Fiji Rugby Union through its agent Kooga entered into negotiation for renewal of Sponsorship Agreements which negotiation ended with termination of Kooga as Fiji Rugby Union's Agent;
- (iv) On 12 October and 16 November 2013, Fiji Rugby Union called for Expression of Interest ("EOI") of its products by advertising in The Fiji Times and Fiji Sun respectively (Annexure BK1 of Kafoa's Affidavit);
- (v) On or about 18 November 2013 Vodafone submitted its EOI to FRU;
- (vi) On or about 27 November 2013 FRU wrote to Digicel asking it to submit EOI in response to advertisement by FRU;

- (vii) On or about 3 December 2013 Digicel submitted its EOI to FRU;
- (viii) Since then various correspondence were exchanged between Digicel and Fiji Rugby Union in respect the provision in the Agreement relating to option granted to Digicel to match any proposed sponsorship until filing of this proceedings by Digicel;

3.36 After careful analysis of the evidence provided to Court in the Affidavits filed I am of the view that there are serious questions to be tried and at least the two questions that need to be tried are:-

- (i) Did Fiji Rugby Union breach the provisions in the Agreement relating to option granted to Digicel to match any proposed sponsorship; and
- (ii) If so, can the breach be remedied by an Order for Specific Performance of those provisions.

3.37 Also I am of the view that the issue which needs to be tried even though it was not raised by Counsel for FRU is that whether the condition in Digicel's letter dated 29 January 2014 that "FRU exclude any sponsor that operates in the telecommunication brand sector" from sponsoring Fiji International Seven Tournament and Deans Trophy makes the offer conditional. Paragraph 3.27 of this ruling refers.

If so, than it may be argued that Digicel has not matched Vodafone Consortium's offer.

I must make it clear that I am not determining this issue in this ruling and will need to hear submission on this issue if it is ever raised.

3.38 Before I deal with adequacy of damages I note that FRU by its Counsel withdrew its submission on issue of duress and as such I will not deal with it.

3.39 Also Vodafone Agreement was handed over to Digicel's Counsel who after going through the Agreement confirmed it was a contract and not Agreement to Contract and withdrew Digicel's submission on existence of Vodafone Agreement.

Whether Damages Would Be Adequate Remedy

3.40 Digicel by its Counsel submits that Damages to Digicel would not be adequate remedy in view of the nature of the Sponsorship Agreement and on the grounds that:-

- (i) Digicel will suffer huge loss as a result of the breach of the Agreement;
- (ii) FRU is an unincorporated association which has very limited financial means of its own account;
- (iii) Digicel will suffer huge and irreparable losses to its brand and corporate reputation which are not compensatable;
- (iv) Defendant has not provided any evidence to meet Digicels damages without recourse to funding from Vodafone Consortium

3.41 FRU submits that Damages would be adequate remedy for following reasons:-

- (i) Sponsorship Agreement is commercial in nature;
- (ii) Sponsor benefits in cash or kind boosts FRU's revenue;
- (iii) Since Digicel alleges breach of contract damages can be assessed on the basis of previous financial data of Digicel.

3.42 Digicel referred to Power's Affidavit, Smith's Affidavit and Barnum's Affidavit to illustrate the benefits that are generated from Sponsorship Agreements such as one subject to this proceedings.

3.43 I quote paragraphs 14 to 20 from the Smith's Affidavit because of the fact that Mr Smith is from Australia and has knowledge about Rugby in Fiji:-

"14. As a part of this process, I identify and consider the benefits, both tangible and intangible, which flow to a brand through a sponsorship relationship. I then advise individual sponsors as

to how to activate their sponsorship relationship so as to maximise the benefit flowing to the sponsor from the sponsorship.

15. *Tangible sponsorship benefits will include such items as tickets, signage, player appearances (although this item crosses over into intangible benefits), advertisement within programs, branding on apparel - both the match strip and merchandise, website branding, use of footage, hospitality, logo on backdrop, right to active (meaning run marketing programs) at venues during matches, big screen advertising, dressing room and tunnel signage.*
16. *In my view the majority of these items are capable of having dollar values ascribed to them without the need to consider any intangible benefit flowing to the sponsor. Ticketing is the most obvious example in that tickets are both provided to a sponsor as a part of the sponsorship and are sold to ordinary members of the public. Other examples are signage, advertisements within programs, branding on apparel - both the match strip and merchandise, website branding, use of footage, hospitality, logo on backdrop, right to active (meaning run marketing programs) at venues during matches, big screen advertising, dressing room and tunnel signage.*
17. *Some of the items listed above as tangible benefits on scrutiny also provide an intangible benefit to the sponsor. One example of this is the intangible value ascribed to a sponsor arranged player appearance by a fan. The greater the attachment of the fan to the team and/or the player, the greater the intangible benefit will be to the sponsor.*
18. *Viewed in this way, I describe the intangible benefits to the sponsor of the sponsorship as the thread that pulls the rest of the sponsorship benefit together so that the sponsor can deliver the message to the fan/consumer that it is a part of the fabric of the team.*
19. *Another intangible item that will increase the melding or associating of the sponsor with the rights holder in the mind of the fan/consumer is the length of the sponsor/rights holder relationship. The length of the term of a sponsorship is important because a sponsorship is a slow-burner. The longer the sponsor is involved with the team the greater the value of the relationship. Put another way, the intangible benefit which accrues to a sponsor increases over time, all other things being equal.*
20. *In my view it is not possible to ascribe a dollar value to the intangible benefits which flow to the sponsor of a sporting team.”*

- 3.44 FRU has not filed any Affidavit to challenge the contents of Smith's, Power's or Barnum's Affidavits.
- 3.45 It is apparent from Smith's Affidavit which is not much different to Power's and Barnum's Affidavits that tangible and intangible benefits are derived from Sponsorship Agreement and whilst tangible benefits can be assessed there is uncertainty as to assessment of intangible benefits.
- 3.46 I am of the view even though sponsorship funds will be used to pay for the expenses to be incurred for various tournaments there is no condition imposed by the sponsors as to how FRU is to manage this funds. As such there is nothing stopping FRU from utilising the sponsorship funds to pay for any damages awarded against it.
- 3.47 Digicel's claim is for breach of contract by FRU. As stated in Smith's Affidavit tangible benefits can be assessed and it is only intangible benefits that may create uncertainty.
- 3.48 The Courts in Fiji and abroad have been called upon to assess damages for breach of contract in relation to intellectual properties and it is not doubted that the Courts in Fiji have the ability for assessing damages for alleged breach of contracts such as the Sponsorship Agreements.
- 3.49 I also note that even though Digicel in its submission submitted that it will suffer irreparable harm, huge loss and loss of reputation it has not sought damages in its Statement of Claim which may seem that Digicel is not seeking damages from FRU but is only interested in equitable relief in form of specific performance and injunctive orders.
- 3.50 In view of the observation and comments made above I am of the view damages to Digicel if it does choose to claim damages for the alleged breach of contract will be adequate remedy.

Balance Of Convenience

- 3.51 Digicel submits that it will suffer irreparable harm if performance of the Sponsorship Agreement between FRU and Vodafone Consortium is not restrained.
- 3.52 Similar submissions have been made by FRU and Vodafone in that they both submit that any restraining orders granted would cause them substantial loss and irreparable harm.
- 3.53 Digicel suggests that the injunction be for a limited period only (four or three months) to enable parties to proceed to determination on the issue of damages and other trial issues and be well advanced of the process upon expiry of the four months.
- 3.54 Digicel submits that status quo prior to execution of Vodafone Agreement remain and in support relied on following passage from **Gardner Cottages Foods Ltd v. Milk Marketing Board** [1983] 2 All ER 770 at 774 (Lord Diplock):-
- “The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.”*
- 3.55 In this instance Agreement between Digicel and FRU has been in existence for 5 years whereas Agreement between FRU and Vodafone Consortium is fairly new.
- 3.56 Digicel submits that it has a strong case which is not answerable and that it has conducted all its dealings honestly whereas FRU disregarded its contractual obligations to the Plaintiff.
- 3.57 Digicel emphasised it will be content with limited injunction for a period of three months only. In support of this Digicel on the date of hearing by itself and by its Chief Executive Officer Maurice McCarthy provided undertaking as follows terms:-

“5. Upon the fulfilment of the foregoing condition I hereby personally undertake to the Court on the basis that the Court grants the interim relief sought in the Plaintiff’s Amended Notice of Motion, with such amendments as the Court may think fit, as follows:

(a) I shall personally procure that the Plaintiff will within five working days of the fulfilment of the condition in paragraph 4 and the grant of interim injunctive relief by the Court, whichever date is the later, match the financial terms (both in cash and in kind) of the Vodafone Consortium Sponsorship Offer (and will so confirm in writing pursuant to this paragraph in called upon to do so) such that the Plaintiff will sponsor the Rugby Assets of the First Defendant on the same terms and conditions as are contained in the Vodafone Consortium Sponsorship Agreement save that the Plaintiff will be entitled during the duration of this Undertaking to all advertising, branding, promotional and sponsorship benefits enjoyed by the members of the Vodafone Consortium pursuant to the Vodafone Consortium Sponsorship Agreement;

(b) The terms of this Undertaking shall continue in force for the duration of any order of this Honourable Court granting interim injunctive relief to the Plaintiff and this Undertaking shall cease to be of any further force and effect upon the discharge or expiry of any such orders for interim injunctive relief.”

3.58 Both Counsel for FRU and Vodafone objected to the undertaking on the grounds that it tantamounts to putting back the Agreements between FRU and Digicel in place despite the existence of Vodafone Agreement.

3.59 Counsel for Vodafone pointed out that the undertaking is as a result of letter written by Digicel on 11 February 2014 after Court refused to grant interim injunction on 6 February 2014 (Annexure 15 of McCarthy’s 2nd Affidavit).

3.60 FRU by its Counsel submits that balance of convenience favours that status quo be maintained in favour of the Vodafone Agreement as that Agreement has been performed during Wellington Sevens.

3.61 FRU submits that it will suffer irreparable harm if it is sued by Vodafone Consortium under that Agreement.

3.62 Counsel for Vodafone submits that Vodafone Consortium will suffer irreparable harm if interim injunction is granted as prayed for by Digicel.

3.63 Vodafone submits that:-

- (i) Products that are subject to Sponsorship Agreements are products of and developed by FRU;
- (ii) Sponsors are merely licencees and in consideration of sponsorship amount the sponsor is granted licence to utilise FRU's products for its own benefit;
- (iii) Vodafone Consortium has invested substantial sum of money to fund the sponsorship of FRU products;
- (iv) Plaintiff's claim is untenable.

3.64 Digicel has submitted that the alleged breach of contract by FRU was induced by Vodafone.

3.65 Vodafone responded to advertisement by FRU calling for EOI in the daily newspapers and no evidence has been submitted by Digicel to substantiate this allegation. If Vodafone Consortium did pursue vigorously to conclude the Sponsorship Agreement with FRU then I see nothing wrong with it as it is standard practice and norm in commercial sector particularly where competitors are vying for sponsorship of same products.

3.66 Digicel by its Counsel has relied on the case **Nike European Operation Netherlands B. U. v. Rosicky** [2007] EWHC 1967 (Ch) and **Araci v. Fallon** [2001] EWCA Civ 668.

3.67 In **Nike v. Rosicky** the parties entered into a contract for two years whereby Defendant contracted to wear and promote Nike products. The contract was to expire on 31 December 2006 and was subject to provision which conferred benefit of an option to renew the contract for two years in favour of Nike.

Claimant was requested to give notice of exercise of option by 30 September 2006 which it claimed it had given to the Defendant.

On 5 July 2007 Defendant entered to a new contract to wear Puma boots and promote Puma products. There was dispute as to whether Nike had validly exercised its option for renewal of Nike contract.

It is to be noted that the contract between the parties provided that Courts of Netherland shall have exclusive jurisdiction to deal with matters arising out of the contract. The English Court exercised its jurisdiction to grant interim relief pursuant to s25 of Civil Jurisdiction and Judgment Act 1982 (UK).

In Nike's case Justice Patten granted interim injunction for a limited period to preserve the status quo in doing so he stated as follows:-

“46. If one approaches this case on that basis, it seems to me that preserving the status quo for what is likely to be a relatively limited period of time must be to preserve the situation as it subsisted up to the beginning of June, namely with the defendant continuing to wear Nike products, including Nike football boots.”

3.68 Counsel for the Vodafone submitted that Nike case can be distinguished from the instant case on following grounds:-

- (i) Products in Nike case was developed by Nike and Defendant was only wearing it and promoting it whereas in the instant case all products have been developed and are owned by FRU and Digicel was only granted licence to use these products on payment of consideration sum.
- (ii) The contract between Defendant and Puma was not performed at the time of granting of interim injunction.

3.69 It also appears that, what, influenced the Court in Nike in granting limited injunction is that the substantive proceeding in respect to the dispute was to be commenced in Netherland Courts.

3.70 In **Vefa Ibrahim Araci v. Kieren Fallon** [2011] EWCA Civ 668 the parties entered into a contract on 11 April 2011 for one year whereby the Defendant

Jockey agreed to ride Plaintiff's horse "Native Khan" in races and not to ride any other horse when he has been retained to ride Plaintiff's horse "Native Khan".

On 30 May 2011 the Defendant informed Plaintiff that he has agreed to ride a rival horse in a race in which Defendant was retained to ride Plaintiff's horse "Native Khan".

The Trial Judge refused to grant the injunction but injunction was granted on appeal by the Appellate Court.

3.71 **Araci's** case can also be distinguished on the ground that the contract between the parties was on foot and had not expired as is in the instant case.

3.72 Another distinguishing fact in both **Nike** and **Araci's** case was that both involved individual football player and jockey respectively and not a body that governs, controls, manages and promotes one of the major sports in the country.

3.73 I take into consideration the following factors in assessing the balance of convenience:-

(i) It is not disputed that:

(a) Digicel and FRU had entered into Digicel Sevens Agreement, Variation Deed and Digicel Cup Agreement which Agreements had clauses which required FRU to exclusively negotiate renewal of the Agreements with Digicel;

(b) Digicel was granted option to match any proposed sponsorship;

(c) FRU few months prior to expiry of the Agreements with Digicel called for Expression of Interest for sponsorship of its products;

(d) Vodafone submitted its EOI to FRU in response to the advertisement;

- (e) At the request of FRU Digicel also submitted an EOI;
- (f) Digicel waived its right to exclusive negotiate renewal of its Agreements.
- (g) Various correspondences were exchanged between Digicel and FRU in respect to option granted to Digicel;
- (h) On 20 December 2013 Digicel wrote to FRU confirming that it will match the offer by Vodafone Consortium;
- (i) On 3 February 2014 FRU entered into Sponsorship Agreement with Vodafone Consortium;
- (ii) FRU as submitted by Vodafone's Counsel is the owner of all the products subject to Digicel Agreements;
- (iii) Rugby is the number one sport in the country and is enjoyed and followed by majority of Fiji's population;
- (iv) Fiji Sevens Team is very well respected on Sevens Circuit internationally;
- (iv) The fight in these proceedings in actual terms is between Digicel and Vodafone as both are major competitors in mobile telecommunication market;
- (vi) Digicel in its Statement of Claim has not sought damages but equitable relief in the form of specific performance and injunction;
- (vii) Accordingly if an interlocutory injunction is granted Digicel may succeed in obtaining its substantive relief.

In **NWL Ltd v. Woods** [1979] 1 WLR 1294 Lord Diplock stated as follows:-

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the

action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction of the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”
(page 1306)

In **Cayne v. Global Natural Resources Plc** [1984] 1 All ER Lord Justice Eveleigh at pages 232 and 233 stated as follows:-

“... the grant of an injunction does not mean that the case must be one which is suitable for the application of the balance of convenience guidelines laid down in the Cyanamid case. Having asked myself the various questions referred to in Cyanamid, I have reached the conclusion that this case is one that the court has to approach on a broad principle: what can the court do in its best endeavour to avoid injustice.” (page 232).

“However, in an application for an injunction when the court is being asked to exercise its discretion in enforcing those rights, regard may be had to all of the circumstances. The real aim of Global is to change the policy of the board. We are not concerned with the rights and wrongs of that policy. The question, it seems to me, is: should the court exercise its discretion bearing in mind all the circumstances of the case, when to decide in favour of the plaintiffs would mean giving them judgment in the case against Global without permitting Global the right of trial? As stated that way, it seems to me that that would be doing an injustice to the defendants.”(page 233).

- (viii) It is apparent from the letter written by Digicel on 11 February 2014 after interim injunction was refused on 6 February 2014 and the undertaking given by it on the date of hearing is that it intends to utilise the injunction orders to force FRU to let Digicel sponsor the FRU products until the trial of this action atleast;
- (ix) The provision dealing with exclusive negotiation and option to match any proposed sponsorship in Digicel favour in my opinion may have offend provisions of Part 6 in particular section 60 of Commerce Commission Decree 2010 as it may seem to hinder competition;
- (x) Telecommunication industry has been quite competitive as is evident from the number of promotions put in place by the stakeholders to capture the market. In **Independent Newspaper Ltd v. Australia Consolidated Press NZ Ltd** [1996] 3 NZLR 722 Ellis J stated as follows:-

“In my view competition is to be encouraged. This is a very competitive market and the parties are competing in the same section of it. Although the two magazines are directed at what could be called different subsets of it, the market for each has substantial overlap. This is accepted and I need not elaborate. The plaintiffs’ magazine sells about twice as many as the defendant’s, but has many more readers: 360,000 compared with 69,000. This does not affect my conclusions, but it lends some support to the claim that the defendant is pushing into the market on what is called a “me too” basis, that is looking to claim readers from the plaintiffs. I think there

may well be truth in that, but that is what competition in a robust market is all about.”

- (xi) The Vodafone Agreement has been performed by FRU and Vodafone Consortium during Wellington Sevens;
- (xii) If interim injunction is granted even for a limited period and the trial of this action for some reason or the other is not held before the sevens and other rugby tournaments then FRU will not have a sponsor for those tournaments which will be detrimental to game of rugby in this country;
- (xiii) In the absence of funding by International Rugby Board it is essential that FRU have continued sponsorship of its products;
- (xiv) I also take notice of the following:-
 - (a) Rugby is number one sport in this country and is supported and followed by the majority of Fijian Community;
 - (b) Rugby in Fiji in particular the fifteens code are in the development phase and there is a need for FRU to obtain maximum benefit from its products;
 - (c) Clauses such as those in Digicel Sevens Agreement, Variation Deed and Digicel Cup Agreement for FRU to exclusively negotiate the renewal of the Sponsors Agreements with Digicel may hinder FRU from obtaining maximum benefit from its products;
 - (d) Also the clause granting option to Digicel to match any sponsorship proposal means Digicel will not at any time permit any of its competitors to sponsor FRU products. This is evident from the letter written by Digicel to FRU on 11 February 2014 (Annexure “MM17” of McCarthy’s 2nd Affidavit) where it is stated that:

“Digicel is willing to increase offer of an advance payment of F\$250,000.00 to F\$500,000.00 provided the FRU immediately cease allowing another party who is a competitor of Digicel or otherwise operate in Digicel’s brand sector to sponsor its rugby assets. (1st sentence 2nd last paragraph).”
 - (e) Even though it was not raised during the hearing of the Injunction Application the enforceability of these clauses as highlighted hereinbefore may be raised at trial.
- (xv) After careful consideration of the above factors and principles I am of the view that balance of convenience and overall justice of the case

require status quo at the time of hearing be maintained until final determination of this matter.

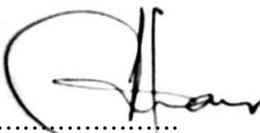
3.74 In view of nature of the proceedings I intend to assign a trial date in this matter within three months of this Ruling.

4.0 Conclusion

I make the following Orders:-

- (i) Application for Interlocutory Injunction by the Plaintiff by way of Amended Notice of Motion dated 7th February 2014 is refused and accordingly Plaintiff's Amended Notice of Motion dated 7th February 2014 is dismissed and struck out;
- (ii) Plaintiff is to pay both Defendants' costs in the sum of \$2,000.00 each;
- (iii) Digicel and FRU are to attend to pre-trial matters by 25th April 2014;
- (iv) Substantive matter be listed for mention on 28th April 2014 at 9.30am.




.....
K. Kumar
JUDGE

At Suva
13 March 2014