

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 168 of 2005

BETWEEN : **GHIM LI APPAREL (FIJI) LIMITED**

PLAINTIFF

AND : **DAUMAKA GARMENTS LIMITED**

DEFENDANT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr I. Fa for Plaintiff
Mr D. Sharma for Defendant

DATE OF HEARING : 7 July 2005 (by Hon. Justice Jitoko)

DATE OF RULING : 27 March 2015

RULING

(Application to Dissolve Injunction)

1.0 Introduction

- 1.1 On 14 April 2005, Plaintiff obtained Ex-parte Injunction Order restraining the Defendant, its agents or servants from preventing Plaintiff taking Plaintiff's goods listed in the Order from Defendant's factory at 9½ miles Nasinu.
- 1.2 Plaintiff caused the Order to be executed by removing the items from Defendant's factory.
- 1.3 On 21 April 2005, Defendant filed Inter-Parte Notice of Motion dated 20 April 2005 seeking following Orders:-

- "1. An Order that the ex-parte injunction obtained by the Plaintiff on 14th April 2005 be dissolved forthwith.*
- 2. An Order that the Plaintiff give an inventory to the Court and to the Defendant of all the items that they removed from the Defendant's premises on 14th April 2005.*
- 3. An Order that the Plaintiff immediately return cash monies of \$15,000.00 together with 3 cutting scissors and 2 cutting machines that were seized by the Plaintiff's agents from the Defendant's premises on 14th April 2005.*
- 4. An Order that proceeds from the sale of properties belonging to the Plaintiff or its associated company Ghim Li Fashion (Fiji) Limited, including Certificate of Title 12777, Lease No. 165517, Lease No. 169738 and Lease No. 311879 be held in trust or paid into Court until further order of the Court.*
- 5. An Order that the Plaintiff do immediately pay to the Defendant the sum of \$52,189.88.*
- 6. Costs of this Application.*
- 7. Such other relief as the Court may deem just in the circumstances."*

("the Application")

- 1.4 Following Affidavits were filed in respect to the Ex-Parte Application. Application for Injunction and Application in 1.3 above:-
- (i) **For Plaintiff/Respondent**
- Affidavit of Jason Lai sworn on 13 April 2005 and filed on 14 April 2005;
- (ii) **For Defendant/Applicant**
- (a) Affidavit of Tang Yan Shun sworn and filed on 20 April 2005
- (b) Affidavit of Tang Yan Shun sworn and filed on 21 April 2005.
- 1.5 On return date of the Application his Lordship Justice Jitoko (as he then was) directed parties to file Affidavits and listed the Application for hearing on 7 July 2005.
- 1.6 On 7 July 2005, the Application was heard by his Lordship Jitoko (as he then was) and adjourned for Ruling on Notice.
- 1.7 On 29 June 2005, Defendant entered judgment by default on its counter-claim and subsequently Plaintiff applied for setting aside of the default judgment.
- 1.8 On 31 October 2005, his Lordship Justice Jitoko (as he then was) by consent of Counsel directed parties to file Submissions and adjourned the setting aside application for ruling on notice.
- 1.9 Judgment not being delivered on the Application and Setting Aside Application this matter was next called on 7 February 2012 before his Lordship Justice Hettiararchchi (as he then was).
- 1.10 Since then this matter has been adjourned on various occasions and was referred to me on 29 May 2013 when I directed it to be called on 4 June 2013.
- 1.11 With consent of parties on 19 June 2013 I delivered Ruling in respect to Setting Aside Application and enquired with Counsel for the parties on the status of the Application.
- 1.12 Counsel for the Defendant informed Court that he will review Defendant's file and inform Court accordingly.

- 1.13 On 24 June 2013, Defendant's Counsel informed the Court that Ruling in respect to the Application is yet to be delivered and moved this Court for Ruling to be delivered in respect to the Application when I directed parties to file Submissions by 31 July 2013.
- 1.14 Thereafter Defendant and Plaintiff filed Summons to Re-instate Judgement in Default of Defense to Counter-claim and Summons seeking Permanent Stay of Proceedings respectively.
- 1.15 Defendant filed its Submissions but Plaintiff had failed to do so.
- 1.16 On 6 September 2013, both parties withdrew their respective Applications in 1.14 above and accordingly both Applications in 1.14 above were dismissed and matter was to take its normal course.

2.0 Application to Dissolve Interim Injunction

- 2.1 It is well established that the principles relating to grant of injunction and whether to dissolve injunction pending determination of matter is that stated by Lord Diplock in *American Cyanamid v. Ethicon Limited* [1975] 1 All ER 504 which are as follows:-
- (i) Is there a serious question to be tried;
 - (ii) Whether damages be an adequate remedy; and
 - (iii) Balance of Convenience.
- 2.2 Defendant submitted that Plaintiff obtained the ex-parte injunction on 14 April 2005 as a result of material non-disclosure.
- 2.3 Plaintiff relied on the following statement of his lordship Justice Winter in **Ali's Civil Engineering Ltd v. Habib Bank Ltd** [2004] FJHC 176; Civil Action No. HBC 0035 of 2004 (5 February 2004):

"The need for a plaintiff applying for urgent relief to "make full disclosure to the court" has been stressed in numerous cases. See for example Douglas and

Williams v. Cammock (unreported NZHC Hamilton: CP48/99: 4/8/99 Pennington J).

*It has been further noted that where a party misleads the court by not providing the fullest information that ground alone may lead to the setting aside of any relief granted or indeed the denial of relief. The decision of *Votualailai Limited v Capitals FNPB Board & Os Lautoka Civil Action No. 272 of 1998* is appropriate. *Sadal J* summarized the effect of material non-disclosure in this way:*

“The non-disclosure of material facts, even if it is innocent or inadvertent, is enough to avoid the injunction. In cases of non-material disclosure as in this case the ex-parte injunction is liable to be dissolved on that ground alone, without any enquiry into the merits of the case.”

- 2.4 I accept the above statement as true principle of law in respect to material non-disclosure.
- 2.5 Defendant submits that Plaintiff failed to disclose its intention to close business operations in Fiji and that it owed certain monies and misrepresented to the Court that Defendant owed Plaintiff \$28,944.30 when Plaintiff obtained ex-parte interim Orders on 14 April 2005.
- 2.6 I agree with Defendant’s Submission that failure to disclose to Court Plaintiffs intention to close down its operation in Fiji was material to the Application for Interim Injunction in that if Court would have known that Plaintiff was in the process of closing down its operations in Fiji then Court would then have to consider the sufficiency of Plaintiffs undertaking as to damages.
- 2.7 Also disclosure of amount owing by Plaintiff to Defendant as submitted by Defendant and reconciliation of amount owing by Plaintiff to Defendant and vice-versa were relevant as that would have alerted the Court as to possibility of Defendant exercising a lien over Plaintiff’s items that were in Defendant’s possession.
- 2.8 I therefore hold that ex-parte interim injunction was obtained by Plaintiff as a result of material non-disclosure and as such Defendant had the right to have it dissolved.

- 2.9 However, since the interim order has been executed I see no point in dissolving the Order made on 14 April 2005 as it will serve no purpose.
- 2.10 Any claim Defendant has now against Plaintiff for obtaining interim injunction without making material disclosure lies in damages.
- 2.11 The fact that Plaintiff has not claimed any amount allegedly owing it by the Defendant and the manner in which the claim is pleaded suggests that sole purpose for instituting this action by Plaintiff was to recover the items listed in the Order of 14 April 2005.
- 2.12 I will now deal with other orders sought by the Defendant in the Application.

Serious Question to be Tried

- 2.13 Defendants contention is that Plaintiff induced it into entering into Sale and Purchase Agreement on 2 December 2004 in respect to Plaintiffs machines and equipment by fraudulent misrepresentation that Plaintiff will sub-contract sewing and related works to Defendant for seven (7) years.
- 2.14 Defendant also claimed for monies owed by Plaintiff to Defendant.
- 2.15 Plaintiff in its Defense to Counter-Claim has made bare denials to Defendants counter-claim.
- 2.16 After analyzing the pleadings and Affidavit evidence I hold that there is a serious question to be tried in respect to the said Sale and Purchase Agreement and amount claimed by Defendant.

Whether Damages would be Adequate Remedy

- 2.17 Plaintiff has closed its operations in Fiji and as such any damages that may be awarded even though adequate may not be able to be recovered by the Defendant.

Balance of Convenience

2.18 One aspect the Court needs to consider in determining where balance of convenience lies is whether Applicant has provided sufficient evidence to support its undertaking as to damages.

2.19 I adopt following statement from **Honeymoon Island [Fiji] Ltd v. Follies International Ltd** Civil Appeal No. ABU 0063 of 2007S (4 July 2008)

*“[16] Applicants for interim injunctions who offer an undertaking as to damages must also proffer sufficient evidence of their financial position. “The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy; **Natural Waters of Viti Limited v Crystal Clear Mineral Water [Fiji] Ltd** [2004] ABU 0011 at p12.*

[17] The opposing party is able to test or challenge any such financial information...;

[18] ...However in every case involving an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that it can meet its undertaking as to damages whether or not the Court specifically directs the applicant’s attention to the matter or not.”

2.20 At paragraph 38 of Affidavit of Tang Yan Shun sworn on 20 April 2005 he stated as follows:-

“I am authorized as Managing Director of the Defendant to give an undertaking on its behalf as to damages and say that the Defendant is able to pay damages because it still owes substantial machinery and other assets in Fiji.”

2.21 At paragraph 35 of Jason Lai’s Affidavit sworn on 13 April 2005 he states:-

“I give an undertaking for damages for the Plaintiff.”

2.22 The above undertakings by both Defendant and Plaintiff does not meet the test stated in **Honeymoon** (Supra) and **Natural Waters** (Supra).

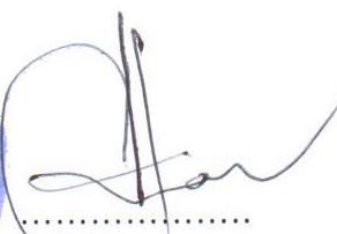
2.23 Defendant claims that Plaintiff while executing the Order of 14 April 2005 removed items that were not subject to the Order.

- 2.24 I therefore hold that Defendant is entitled to an inventory in respect to items removed by Plaintiff from Defendant's premises pursuant to Order of 14 April 2005.
- 2.25 Application for return of \$15,000.00, 3 cutting scissors and 2 cutting machines and payment of \$52,189.88 in prayers 3 and 5 of the Application cannot be granted for the reason that Defendant will need to establish by evidence during trial that Plaintiff did take the sum of \$15,000.00 and mentioned items from Defendant's premises, and that Plaintiff actually owes the sum of \$52,189.88 to the Defendant.
- 2.26 All titles/lease annexed to Affidavit of Tang Yan Shun sworn on 20 April 2005 is registered in the name of Ghim Li Fashion (Fiji) Limited and not the Plaintiff and as such Orders cannot be granted in respect to prayer 4 of the Notice of Motion on the basis of evidence tendered in Court.
- 2.27 On the issue of costs I take into consideration that Plaintiff obtained interim injunction by not making material disclosure as stated at paragraphs 2.3 to 2.8 of this Ruling and also the fact Defendant filed Submissions whereas Plaintiff did not.
- 2.28 I therefore make following Orders:-
- (i) Defendant's Application to dissolve the interim injunction granted on 29 April 2005 is dismissed.
 - (ii) Plaintiff do provide to Defendant and Court an inventory of all items removed from Defendants' premises pursuant to Interim Injunction Order granted on 14 April 2005 within thirty (30) days from date of this Ruling;
 - (iii) Defendant's Application for an Order that Plaintiff return the sum of \$15,000.00 together with 3 cutting scissors and 2 cutting machines, proceeds of sale of property belonging to the Plaintiff or its associated company Ghim Li Fashion (Fiji) Limited including Certificate of Title 12777, Lease No. 165517, Lease No. 169738 and Lease No. 311879 be held in trust or paid into Court until further order of the Court and for

Plaintiff to pay to the Defendant the sum of \$52,189.88 in prayers 3, 4 and 5 of the Notice of Motion dated 20 April 2005 is dismissed;

- (iv) Plaintiff do pay Defendant's costs of Notice of Motion dated 20 April 2005 assessed in the sum of \$1,500.00.




K. Kumar
JUDGE

At Suva

Fa & Co. for the Plaintiff

R. Patel & Co. for the Defendant