

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action 248 of 2006

BETWEEN : KELTON INVESTMENTS LIMITED

*Plaintiff*

AND : LAMI INVESTMENTS LIMITED trading as FOOD FOR LESS  
SUPERMARKET

*Defendant*

**Coram** : The Hon. Mr Justice David Alfred

**Counsel** : Ms B Narayan for the Plaintiff  
Mr H Nagin for the Defendant

**Date of Hearing** : 4 December 2015

**Date of Judgment** : 21 November 2016

INTERLOCUTORY JUDGMENT

1. This is the Defendant's Application for the following Orders:

- (1) That the Plaintiff remove a crossbar and allow delivery vehicles free entry and exit to the bays.

- (2) That the Plaintiff be restrained from using the crossbar and from refusing vehicles, with the Defendant's deliveries, free entry and exit to the bays.
  - (3) That the Plaintiff allow free entry for one hour to the car park for the Defendant's customers who spend a minimum of \$10.00.
  - (4) That the Plaintiff allow four of the Defendant's vehicles (2 delivery and 2 other) free entry to the car park on a 24 hours basis.
2. At the hearing of the summons, the Defendant's Counsel submitted that under the lease of 1998, the Defendant's customers have had free use of the car park, and loading and unloading were allowed. In July 2015 the Plaintiff placed restrictions on loading and removed the free parking for the Defendant's customers. The lease provided for 100 car park bays. The Defendant's supermarket business is affected by the lack of car parks. Counsel therefore asked for an injunction to prevent irreparable harm.
  3. Counsel for the Plaintiff then submitted. She agreed that it was only necessary to look at the lease to determine the rights of the parties. The Plaintiff only wants the trucks to come by the designated lane. The Plaintiff never allowed the Defendant's customers to park for free. It has parking places for all on payment of a fee. There is no proof of any loss by the Defendant. It has also not provided evidence that it has the means to satisfy an order for damages, and on this ground alone the injunction should be refused.
  4. The Defendant's Counsel replied it has the means to satisfy an undertaking as to damages. There is a customer who has sworn an affidavit that he is not shopping there because he has to pay a parking fee.
  5. At the conclusion of arguments I said I would take time for consideration. Having done so I now proceed to deliver my decision.

6. The pivotal issue here is whether the Defendant has made out a case for it to be granted an interlocutory injunction.
7. The leading authority in this area is the decision of Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 396.
8. The Supreme Court Practice 1995 (The White Book) summarises the first 2 tests that the plaintiff has to satisfy as follows:
  - (1) The plaintiff must establish that he has a good arguable claim to the right he seeks to protect.
  - (2) 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.
9. It goes without saying that the plaintiff must give a cross undertaking to be answerable in damages if the injunction proves to have been wrongly granted. At the outset, I state I consider this has been done in the Affidavit in Support sworn by the Defendant's Managing Director.
10. In the instant Summons it is the Defendant who is in the position of the Plaintiff in the White Book situation.
11. I consider that the answers to the issues at hand are to be found in the Lease concerned. Clause 6(e) requires the Lessor (Plaintiff) "to provide the Lessee (Defendant) with 100 car parks for the joint use of the Lessee and other tenants of the centre and its customers. The Lessee will receive two car parks for its exclusive use."

12. The Second Schedule to the Lease which set out the Rules and Regulations of the Building states in para 13 thereof: "That the Lessee shall abide by all the rules relating to the use of the car park which shall be determined at the sole discretion of the Lessor and subject to change from time to time.
13. The Defendant has not shown why it is not required to abide by the cross bar restriction which the Plaintiff has imposed under its right to lay down rules for the use of the car park. The Defendant has also not shown where under the lease the Lessor is required to provide the Defendant's customers with free entry if they spend a minimum of \$10.00. Finally the Defendant has not shown where under the Lease the Lessor is required to provide free entry for any 4 of its vehicles on a 24 hour basis.
14. In the light of the above I find and I so hold that the Defendant has failed to satisfy the preliminary tests set down in "American Cyanamid" as stated above.
15. I therefore dismiss the Summons filed on 31 July 2015, decline to grant the orders prayed for therein and order that the costs hereof be costs in the cause.

Delivered at Suva this 21<sup>st</sup> day of November 2016.



David Alfred  
**JUDGE**  
High Court of Fiji