IN THE HIGH COURT OF FIJIAT SUVA
CIVIL JURISDICTION

Action No. HBC 337 of 2010

BETWEEN : METEOR PARADISE INVESTMENT LIMITED

PLAINTIFF/APPLICANT

AND : FIJI NATIONAL PROVIDENT FUND BOARD

DEFENDANT/RESPONDENT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr H. Nagin and Mr R. Singh for the Plaintiff/Applicant

Mr S. Saro and Ms L. Mocedru for the Defendant/Respondent

DATE OF JUDGMENT : 15 July 2016

RULING

(Application for Interlocutory Injunction)

1.0 INTRODUCTION

1.1 On 3 December 2000, Plaintiff filed Writ of Summons with Statement of Claim and Ex-parte Notice of Motion (**"the Motion**) seeking restraining Order against the Defendant from interfering with Plaintiff's occupation of premises known as **"Bar66"** on first floor of Defendant's property known as **"FNPF Dolphins Plaza"** situated at Victoria Parade, Suva (hereinafter referred to as **"the premises"**) and for return possession of the premises to the Plaintiff.

1.2 On 9 December 2010, being the returnable date of the Motion his Lordship Justice Calanchini made following Orders:-

"(1) The Defendants by themselves and/or through their servants and/or agents and/or howsoever be restrained from in any manner whatsoever interfering with the Plaintiff's quiet enjoyment and occupation of the premises known as "Bar 66" on the Defendant's property known as "FNPF Dolphins Plaza" situate at Victoria Parade, Suva until Wednesday the 15th of December 2010;

(2) The Defendant to return possession of the said premises to the Plaintiff with immediate effect;

(3) The further hearing of the application is adjourned to Wednesday 15th of December 2010 at 9.30 am;

(4) The application is to proceed inter-parte and for that purpose the Plaintiff is to serve a copy of the documents on the Defendant no later than 4pm on Friday 10th December, 2010;

(5) Costs in the cause."

1.3 On 15 December 2010, his Lordship extended the interim Orders, directed parties to file Affidavits and adjourned the Motion to 18 February 2011, for mention.

1.4 On 18 February 2011, the Motion was adjourned to 15 April 2011, for mention and thereafter adjourned to 27 May 2011, for mention with interim orders extended until that date.

1.5 On 27 May 2011, his Lordship adjourned the Motion to 1 July 2011, for mention and on 1 July 2011, parties were directed to file Affidavits and the Motion was adjourned to 5 August 2011, for mention.

1.6 On 14 July 2011, Defendant filed Answering Affidavit.

1.7 On 5 August 2011, Plaintiff was granted time to file Affidavit in Reply and the Motion was adjourned to 16 September 2011, for mention.

1.8 On 9 August 2011, Plaintiff filed Affidavit in Reply.

1.9 On 16 September 2011, the Motion was adjourned to 21 October 2011, for mention when it was further adjourned to 21 December 2011, for mention with interim injunction extended to that date.

1.10 On 21 December 2011, the Motion was adjourned to 24 February 2012, for mention with interim Orders extended to that date.

1.11 On 24 February 2012, the Motion was called before his Lordship Justice Balapatabendi (as he then was) when interim Order was extended until further Order of the Court with no returnable date for the Motion.

1.12 On 9 May 2014, almost fourteen (14) months after last call date, Plaintiff filed Notice of Intention to Proceed with the action.

1.13 On 17 October 2014, Plaintiff filed Summons for Directions.

1.14 On 7 November 2014, this action was in this Court for the first time when:-

(i) Leave was granted to Plaintiff to withdraw Summons for Directions;

(ii) Leave was granted to Defendant to file Statement of Defence and Counter-claim by 21 November 2014;

(iii) Parties were directed to file Submissions and Reply to Submissions by 5 December 2014;

(iv) The Motion was adjourned to 27 January 2015, for hearing.

1.15 On 21 November 2014, Defendant filed Statement of Defence and Counter-claim.

1.16 On 2 December 2014, Plaintiff filed Submissions.

1.17 On 5 December 2014, Plaintiff filed Reply to Statement of Defence and Defence to Counter-claim.

1.18 0n 22 December 2014, Plaintiff filed Summons for Directions.

1.19 On 27 January 2015, by consent of the parties Order in Terms of the Summons for Direction was made and Counsel for the parties made Submissions.

The Defendant failed to file Submissions as directed on 7 November 2014, but handed in unsigned and bare Submission on date of hearing which Submission was not helpful at all. The Motion was adjourned for ruling on notice.

1.20 On 16 February 2015, and 13 April 2015, Plaintiff and Defendant respectively filed their Affidavit Verifying List of Documents.

1.21 On 21 May 2015, the Acting Master of the Court directed parties to exchange documents, to attend to Pre-Trial Conference and adjourned this action to 11 June 2015, when it was adjourned to 17 July 2015.

1.22 This action was next called on 20 July 2015, before the Acting Master when it was adjourned to 10 September 2015, for parties to comply with direction of 21 May 2015.

1.23 On 3 September 2015, Defendant filed Ex-parte Notice of Motion seeking following Orders:-

"(a) That the Plaintiff be immediately restrained from operating its business operations known as Bar 66 located at Level 1, FNPF Place, Victoria Parade, Suva;

(b) That the Plaintiff be immediately evicted from the premises;

(c) That the costs of this application be costs in the cause."

(**"the Application"**)

1.24 I directed that the Application be called inter-parte.

1.25 On 24 September 2015, being returnable date of the Application I made following Orders:-

"1. That the Plaintiff, its agents, servants, Managers, whosoever are restrained from using or operating the bouncing dance floor in the premises known as "Bar 66" on the Defendants property known as "FNPF Dolphin Plaza" situated at Victoria Parade, Suva until further Order of this Court;

2. That the Plaintiff to file and serve Affidavit in Opposition by 4pm on 12th October 2015;

3. *That the Defendant to file and serve Affidavit in Reply by 20th October 2015;*

4. *That both parties to file and serve Submission by 3rd November 2015;*

5. *That any Reply to Submissions to be filed and served by 12th November 2015;*

6. *By consent, thereafter Ruling on Notice."*

1.26 On 3 November 2015, Plaintiff filed its Submissions.

1.27 The Motion and the Application was called before the Master on 16 November 2015 and 24 November 2015, when it was referred to this Court.

1.28 The Motion and Application was called on 8 December 2015, before this Court, when Counsel for the Defendant raised objection to Defendant's Affidavits filed in Court. This Court allowed the Affidavits filed by the Defendants on the ground that all Affidavits were to be filed before 20 October 2015, by which date parties were directed to file Affidavits; the parties were granted leave to file Submission by 6 January 2016 and the Application was adjourned for ruling on notice.

1.29 On 22 December 2015, and on 6 January 2016, Plaintiff and Defendant filed their Submissions respectively.

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

For Plaintiff

(i) Affidavit of Zhou Rong in Support of Motion sworn on 1st December 2010 (hereinafter referred to as **"Rong's 1st Affidavit"**);

(ii) Affidavit in Reply of Zhou Rong sworn and filed on 9 August 2011 (hereinafter referred to as **"Rong's 2nd Affidavit"**);

(iii) Affidavit in Reply of Zhou Rong sworn on 12 October 2015 (hereinafter referred to as **"Rong's 3rd Affidavit"**);

(iv) Further Affidavit of Zhou Rong sworn on 19 January 2016 (hereinafter referred to as **"Rong's 4th Affidavit"**);

For Defendant

(i) Answering Affidavit of Sailosi Ulaniceva sworn and filed on 14 July 2011 (hereinafter referred to as **"Ulaniceva's Affidavit"**);

(ii) Affidavit of Laisa Saumaki sworn on 4 September 2015 (hereinafter referred to as **"Saumaki's 1st Affidavit"**);

(iii) Affidavit of Alifereti Nateba sworn on 13 October 2015 (hereinafter referred to as **"Nateba's Affidavit"**);

(iv) Affidavit of Kristina Crocker sworn on 8 October 2015 (hereinafter referred to as **"Crocker's Affidavit"**);

(v) Affidavit of Laisa Saumaki sworn on 9 October 2015 (hereinafter referred to as **"Saumaki's 2nd Affidavit"**);

(vi) Affidavit of Alena Mucunabitu sworn on 15 October 2015 (hereinafter referred to as **"Mucunabitu's Affidavit"**);

2.0 BACKGROUND FACTS

2.1 On or about 27 October 2004, Plaintiff purchased night club business operating in the name of Planet Nightclub from the premises as a going concern which business name was subsequently changed to "Bar 66".

2.2 Correspondence was exchanged between Plaintiff and Defendant in respect to certain repairs to the premises as appears from Annexure C to H of Rong's 1st Affidavit.

2.3 The Plaintiff held certain months' rental pending repairs to the premises as undertaken by the Defendant.

2.4 On 10 November 2010, Defendant levied distress for outstanding rental and locked the premises.

2.5 On 11 November 2010, parties held a meeting and agreed as follows:-

> *"1. The landlord agrees to tile the whole bar area for a duration of two weeks and works to begin by end of November 2010;*
>
> *2. The landlord to replace the current toilet tiles for duration of two weeks works to begin by end of November 2010;*
>
> *3. The landlord to install the toilet waste water outlet from the premises by end of November 2010;*
>
> *4. The landlord to address the ceiling leakage immediately;*
>
> *5. The landlord to cover the ceiling exhausts fans with gothic mesh wire immediately;*
>
> *6. The landlord to include the extension of the bar area in the next financial year and works to commence by December 2011;*
>
> *7. The landlord to replace the painted aero flex covers of the air condition immediately;*
>
> *8. The landlord to draft and forward a lease agreement for signing to the tenants immediately;*
>
> *9. The tenant from hereon to pay rental on the first week of every month commencing from the November 2010 rental;*
>
> *10. The tenant to pay the arrears of $23,888.40 (3 months) today Thursday, 11 November 2010;*
>
> *11. The tenant will forward receipt evidence later to confirm arrears is only 2 months and if they prove so the overpayment in clause 10 will be used to offset rent for the following month."*

2.6 On 12 November 2010, Defendant again levied distress for rent.

2.7 On 20 November 2010, Defendant called for Expression of Interest for leasing the premises by advertisement in the Fiji Sun.

2.8 Plaintiff subsequently paid the outstanding rent and moved the Court by Motion. The Court proceedings in respect of the Motion are stated at paragraph 1.1 to 1.11 of this Ruling.

2.9 On 7 August 2015, the Defendant became aware of a **"bouncing dance floor"** constructed in the premises by the Plaintiff as advertised in the Fiji Times of the same date which construction was without Defendant's consent.

2.10 Defendant then checked with Suva City Council (**"SCC"**) if SCC had granted any approval for construction of bounding dance floor. SCC informed Defendant that it has not granted the approval.

2.11 Defendant then moved this Court for interlocutory injunction as prayed for in the Application.

3.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

3.1 Counsel for Plaintiff and the Defendant relied on the principle 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 favors granting or refusing Interlocutory Injunction.

3.2 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.

3.3 Lord Diplock in **<u>American Cyanamid *v.* Ethicon Ltd</u>** [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-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment 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."

3.4 In **<u>Series 5 Software *v.* Clarke</u>** [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."

3.5 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. Marshaling 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

3.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

3.7 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.

3.8 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)

3.9 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."

3.10 I think it is appropriate that the Motion and the Application be dealt separately to determine if there is serious question to be tried.

Motion

3.11 Motion was filed after Defendant levied distress, locked the premises and called for expression of interest in respect to the premises.

3.12 Section 3 (1) to (4) of Distress for Rent Act Cap 36 provides as follows:-

"S*3.-(1)* *From and after the commencement of this Act no person, other than a landlord in person, shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing to that effect, and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time in such manner as may be prescribed by rules made under the provisions of this Act.*

(2) Any resident magistrate may exercise the power of granting certificates in cases in which such magistrates may be authorised to do so by rules made under the provisions of this Act.

(3) If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this section or if any bailiff holding such a certificate shall levy a distress otherwise than in accordance with this Act and any rules made thereunder, the person so levying shall be guilty of an offence, and shall be liable, on conviction, to a penalty not exceeding forty dollars or to imprisonment for any term not exceeding three months, in addition to any other liability which he may have incurred by his proceedings.

(4) Any person who shall authorise any person not holding a certificate under this section to levy a distress contrary to the provisions of this Act shall be guilty of an offence, and shall be

liable, on conviction, to a fine not exceeding forty dollars in addition to any other liability which he may have incurred by his proceedings."

3.13 Except for Defendant submitting the distress for rent levied by Defendant was unlawful it has not submitted the grounds as to why it was unlawful.

3.14 Only reason given by the Plaintiff is that the Defendant failed to carry out repairs to the premises.

3.15 Plaintiff must appreciate the fact that failure to carry out repairs to the premises does not make any distress levied by the Defendant unlawful.

3.16 Only thing that will make the distress unlawful is if Defendant failed to comply with provision of any legislation or regulation.

3.17 Failure to repair premises as agreed by parties would amount to breach of agreement.

3.18 I note that Plaintiff in its Statement of Claim states that the distress levied by the Defendant was wrongful but has failed to plead as why the distress was wrongful.

3.19 Since, court has not been provided with any evidence as to by whom and how the distress was levied, it will need to hear oral evidence to determine as to whether or not the distress levied by the Defendant was unlawful.

Whether Damages would be Adequate Remedy

3.20 The relationship between the Plaintiff and Defendant is of tenant and landlord.

3.21 It is therefore not doubted that in the absence of any Agreement as to duration of the tenancy Agreement or how much time is to be given by either party to

terminate the contract, either party may terminate the Agreement by giving reasonable notice.

3.22 What is reasonable in respect to a commercial tenancy will depend on the nature of the business conducted by the tenant and other relevant factors.

3.23 It is undoubted that in cases such as this damages would be adequate remedy which any Court will be able to assess after hearing evidence. Also, Defendant's ability to pay damages is not doubted.

3.24 However, as I stated in **Devi v. Prasad & Ors.** [2016] Civil Action No. 271 of 2014 [20 May 2016] that ***"…when a Family Court or any other Court makes an Order for sale and distribution of sale proceeds in respect to matrimonial property and where there is allegation that the owner of the matrimonial property attempts to sell or sold the property at an undervalue and there is some evidence to suggest that the new owner was aware of the Court Order and that fact that the registered owner sold or is selling the matrimonial property to defeat other party's interest, then Court should not strike out the Application only on the basis that damages would be adequate remedy and can be assessed."***

3.25 The above equally applies to matter when one party alleges illegality or unlawfulness on the part of the other party.

3.26 In other words if the Applicant for Interlocutory Injunction alleges that the Respondent acted in breach of provision of any legislation or regulation or by-laws and court finds that issue needs to be tried by oral evidence, then Court should not dismiss the Application only because damages would be adequate remedy but also consider other relevant factors in assessing balance of convenience.

Balance of Convenience

3.27 I take note of the following:-

(i) Plaintiff has paid the outstanding rental to Defendant;

(ii) There is no allegation that Plaintiff was in arrears of rental at date of hearing.

(iii) The substantive matter is at Pre-Trial Conference stage and could be listed for trial by end of this year;

(iv) Defendant will not suffer any prejudice if Plaintiff continued to occupy the premises and operate its business until final determination of this action;

(v) The Plaintiff and Defendant had been engaged in settlement talks after grant of interim Orders on 9 December 2010, and as a result Defendant did not file its Affidavit in Opposition until 24 July 2011, some seven months after the interim Order was made.

Application

3.28 The Application was based on the ground that the Plaintiff constructed the bouncing dance floor without the consent of the Defendant and Suva City Council (**"SCC"**) as appears from paragraph C (4) of Saumaki's 1st Affidavit.

3.29 There is no dispute that the Plaintiff constructed the bouncing dance floor without Defendant or SCC's approval.

3.30 Plaintiff submits that no such consent or approval was required.

3.31 Regulations 4(1), and 12(1)(2) of Towns (Building) Regulations made pursuant to Section 39 of Public Health Act Cap 111 provides as follows:-

"4-(1) Every person about to erect a building or to add to or alter or repair an existing building shall before commencing so to do

make an application in the form in the First Schedule and shall file in duplicate with the Council for its approval the additions or alterations. The applicant or his agent shall sign such plans, elevations, sections and specifications. (Amended by Regulations 16 February 1938; 11 August 1942.).”

“12.-(1) The Council may through its building surveyor approve such plans, elevations, sections and specifications, or specify the alterations which shall be made in the same before granting such approval.

(2) Except as provided in regulation 4, no person shall commence the work of erecting a building or commence any work of additions, alterations or repairs to an existing building without such approval.”

3.32 The construction of the bouncing dance floor as appears from Annexure “LS8” of Saumaki’s 1st Affidavit is clearly and without any doubt is an alteration to the building in which premises is situated as such requires SCC approval.

3.33 The Plaintiff at paragraph 11 (iv) of Rong’s 4th Affidavit states that after the Court Order of 24 September 2015, the bouncing dance floor has been removed which is confirmed by National Fire Authority Report (Annexure “B” of Rong’s 4th Affidavit).

3.34 It appears that Plaintiff still intends to construct the bouncing dance floor.

3.35 If Plaintiff does intend to construct bouncing dance floor then it should draw proper plans and have it approved by Defendant as owner of the subject property, SCC and other relevant authorities.

3.36 However, any works toward construction of bouncing dance floor should be put on hold until final determination of this action.

3.37 As to prayer (b) of the Application this Court cannot just order Plaintiff to evict the premises until such time substantive matter is determined and Court finds that the distress was lawful.

3.38 If Court finds that distress was unlawful then Defendant subject to legal advise, if it still wants Plaintiff to vacate the premises should attend to the following:-

(i) Terminate the tenancy agreement;
(ii) Issue notice to quit giving Plaintiff reasonable time to quit;
(iii) If Plaintiff still continues to occupy the premises, then Defendant should move the Court under the provisions of Land Transfer Act or High Court Rules for courts determination.

3.39 In view of what I stated hereinbefore and overall justice of the case the interim injunctions granted on 9 December 2010, and 24 September 2015, should continue until final determination of the substantive proceedings on the condition that Plaintiff does not construct the bouncing dance floor or carry out any other renovation works to the premises until final determination of this action or further order of this Court.

4.0 COSTS

I have taken into consideration the nature of the proceedings and Affidavits and Submissions filed by the parties.

5.0 ORDER

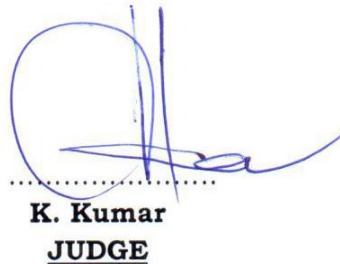
I make following Orders:-

(i) The Defendant whether by itself and/or through their servants and/or agents and/or howsoever be restrained from in any manner whatsoever

from interfering with the Plaintiff's quiet enjoyment and occupation of the premises known as "Bar 66" on the Defendant's property known as "FNPF Dolphins Plaza" situate at Victoria Parade, Suva until final determination of this action or further order of this Court;

(ii) That the Plaintiff whether by itself its agents, servants, managers, contractors or howsoever are restrained from constructing, using or operating bouncing dance floor or carrying out any renovation works in the premises known as "Bar 66" on Defendant's property known as "FNPF Dolphin Plaza" situated at Victoria Parade, Suva until final determination of this action or further Order of this Court;

(iii) Costs of the Applications for Interlocutory Injunction filed on 3 December 2010, and 3 September 2015, is costs in the cause.



....
K. Kumar
JUDGE

At Suva
15 July 2016

Sherani & Co. for the Plaintiff
FNPF Legal Services for the Defendant