IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 62 OF 2020

BETWEEN : **SHAUN ROSEN** of 100 Coast Boulevard, La Jolla, San Diego, CA 92037, United States of America.

PLAINTIFF

A N D : **VUNABAKA BAY FIJI LIMITED** a limited liability company incorporated in New Zealand and registered as foreign company in Fiji.

FIRST DEFENDANT

A N D : **VUNABAKA BODY CORPORATE (FIJI) LIMITED** a company limited by guarantee and not having share capital.

SECOND DEFENDANT

Appearances : Mr F. Haniff for the plaintiff
Mr D. Sharma with Ms G. Fatima for the defendant
Date of Hearing : 5 October 2020
Date of Ruling : 6 November 2020

RULING

[on interim injunction]

Introduction

[01] This is an application for interim injunction.

[02] By summons filed on 13 March 2020 (*"the application"*), the plaintiff seeks the following orders on interim basis:

i. An injunction against the defendants, their servants and/or agents to restore the temporary power, restore the water connection and restore the gas connection to

Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of) to until further order of this Court or final determination of this matter.

ii. *An injunction to restrain the defendants, their servants and/or agents from preventing and/or interfering with Mr Rosen to complete the building at Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of).*

iii. *An injunction to restrain the defendants, their servants and/or agents from restricting Mr Rosen from the quiet enjoyment of his property at Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 (part of).*

iv. *An injunction to restrain the defendants, their servants and/or agents from entering the land and premises described in Lot 2 being part of Lot 1 on SO 5817 known as Vunabaka (part of) containing an area of 2736m² comprised in Native Lease No. 28602 until further order of this Court or final determination of this matter.*

v. *Costs on indemnity basis.*

vi. *Such further and other relief this Court may deem just.*

[03] On 17 March 2020, the court granted orders (i), (ii), and (iii), above on *ex parte* basis to be valid until the hearing of the matter *inter partes* on 8 April 2020. Thereafter, the orders granted on *ex parte* basis were continued until the determination of this application, indeed, with the consent of the defendant.

The background

[04] The background facts gathered from the supporting affidavit are as follows:

4.1 The plaintiff, Mr Rosen is the registered owner/sub lessee of Lot 2 on Plan SO 5817 known as Vunabaka (part of) comprised in Native Lease No. 28602 (part of) on Malolo Island under a registered sub-lease No. 789123. (*"the property"*).

4.2 The property is part of larger integrated resort development project (*"Vunabaka Development"*). The Vunabaka Development is planned to include a resort, three (3) marinas and up to sixty (60) private residences.

4.3 The resort is operated and managed by Sustainable Luxury Mauritius Limited (*"Six Senses"*) under a long-term management agreement.

4.4 Once the construction of plaintiff's house is complete, it will be put in a common pool to be let out for rent.

4.5 The first defendant, Vunabaka Bay Fiji Limited (*"VBFL"*) is a limited liability company incorporated in New Zealand and a foreign entity branch registration in Fiji. VBFL act as bare trustee for the VB Joint Venture, where VBFL has five (5) directors. VBFL is the owner/developer of Vunabaka Development.

4.6 The second defendant, Vunabaka Bay Body Corporate (Fiji) Limited (*"VBBC"*) is a body corporate entity incorporated to administer the common property and common facilities for the owners of Lots on Vunabaka Bay.

4.7 In January 2019, the plaintiff began construction of his house on the property. He was required to provide power to his contractor to enable the contractor to begin construction of his house. In January 2019, the plaintiff requested VBFL to provide his property with temporary power access until his house was completed. VBFL agreed to connect temporary power to the plaintiff's property.

4.8 The Vunabaka Development has a micro grid, a power station, which consists of panels on each residence plus other panels located throughout the Vunabaka Development. The Vunabaka Development also has backup diesel generators. All infrastructure which is required to deliver power to each residential and the resort is now in place and form part of the overall development.

4.9 On or about 23 January 2019, the plaintiff sent VBFL a purchase order to dig a trench to the plaintiff's property and supply the plaintiff with a temporary electrical power connection.

4.10 The also paid for the general ground works to lay the appropriate infrastructure for all future services, including water, power, gas and data. All these costs were paid for by the plaintiff. He also paid for his own electrician to connect the temporary power supply to the property.

4.11 The temporary power supply to the plaintiff's property was connected on or about 25 January 2019. He says he has never been sent an invoice by the Vunabaka Development for the temporary power supply to his property.

4.12 On 1 February 2019, VBFL 'invoiced' the plaintiff for a number of utility services for the property. The invoice was sent to him without any discussion about the cost of these utilities. The cost of the temporary power supply to the plaintiff's property was priced at $6,250.00 which included pedestals and meters for power and water.

4.13 The cost by VBFL to supply permanent utilities to the plaintiff's property was priced as follows: solar power $156,250, data connection $23,958, water connection $31,250, pontoon $73,500, gas connection $10,417. He accepted the cost of the water connection and the gas connection.

4.14 On 12 February 2019, the plaintiff paid the first installment of his water and gas utilities as well as his temporary power connection meter and pedestal connection. The amount was $15,000 and the description of the transfer was "*Pay 1 Utilities*".

4.15 On 13 February 2019, the plaintiff paid the second installment for his utility connection. The amount was $20,000 and the description of the transfer was "*Pay 2 Utilities*".

Query received on utilities

4.16 On or about 3 May 2019, he received a query from VBFL about the payment of the rest of the utilities quoted in the invoice of 1 February 2019. On 3 May 2019, the plaintiff wrote an email "*... would you be so kind as to direct me to the clause in my agreement or the bylaws which stipulates I must pay for the connection to the grid now. I only see Clause 10.10 in the purchase agreement.*"

4.17 The plaintiff received a response from Ms Deo on the same day, i.e. on 3 May 2019, accepting his proposal. Ms Deo in her email said: "*we have made note that you will pay the utilities once your house is complete and we agree with your proposal*".

4.18 In the meantime, the temporary power supply continued to be supplied to the plaintiff's property by VBFL.

4.19 The plaintiff had anticipated that his house would be complete in 2 months, however weather delays, unavailability of building materials, barge from the mainland delays meant that the construction period kept on getting extended.

Discussions about permanent power supply

4.20 On 26 July 2019, the plaintiff met with Mike Lucas and Marcus Langford-Lee at the Rara Restaurant of the resort. Mike Lucas is a director of VBFL and VBBC. Marcus Langford-Lee is the Managing Director of both VBFL and VBBC and Mike Lucas's brother-in-law.

4.21 The upshot of the discussions was that the plaintiff would need to make structure to house the solar panels and that he need to pay for the rest of the utilities.

4.22 The plaintiff started the process to build the structure that would house the solar panels. This included architect design, engineering design, ARC approval, sourcing of materials and build.

4.23 On 30 July 2019, he paid the third installment for his utility connection. The amount was $28,000 and the description of the transfer was "*Water con rates*". As at 1 August 2019, Mr Rosen had paid VBFL a total of $63,000 allocated as follows:

Gas	$10,417.00
Water	$31,250.00
Pedestals	$6,250.00
VAT	$4,312.53
Total	**$52,229.00**

4.24 The plaintiff instructed VBFL to apply the balance of $10, 771 to any other fees he may have owed as there were on going charges from VBFL pertaining to the plaintiff's building and Body Corporate Usage Fees.

4.25 According to the plaintiff, on or about 5 December 2019, VBFL and/or VBBC began to pressure him to pay for the permanent power connection to the property despite the earlier agreement that the issue of the payment of the outstanding utilities would be discussed after completion of building his house.

4.26 On 4 December 2019, the plaintiff received an email from Mr Langford-Lee questioning how the plaintiff came to be connected with a temporary power connection to the property using the Vunabaka Development grid and claiming that the plaintiff had done so illegally.

4.27 It was clear that VBFL and/or VBBC had supplied the plaintiff with the temporary power to the property.

4.28 The plaintiff responded to Mr Langford-Lee on 5 December 2019, by asking if "*am I to take this as notice that you are disconnecting my power.*"

4.29 VBFL and/or VBBC were insisting that the plaintiff pay the electricity connection. In order to avoid conflict the plaintiff entered into discussions

with VBFL and VBBC to conclude an agreement with regard to the plaintiff's outstanding services being the permanent power and data connection to the property.

13 December 2019 Agreement

4.30 On 13 December 2019, the plaintiff signed a contract with VBBC to purchase a share of the power station as well as a data connection.

4.31 The contract did not include the plaintiff's water connection as this had been fully paid for. The contract stated that there was an amount owing on the gas connection of $3,728.00 which the plaintiff took to be a difference on how that moneys he had been paid applied by VBFL and/or VBBC.

4.32 The plaintiff agreed to pay $50,000.00 by way of a deposit under the 13 December 2019 Agreement, of which $3,728.00 was to be applied for the balance of the plaintiff's gas connection and the balance of the $50,000.00 being $46,272.00 as a deposit for the plaintiff's permanent power connection.

Correspondence of 14 February 2020 by VBBC

4.33 On 14 February 2020, the plaintiff wrote to Mr Langford-Lee. He started his email with the preface *"in anticipation of the solar being connected please ensure as per our initial agreement"*. The initial agreement the plaintiff was referring to was the 13 December 2019, agreement. He was aware that by the 29 February 2020, VBFL and/or VBBC had to fulfill obligations. The plaintiff listed out the obligations in his email of 14 February 2020, as follows:

> i. I requested that all solar panels, inverters, meters and batteries I owned be on my site and connected by 29 February 2020.
>
> ii. I also sought FCCC compliance in terms of the agreement of 13 December 2019. The rationale behind this request was that I did not want to be paying a lot of money for my ownership of the grid if it was not in compliance with the FCCC regulations.

iii. I wanted my daily power allocation to be documented. Mr Lucas had represented to me that my daily power allowance *"way exceeds"* my possible daily allowance. I simply wanted my daily power allocation to be property documented to valid any disputes later.

iv. I also wanted a contract and/or documentation detailing exactly my ownership of the grid in anticipation of settling on 29 December 2020. At this stage, 14 February 2020, I simply had no idea of my ownership details of the grid.

v. I also wanted documented the remedies each party had if the contract signed on 13 December 2019, was breached by either party and what the resolution process would be for such breach.

vi. I also sought an assurance that if the FCCC rules that VBFL and/or VBBC were in breach of the FCCC Regulations, the money I paid for the electricity connection would be refunded back to me.

vii. I wanted a formal contract from VBFL and/or VBBC on these issues to give me certainty for the money that I was paying for the power connection. It was not a small amount of money.

4.34 Mr Langford Lee replied on 17 February 2020. He responded by stating that the structure to house the solar equipment was not ready so the plaintiff's equipment would not be delivered. However, by 25 February 2020, the plaintiff was ready to receive the equipment.

4.35 VBFL and/or VBBC refused to provide him with a contract or written confirmation of his requests in his email of 14 February 2020. Instead Mr Langford sent the plaintiff a service agreement. The service agreement in no way covered the issues the plaintiff raised in his email of 14 February 2020. The service agreement sent by Mr Langford-Lee, according to the plaintiff, was prepared in May 2018, well before he entered into on 13 December 2019 contract.

4.36 The plaintiff responded to Mr Langford-Lee on 18 February 2020. In his email of 18 February 2020, he said to Mr Langford-Lee that what he sent was a service agreement and not an agreement detailing exactly what he was purchasing and what he would own. He also said that the service agreement did not address his concerns about the dispute resolution process and that it did not contain the special conditions relating to the FCCC. The plaintiff again requested Mr Langford-Lee to address the issues raised in his (plaintiff) email of 14 February 2020.

4.37 Instead of addressing the plaintiff's concerns, Mr Langford-Lee then responded on 19 February 2020, simply saying that if he did not pay for the utilities in full by 29 February 2020, there would be no utilities offer through VBBC.

4.38 The plaintiff responded on 19 February 2020, by stating that he had paid for his water and gas connections.

4.39 On 20 February 2020, in response to his inability to get VBFL and/or VBBC to allay his concerns, he requested a refund of money that he paid for the power connection. The plaintiff did not cancel his water and gas connection as he had already paid for these utilities in full.

3 March 2020 Notice from VBBC

4.40 On 3 March 2020, the plaintiff was served with a notice by VBBC that ALL his services would be suspended within 1 day as he was in breach of the contract. This was despite the fact that his gas and water connections had been paid for and acknowledged by VBFL and VBBC.

4.41 The plaintiff complains that VBBC did not follow its own articles in terms of dispute resolution under Clause 38. He was not given 21 days to resolve any dispute as he was not informed what the basis of the dispute was even though he requested the same on 21 February 2020.

4.42 Clause 35.1 of the Articles of Association does not obligate the plaintiff to buy his power from VBBC if he can demonstrate the same service of the same quality can be obtained elsewhere at a cheaper price.

4.43 It is in these background facts the plaintiff seeks interim relief.

Evidence

[05] The parties have filed their affidavit evidence respecting the application:

i. Affidavit in support made by the plaintiff on 11 March 2020.
ii. The affidavit in response made by Mr Michael Lucas sworn on 11 May 2020; and
iii. Affidavit in reply made by the plaintiff on 17 June 2020.

The law

[06] High Court Rules 1988, as amended ("*HCR*"), O 29, R1, provides

> "***Application for injunction*** *(O 29, R 1)*
>
> *1 (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.*
>
> *(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.*
>
> *(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

Principles on interim injunction

[07] The principles relevant to the grant of interim injunction were set out by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 includes:

a) A serious question to be tried;
b) Inadequacy of damages;
c) The balance of convenience;
d) Special causes.

Discussion

[08] The plaintiff applies for an interim injunction to restore the temporary power, the water and the gas connection to his property; to restrain the defendants from preventing and/or interfering with the plaintiff to complete the building on the property; and to restrain the defendants from entering the plaintiff's property. The court had granted these orders on *ex parte* basis. The *ex parte* orders granted are valid until determination of this application.

[09] In these proceedings, the court has to consider whether the plaintiff is entitled to an interim injunction until final determination of the substantive matter.

[10] An application for the grant of an injunction may be made by any party to an action before or after the trial of the action, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be (see HCR, O 29, R 1 (1)).

[11] In his writ of summons, the plaintiff claims among other things restoration of the temporary power, the water and gas connection; and damages for breach of contract.

[12] In order to determine the plaintiff's entitlement for an interim injunction, I would apply the *American Cyanamid* principles.

Whether there is a serious question to be tried

[13] At this stage, without attempting to resolve the conflict of evidence on facts and question of law which might call for detailed oral evidence and argument, I intend to consider the pleadings and the affidavit evidence to determine whether or not there is a serious question to be tried.

[14] Lord Diplock, in *American Cyanamid* (above), said at 407 (H) that: *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence of 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"*.

[15] The plaintiff was getting the temporary power, water and gas from the defendant's grid and was making payment for those utilities. There is an agreement between the parties that the defendants should provide those utilities on a temporary basis until the plaintiff complete his building. Subsequently, dispute arose between the parties. A number of email correspondences had been exchanged between them. During the course of the trail of emails, the defendants informed that they were withdrawing the temporary supply of the utilities they provided to the plaintiff. Afterwards, the defendants disconnected the temporary power, the water and the gas connection to the plaintiff's property.

[16] The plaintiff appears to have accepted the repudiation of the agreement to provide the temporary electricity, water and gas connection by the second defendant. This can be gathered from his email of 13 December 2019 where he wrote that: *'Please make arrangement to refund my money for the electrical connection. I am fully paid up for the water and gas which will remain. I will make my own arrangements with regards to all other services.'* In reply to this, on 21 February 2020 the defendant had asked for the plaintiff's local bank account details to refund the plaintiff's utility package.

[17] Counsel for the defendants did not put forward arguments that there is a serious question to be argued at the trial. Rather, he largely focused his argument on the issue of adequacy of damages.

[18] Having considered the affidavit evidence adduced by the parties for the purpose of these interlocutory proceedings, and having heard the argument advanced by counsel representing both parties, I am satisfied that there is a serious question to be tried over the temporary electricity, the water and the gas connection to the plaintiff's property.

Inadequacy of damages

[19] I now embark on the second stage whether damages would be adequate remedy to the plaintiff in the circumstances of the case.

[20] Lord Diplock in *American Cyanamid Co v Ethicon Ltd*, above states that:

> *"The Court should go on to consider... if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If the damages...would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage" (at 408-C).*

[21] As I said elsewhere in this ruling, counsel for defendants largely relied on the principle that no injunction should normally be granted if the damages would be adequate remedy. He submitted that damages would be an adequate remedy to the plaintiff arising out of the disconnection of the utility services provided by the defendants to the plaintiff's property and the defendants are in a financial position to pay them.

[22] Both parties are in a financial position to pay damages. Their financial capacity to pay damages was not in dispute. Both parties have properties in Fiji. The dispute between the parties is not over the property. The actual dispute relates to the temporary utility services provided by the defendants to the plaintiff's property and disconnection of such services by the defendants.

[23] The plaintiff purchased the property with a view to build a house on it and to earn money by renting out the house. The defendants agreed to provide the temporary utility connection until completion of the house provided that he shall pay for the temporary utilities. The plaintiff is yet to complete the house. COVID-19 has delayed the completion of the house. Without the temporary electricity, the water and the gas connection, the plaintiff would be unable to complete the house. The purpose for which the property was purchased will be lost if the plaintiff is unable to complete his project-building a house for renting out and earn money.

[24] In *Bath and North East Somerset DC v Mowlem PLC* [2004] EWCA Civ 115, the claimant *Council* obtained an injunction restraining *Mowlem* (who were main contractors) from denying a firm of contractors access to the cite to carry out works ordered by an architect's instruction. The contract provided for liquidated and ascertained damages to be paid at the rate of € 12,000 per week. The trial regarded *Mowlem's* conduct as "[leaving] sterilized in some sort of limbo the completion of the Bath Spa Project for who knows quite how long" and held that the effect of the liquidated damages clause was that the *Council* would sustain damages which would not be adequately compensated by an award of damages unless the injunction were granted. *Mowlem* unsuccessfully appealed to the Court of Appeal.

[25] If the temporary utility services the defendant agreed to provide to the plaintiff's property stopped or disconnected abruptly before the completion of the house, the plaintiff would not be able to complete his house. Moreover, the purpose for which the property was purchased will be defeated. The plaintiff is building the house to rent it out and to earn money. Everything is likely to collapse without the temporary utility services. In the circumstances of the case, an award of damages would not, in my opinion, adequately compensate the plaintiff for the temporary damages in the event of his succeeding at the trial.

Balance of convenience

[26] It is where there is doubt as to the adequacy of the respective remedies available to either party or to both, that the question of balance of convenience arises (see *American Cyanamid* case (at 408E)).

[27] I have already decided that damages would not be adequate remedy to the plaintiff in the circumstances of the case. Therefore, I need not deeply go into this third stage.

[28] However, for the sake of convenience, I can say that the defendants would not suffer any uncompensatable disadvantage by the grant of the interim injunction given the fact that the plaintiff will be paying for the utilities he would use. Furthermore, the plaintiff had been enjoying the temporary utility services until they were disconnected by the defendant over the dispute on 31 March 2020. By the grant of interim injunction, the defendants are not going to embark upon a course of action which they have not previously done. The defendants were supplying the utility services to the plaintiff's property until they stopped them on 31 March 2020.The plaintiff has been paying for the temporary electricity, water and gas as billed by the defendants and he will continue to pay according to the usage of utilities. In these circumstances, the balance of convenience favours the grant of interim injunction.

Conclusion

[29] For the reasons given above, I am prepared to grant an interim injunction as sought in prayers 1, 2 and 3 of the application filed 13 March 2020. However, the interim injunction is granted on the condition that the plaintiff shall pay and settle the invoices for the temporary usage of the electricity, water and gas.

Costs

[30] I would decline to order costs in this case because the defendants were consenting from time to time to extend the *ex parte* orders until final determination of the application for an interim injunction.

Result:

1. There shall be an interim injunction in favour of the plaintiff as sought in prayers 1, 2 and 3 of the application filed 13 March 2020.

2. The above injunction is granted on the condition that the plaintiff shall pay the charges for the temporary utilities he would use.

3. There shall be no order as to costs.

....
M. H. Mohamed Ajmeer

<u>JUDGE</u>

At Lautoka
06 November 2020

<u>Solicitors:</u>
Haniff Tuitoga for the plaintiff
R. Patel Lawyers, Barristers and Solicitors for the defendants