IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 237 of 2021

BETWEEN: **BIRONDA FIJI LIMITED T/A TRUE BLUE HOTEL** a limited liability company incorporated under the laws of Fiji.

PLAINTIFF

A N D: **SHANIL NAIDU** father's name Chinmunsami Naidu formerly of Koala Way, Horsely Park, New South Wales 2175, Australia, Businessman/ Managing Director currently residing at Heven Hotel Nawai Nadi.

SECOND PLAINTIFF

A N D: **SIGATOKA CLUB** a club duly registered under the Registration of Club Act.

FIRST DEFENDANT

A N D: **WILL TIROILAU** a registered Bailiff with registration number 06/2017 of Sigatoka.

SECOND DEFENDANT

Appearances: Mr. Patel for the Plaintiffs
Mr. N. Sharma and Mr. D. Nair for the first Defendant
Date of Hearing: 23 September 2022
Date of Ruling: 14 February 2023

RULING

(Under Slip Rule - Order 20 Rule 10 High Court Rules 1988)

BACKGROUND

1. Bironda Fiji Limited (**"BFL"**) – the plaintiff – since 2003, had been operating a hotel called True Blue Hotel from the first and second floor of a property owned by the Sigatoka Club (**"Club"**).

2. At some point, BFL and the Club had a dispute about their tenancy arrangement. That tenancy agreement had expired in 2018.

3. That dispute led to the filing of two court proceedings namely HBC 128 of 2007 and HBC 130 of 2010 which were consolidated at some point. Bironda obtained judgement in the sum of $50,000-00 in general damages plus $3,500-00 in costs. BFL demanded the judgement sum from the Club but the Club could not satisfy the judgement sum as it was in a poor financial state.

4. The Club then proposed to BFL an arrangement whereby (i) the Club would give BFL a free monthly tenancy (ii) until such time as the total cumulative value of the free tenancy has offset the judgement sum in total.
5. BFL agreed to the proposal – and the parties entered into a new tenancy agreement on 15 January 2018 for a term of twenty (20) years at a monthly rental of $1,200 VIP. BFL's consideration was its forbearance to take legal action to enforce the judgement sum.

6. At some point into the new tenancy, the Club levied distress on BFL's properties on account of unpaid rental. However, over and above that, the Club also gave notice of termination to BFL on account of the same unpaid rental for which distress had been levied.

7. The Club argues that the arrangement which allowed BFL to occupy the premises rent-free to offset the judgement sum – was based on an earlier deal. This was not part of the new tenancy agreement which the parties entered into in 2018 after the first tenancy had expired.

8. Admittedly, the new 2018 tenancy agreement contains no express provision to reflect the alleged deal.

9. Meanwhile, BFL is aggrieved because it has, allegedly, carried out substantial improvement on the Club's premises to the value of over $400,000-00 (four hundred thousand dollars).

10. What I am dealing with here is a *Summons for Injunction* filed by BFL's Solicitors (Krishneel Patel Lawyers) filed pursuant to Order 29 Rule 1 of the High Court Rules 1988. That Summons is supported by an affidavit of Shanil Naidu sworn on 04 March 2022.

11. When the matter was called in Court on 20 June 2022, Mr. Sharma appeared for the Club and informed the Court that the Club has since entered into a new tenancy agreement with a Mr. Epeli Kurisari who has moved into occupation. Mr. Sharma further argued that the Club's tenancy agreement with BFL terminated upon distress being levied.

12. The principal question is whether or not the injunction should be granted.

13. Guided by the principles in **<u>American Cyanamid v. Ethicon Co. Ltd</u>** [1975] 1AllER 504 I say as follows.

<u>SERIOUS ISSUE TO BE TRIED</u>

14. Clearly, there are serious issues to be tried. With distress having being levied to completion by the Club, the principle issue is whether or not BFL has a subsisting right to remain on the premises on account of the tenancy agreement.

15. This question ultimately hinges on whether or not the levying of distress does automatically terminate the tenancy agreement.

16. At the hearing of the injunction application, Mr. Patel argued that, even though the Club has completed the distress process – and has even entered into a new tenancy agreement over the same premises with a new tenant - BFL is still pursuing the injunction on the following basis:

(a) the Club's tenancy agreement with BFL is still perfectly in place
(b) the levying of distress does not terminate the tenancy agreement.
(c) to validly terminate the tenancy agreement, the Club would have to issue a valid termination notice.
(d) the Club has not issued a termination notice to BFL – let alone a valid one.
(e) there was an arrangement between the Club and BFL that BFL could occupy the premises. rent free until the judgement sum plus costs in excess of FJD$20,000 had been off-set.
(f) BFL has expended over $400,000 improving the property over the years. This is a fact which Ajmeer J found in his Ruling dated 06 July 2017 in HC 128 of 2007 consolidated with HBC 130 of 2010 (see **Bironda Fiji Ltd v Naidu** [2017] FJHC 523; HBC128.2007 (6 July 2017)).
(g) flowing from that, BFL has a real equity over the property based on the above expenses which Ajmeer J had found as a fact.

17. As a matter of principle, the argument that the levying of distress does not terminate the tenancy is a tenable one. In **Delane Industry Co. v PCI Properties Corp**. et al., 2014 BCCA 285, the British Columbian Court of Appeal made some interesting comments on the law in this area – which – in my view, I shall reserve for further consideration at the trial of the this matter.

18. In **Delane Industry Co**, a landlord sold some of the tenant's chattels in the course of levying distress for past arrears of rent. However, following that process, a large amount of the arrears remained outstanding. On account of that outstanding balance, the landlord then purported to terminate the tenancy by relying on an earlier Notice of Default issued before it (landlord) had levied distress.

19. Aggrieved, the tenant sought a declaration to have the tenancy reinstated. The tenant's main argument was that the remedy of rent distress on the one hand, and termination on the other – were alternate and mutually exclusive options.

20. In other words, once the landlord has exercised its right of distress for unpaid rent, the landlord could not then terminate the tenancy for the same breach (i.e. on account of the same unpaid rent).

21. On appeal from the British Columbia Supreme Court, the British Columbia Court of Appeal agreed that:

(a) a notice of default by the landlord while distress was on foot was not effective to terminate the lease immediately upon completion of the distress.
(b) while there is admittedly a "cumulative remedies" clause in the lease, that clause did not change that result.
(c) any new notice of default would have to be based on a "new" default or breach by the tenant and would have to comply with the requirements set out in the lease for termination by the landlord.

22. I note that the reasoning in the above case is based on the notion that a landlord levying distress elects and acts to affirm the lease whereas a notice of termination is an act to terminate the lease. A landlord can either elect one or the other but cannot have his cake and eat it too so to speak. Furthermore, once an election is made, it is irrevocable.

BALANCE OF CONVENIENCE

23. In my view, the balance of convenience favours a refusal of the injunction. I say this on the basis of the fact that the Club has since entered into a new tenancy arrangement with a new tenant.

24. Mr. Patel had argued that the new tenancy is illegal because the old tenancy is still alive on account of the fact that it had not been terminated vide a valid notice of termination.

25. That argument is one which I cannot determine at this interlocutory stage and which will have to be postponed to the substantive trial. If I were to try to determine that at this stage, the parties rights would be determined finally at this interlocutory stage.

26. I have considered the argument that BFL has expended more than $400,000 in improving the property. Whether Ajmeer J's findings on that final and enforceable – I have some misgivings. I leave that open for now. For the record, I did ask Mr. Patel whether or not his client could register that finding as a judgement against the property. Mr. Patel's response (or lack of it) perhaps underscores the doubt that we all have over the enforceability of Ajmeer J's obita comment.

27. There was a lot of toing and froing in argument about the alleged arrangement between BFL and the Club to allow the Club to occupy the premises rent free for a number of years until the judgement sum is set off. At the end of the day, that alleged arrangement is not expressed in the tenancy agreement. To take it into account as a point that was accepted during the parties'negotiations – may offend the parol evidence rule.

28. **Prenn v Simmonds** [1971] 1 WLR1 WLR 1381, 1384, is authority that, as a matter of evidence law, if there is an issue of construction of a term of a contract, then pre-contractual negotiations cannot be used to aid the court.

29. As Wilberforce LJ said:

> "The reason ....is not a technical one or even mainly one of convenience..... It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different.

30. Lord Gifford in (1877) 4 R 58, 69-70)said [30]:

> "Now, I think it is quite fixed - and no more wholesome or salutary rule relative to written contracts can be devised - that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations - that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what

they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case."

(see also Court of Appeal in **HP Kasabia Brothers Limited v Reddy Construction Company Limited** [1977] FJCA 4; [1977] 23 FLR 235 (25 Novemb77); **Din v Westpac Bpac Banking Corporation** [2004] FJCA 30; ABU0066.2003S (26 November 2004)).

31. In the event that BFL were to win its case, it could still be compensated in damages.

CONCLUSION

32. I refuse to grant the injunction sought. I grant costs to the defendant which I summarily assess at $1,500-00.

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Anare Tuilevuka
JUDGE
Lautoka

14 February 2023