

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 26 of 2022

BETWEEN: **SOFTWARE FACTORY PTE LIMITED** a limited liability company with its
registered offices at 371 Victoria Parade, Suva.

PLAINTIFF

AND: **PARMESH DAYAL** of 95 Kaunitoni Street, Vanuaqa, Suva, Director.

DEFENDANT

Before: **Hon. Mr. Justice Vishwa Datt Sharma**

Counsel: **Ms Vaurasi L** for the Plaintiff
Mr Singh R for the Defendant

Date of Decision: **17th February, 2023**

DECISION

*[Inter-parte summons seeking Injunctive Orders for Recovery of Property – pursuant of
Order 29 of the High Court Rules 1988 and Inherent Jurisdiction of the High Court of
Fiji]*

- xvi. Tonga Retirement Fund Board;
- xvii. Samoa Housing Corporation – Simple Interest;
- xviii. Development Bank of Samoa (LMS);
- xix. Niue Development Bank (LMS);
- xx. Samoa Housing Corporation (LMS)

[2] An Order restraining the Defendant, Parmesh Dayal, his servants or agents or otherwise from using, or dealing with, or transferring, or selling, or disposing, or destroying or changing the latest version of the 20 source codes for Software Factory PTE Limited's corporate clients as listed below, until further orders of the court:

- i. Fiji School of Medicine (Student ONLINE);
- ii. Samoa Life Assurance Corporation (LMS);
- iii. Fiji National University (LECOSYS);
- iv. Solomon Islands National Provident Fund;
- v. Tuvalu National Provident Fund (FMS)
- vi. Retirement Fund Board Tonga (LMS);
- vii. Samoa National Provident Fund;
- viii. Samoa Land Corporation Ltd (LMS);
- ix. National Retirement Benefits Fund Tonga;
- x. Samoa Housing Corporation – PRS;
- xi. Fiji School of Medicine – Student Soft;
- xii. Vanuatu National Provident Fund (LMS);
- xiii. Native Land Trust Board (Landsoft);
- xiv. Fiji National Provident Fund (LMS);
- xv. Fiji National University (SPRS);
- xvi. Tonga Retirement Fund Board;
- xvii. Samoa Housing Corporation – Simple Interest;
- xviii. Development Bank of Samoa (LMS);
- xix. Niue Development Bank (LMS);
- xx. Samoa Housing Corporation (LMS)

[3] An Order restraining the Defendant, Parmesh Dayal, his servants or agents or otherwise from contacting, liaising or communicating with any of the Plaintiff's corporate clients including, but not limited to the following, until further orders of the court:

- v. Tuvalu National Provident Fund (FMS)
- vi. Retirement Fund Board Tonga (LMS);
- vii. Samoa National Provident Fund;
- viii. Samoa Land Corporation Ltd (LMS);
- ix. National Retirement Benefits Fund Tonga;
- x. Samoa Housing Corporation – PRS;
- xi. Fiji School of Medicine – Student Soft;
- xii. Vanuatu National Provident Fund (LMS);
- xiii. Native Land Trust Board (Landsoft);
- xiv. Fiji National Provident Fund (LMS);
- xv. Fiji National University (SPRS);
- xvi. Tonga Retirement Fund Board;
- xvii. Samoa Housing Corporation – Simple Interest;
- xviii. Development Bank of Samoa (LMS);
- xix. Niue Development Bank (LMS);
- xx. Samoa Housing Corporation (LMS)

[5] An Injunction to recover from the Defendant, Parmesh Dayal, his servants or agents or otherwise the following other assets belonging to the Plaintiff, Software Factory PTE Limited, until further orders of the court:

- i. Company external hard drive, blackish grey in colour.
- ii. Grey Safe with all the Plaintiff's corporate contracts with the commercial clients of the Plaintiff inside. The height of the safe is estimated at 75 centimeters, length of 70centimeters, and depth of 60 centimeters.
- iii. One Dell Alienware Company laptop used by the Defendant, Parmesh Dayal;
- iv. One Dell Precision 17" Laptop Model 7720;
- v. Company Motor vehicle, FORD Everest, registration number KO 176 with the keys and the fuel card;
- vi. Company Coconut lounge seats and coffee table furniture's.
- vii. Company Samsung Note mobile phone.

7. The Plaintiff [SFL] subsequently filed Summons on 24th of June 2022 seeking for striking out of the Defendant's application HBE 65 of 2021, seeking for relief from oppression and Appointment of an interim liquidator.

Background

8. The Plaintiff [SFL] is a Software Development Company.
9. The Defendant joined the Plaintiff Company on 04th April 2022 as a Trainee Computer Programmer. He was then elevated to the position of the General Manager Software Development from 31st December 2019 until the 13th of January 2022. He had been in the Company for 19 years and held a share of 19.95%. He became a Director of the Company in 2012.
10. On or about December 2021, the Defendant instituted proceedings for relief from oppression [otherwise known as a Shareholders Winding Up] against the Plaintiff [SFL]. These proceedings are pending before court in Companies Action No. HBE 65 of 2021 and has a Nexus with the current proceedings Civil Action No. HBC 26 of 2022.
11. It is noted that after the Defendant had initiated and commenced the Shareholder's Winding Up proceedings, that the current proceedings Civil Action HBC 26 of 2022 was commenced subsequently by the Plaintiff.
12. The Plaintiff Company [SFL] has a total of 21 corporate clients including 6 locals and 15 international.
13. According to the Plaintiff [SFL], to customize the software to meet the specific needs of their corporate clients, their developers need to access the source codes and make changes to it. The source codes are then compiled into executable code (machine codes) which in turn is installed into the main computer that one at the Corporate Clients Room, and the users can then run and use the features of the software. The ownership and access to the source codes are critical and it is the life-line of the Software Company and vital to the operation of their corporate clients.

proprietary interest in the Source Codes.

Court's Consideration

23. This court only needs to determine the remaining Injunctive and Restraining orders sought and as enumerated at paragraph 1 [1], [5] to [9] inclusive hereinabove of my Judgement accordingly.
24. The Defendant has vigorously opposed the relief sought therein by the Plaintiff [SFL] and claimed a proprietary interest in the Source Codes of the Plaintiff by virtue of his 19.95% shareholding in the Plaintiff [SFL].
25. The Defendant submitted that the situation is exacerbated by the fact that there is an existing shareholder's dispute between the shareholders of the Plaintiff and proceedings HBE 65 of 2021 has impending court determination.
26. Further, the issue of ownership and proprietary interest of the Source Codes and other property arises directly from the fact that the Defendant has a significant undisputed shareholding in the Plaintiff [SFL].
27. The nature of the Injunctive relief sought by the Plaintiff [SFL] herein is a mandatory injunctive.
28. The principles governing mandatory injunction was laid down in Redland Bricks, Ltd v. Morris [1969] 2 ALL ER 576. Generally, while the Court has jurisdiction to grant a mandatory injunction upon an interlocutory application, it is a jurisdiction that is exercised very sparingly. And unlike interim injunction applications, the Cyanamid guidelines do not apply. As Lord Upjohn stated in Redland Bricks (at p.579):
 - i. "A mandatory injunction can only be granted where the Plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. As Lord Dunedin said, it is not sufficient to say "times" (Attorney-General for the Dominion of Canada v. Ritchie Contracting and Supply Company [1919] AC 999, 1005, PC). It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly."

37. That Defendant maintains that as a shareholder in the Plaintiff Company [SFL], he has a proprietary interest in the source codes and other property.
38. The issue of the ownership and proprietary interest of the Source Codes and other property arises directly from the fact that the Defendant has a significant undisputed shareholding in the Plaintiff Company [SFL].
39. It will be noted that Semi Tukana has the majority shareholder of 59% in the Plaintiff Company [SFL] and is also a majority shareholder in a Company called SOLÉ Ltd.
40. The major Contention and the dispute of the Defendant that can be ascertained herein is that, Semi Tukana having a 59% share in the Plaintiff Company [SFL] and being a shareholder also in SOLÉ Ltd, it is likely that Semi Tukana will sell the Source Codes SaveLoanSmart software in his possession that is owned by Plaintiff [SFL] to SOLÉ Ltd. This dispute is also the subject matter and substantive issue in the pending shareholders Winding Up Action HBE 65 of 2021 which is impending for Court Hearing and determination.
41. Above can be substantiated by the fact that Semi Tukana advised the Court on 23rd August 2022 that the deal for the sale of the software to SOLÉ Ltd is not being pursued. Further, according to the Defendant's contention, Semi Tukana and SOLÉ Ltd have both advertised on SOLÉ Ltd's website that they will be launching the banking product in October 2022.
42. In short, the Defendant is of the contention that if the Source Codes in the possession of the Defendant are ordered by the Court to be given/handed/over to the Plaintiff [SFL], then there is every likelihood that Semi Tukana will transfer the IP System belonging to the Plaintiff [SFL] to SOLÉ Ltd. The Defendant added that this was the very reason which prompted the shareholders winding up Action No. HBE 65 of 2021 to be instituted and seek an order for oppression and the appointment of an interim liquidation accordingly.
43. The Defendant claimed a property interest in the Software and Source Codes of the Plaintiff by virtue of his 19.95% shareholding with the Plaintiff. The question therefore arises **"whether the Plaintiff can claim that the entire 26 Source Code (20 with the Plaintiff and 6 with the Defendant currently) belongs to the Plaintiff [SFL] alone and that the same 20**

to be tried by the Court and determined accordingly.

52. The first substantive question to be tried is, 'whether the Defendant has a legal proprietary interest in the Software and Source Code of the Plaintiff [SFL] by virtue of his 19.95% shareholding in the Plaintiff [SFL].'
53. Further, the second substantive question to be tried is, "whether the Plaintiff [SFL] can claim that the Source Code belonging to the Plaintiff [SFL] alone and that the same should now be handed over to the Plaintiff [SFL].?"

Damages Undertaken

54. The Defendant submitted that the undertaking as to damages provided by the Plaintiff is stale and about 8 months old.
55. The Defendant pleaded at paragraph 50 of his Affidavit in Response filed on 30th May 2022, that the Bank accounts of the Plaintiff are now being meddled with.
56. Reference is made, to the Fiji Court of Appeal decision of *Natural Water of Viti Ltd vs. Crystal Clear Mineral Water (Fiji) Ltd [2004] FJCA 59; ABU 0011.2004S & ABU 0011A.2004S (26 November 2004)* in particular to the following paragraph:

"Applicants for interim injunctions who offer an undertaking as to damages should always 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."

57. In *Graham v Campbell [1878] 7 CH D 490 at 494* James LJ Said:

"The undertaking as to damage which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing is found to have been wrongly asked for, justice requires that such damages should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so."

58. In *Honeymoon Island Fiji Ltd v Follies International Ltd [2008] FJCA 26; ABU*

stated:

"The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted."

64. The Defendant had strongly submitted and argued that the Defendant has a legal proprietary right over the Software and the Source Codes of the Plaintiff [SFL] by virtue of 19.95% shareholding with the Plaintiff [SFL] and whether the Defendant has in anyway infringed any such rights.
65. The issue of Legal proprietary will be determined at the substantive hearing, may be on viva-voce evidence together with the impending Shareholders Winding Up Application No. HBE 65 of 2022 and cannot be determined within the current Interlocutory application.
66. Therefore, the **Balance of Convenience is a material consideration** to determine in this case in terms of the injunctive orders sought therein.

In conclusion

67. The current case HBC 26 of 2022 has Nexus with Shareholders Winding Up Application HBE 65 of 2022 and vice-versa.
68. Following are some serious Questions to be tried in the current matter –
 - (i) *"whether the Plaintiff [SFL] has the ownership of the 26 Source Codes [20 in the Defendants possession and 6 in the Plaintiff's possession at the current time]."*
 - (ii) *"Whether the Defendant as claimed by him has any "Proprietary interest" in the Source Codes?"*
 - (iii) *"Whether the Defendant has disregarded the shareholder's rights to the Plaintiff's property in the Defendant's position as is contended by the Plaintiff?"*
 - (iv) *"Whether Semi Tukana has a shareholding in the company SOLE Ltd?"*

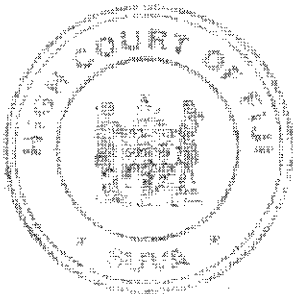
Costs

75. The application proceeded on to the hearing and determination on the remaining injunctive and other orders sought therein. It is only fair that the Plaintiff [SFL] Pays the Defendant a sum of \$650 as Summarily Assessed Costs.

ORDERS

- i. The Remaining Orders sought at paragraph 1[1], [5], [6], [7], [8] and [9] inclusive for an injunction order for the Recovery of 20 Source Codes from the Defendant, Assets and List of Assets of the Plaintiff [SFL] in Defendant's possession, Police Assistance, cost and other just relief are all accordingly refused and dismissed.
- ii. The status quo of the Software, Source Codes and the Assets of the Plaintiff [SFL] to remain intact until this court hears and determines both Civil Action No. HBC 26 of 2022 and Shareholders Winding Up Application No. HBE 65 of 2021 accordingly.
- iii. The Plaintiff [SFL] to pay the Defendant a sum of \$650 as summarily assessed costs.
- iv. The substantive matter is now adjourned to 28th March 2023 at 9.30am for Mention with impending Shareholders Winding Up Application No. HBE 65 of 2021.

Dated at Suva this 17th day of February, 2023.



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Vishwa Datt Sharma
JUDGE

cc: *Shekinah Law, Suva.*
Parshotam Lawyers, Suva.