

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 146 of 2024

BETWEEN: **ORCHID FLAT INVESTMENT PTE LIMITED** a limited liability
company having its registered office at 84 Ragg Avenue, Suva

PLAINTIFF

AND: **CONSTRUCTION EQUIPMENT HIRE LIMITED** a limited
liability company having its registered office at Wailada Industrial
Subdivision

DEFENDANT

For the Plaintiff: Mr. Savou. J

For the Defendant: Mr. Singh. N

Date of Hearing: 15th November 2024

Date of Ruling: 19th February 2025

RULING ON APPLICATION

1. There are two separate applications before the Court – an application for Summary Judgment filed by the Plaintiff on the 21st of May 2024 seeking the following orders: -
 - i. Summary judgment against the Defendant in accordance with the Plaintiffs Statement of Claim for mesne profits at the rate of \$80, 000 (eighty thousand dollars) per anum for the period of 5 years from the 1st of September 2018 to 18th September 2023 being a total sum of \$400, 000 (four hundred thousand dollars) plus interest on the Judgment sum from the date of Judgment until payment.
 - ii. Costs against the Defendant.
2. The Plaintiff relies on the affidavit of Sophia Khan deposed on the 1st of February 2024 and filed on the 21st of May 2024.

3. The application is made pursuant to Order 14 Rules 1, 2 and 3 of the High Court Rules 1988.

The Grounds for the Summary Judgement application

4. The Plaintiff submits the following grounds in support of the application for summary judgment: -
 - a) The Plaintiff is the registered proprietor of all that land comprised and described in Certificate of Title No. 42542.
 - b) The Defendants have occupied that property since September 2018 and the Plaintiff sent a Notice to vacate the land to the Defendant on the 9th of November 2020.
 - c) The Defendant did not vacate the property as demanded and legal action for vacant possession was initiated against the Defendant (HBC 377 of 2020.)
 - d) At the hearing, counsel for the Defendant did not contest giving up vacant possession and the Learned Master granted vacant possession to the Plaintiff and execution was stayed for 6 months. The ruling was handed down on the 16th of March 2023.
 - e) The Plaintiff obtained a Ground Rental Valuation of the land by Rolle Valuers and valued the annual ground rental at \$80, 000 per anum.
 - f) The Plaintiff then served the Defendant with a Demand Notice on the 15th of December 2023 seeking Mesne Profits of \$400, 000 (four hundred thousand dollars.)
 - g) The Plaintiff verily believes that the Defendant has no defence to the claim and seeks an order for Summary Judgment.

The Opposition to the Application for Summary Judgment

5. The application for Summary Judgment is opposed and the Defendant filed the affidavit of Hansel Pillai deposed on the 20th of August 2024 and filed on the 21st of August 2024. The application for summary judgment is opposed on the following grounds: -

- (i) On the 16th of March 2023, the Master entered consent orders, inter alia that the Defendant give vacant possession of CT 42542, being Lot 2 on DP 11132.
 - (ii) On the 15th of March 2024, Justice Amaratunga dismissed the appeal against the Master's Order for vacant possession.
 - (iii) The Defendant have now appealed that decision to the Court of Appeal and the Notice and Grounds of Appeal was filed on the 25th of April 2024. The Defendants submit that they have meritorious grounds of appeal and security of costs have been fixed at \$3, 000. The security of costs has been paid and they are now in the process of compiling the record of the High Court.
 - (iv) The Defendant contends that the Plaintiff, in particular Sophia Khan has not disclosed material facts and has deliberately hidden these relevant factors from both the Master and later, Justice Amaratunga on appeal.
 - (v) These material non disclosures are set out from paragraphs 12 to paragraph 88 of the affidavit of Hansel Pillai.
 - (vi) The Defendant submits that there is a good and bona fide defence and counterclaim to the Plaintiff's claim.
 - (vii) The Defendant submits that the facts as set out and the allegations of fraud on the part of Sophia Khan and/or the Plaintiff establish that this matter ought not be summarily decided by granting the Plaintiff's application for summary judgment but raise triable issues that must be decided after a viva voce trial and not on the affidavit evidence alone.
 - (viii) The Defendant seeks that the Plaintiff's application for summary judgment be dismissed with costs on an indemnity basis.
6. The second application before the Court is the Defendant' application seeking the following orders from the Court: -
- a) That **JIAOJI SAVOU** be restrained and/or be enjoined from appearing and/or acting and/or representing the Plaintiff and/or **SOPHIA KHAN** as and/or its and/or her solicitor in this matter as against the Defendant.
 - b) THAT **SOPHIA KHAN** be restrained and/or enjoined from instructing any solicitor to represent the Plaintiff and/or **SOPHIA KHAN** in this matter as against the Defendant.

- c) THAT the Honourable Court grant leave to **VIJAI WATI** as the Administrator of the Estate of Gopal also known as Gopal Pillay to intervene in these proceedings for the purpose of discontinuing these proceedings.
 - d) THAT the Honourable Court appoint a Receiver or Manager of all the Company's properties.
 - e) THAT the Plaintiff be wound up.
 - f) THAT the Plaintiff pays the Defendant the costs of these application on an indemnity basis.
 - g) Such further or other orders as may be deemed fit, necessary just or expedient in the circumstances.
7. The Defendant relies on the affidavit of Hansel Pillai deposed on the 20th of August 2024 and filed on the 21st of August 2024. The application is made under Order 14 Rules 1, 2 and 3 of the High Court Rules 1988.
8. The Plaintiff relies on the following grounds in support of the application: -
- (i) The conduct of Sophia Khan and the Plaintiff is contrary to the interest of the members of Orchid and oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members of Orchid.
 - (ii) Sophia Khan has breached her duties as a director of Orchid and/or Construction Equipment.
 - (iii) With respect to Mr. Jiaoji Savou, the Defendants object to him acting against the Defendant in this matter.
 - (iv) On previous occasions he has acted as solicitor for the Defendant and was and/or is in possession of information of and belonging and/or pertaining to the Defendant that is confidential and/or prejudicial and that which has been disclosed by Jiaoji Savou to the plaintiff and is now being used by the plaintiff and/or Jiaoji Savou against the Defendant in this matter.
 - (v) To send the notice, Jiaoji would have had access to and then provided information of and belonging and/or pertaining to the Defendant that is confidential and/or prejudicial such as the Defendant's financial records, accounts, statements, books of account etc.

- (vi) Jiaoji Savou would have received instructions from and been given documents financial records, accounts, statements, books of account etc. of the Defendant by Sophia Khan, then a Director of the Defendant.
 - (vii) Prior, during and after those proceedings Jiaoji Savou would have had access to and been provided with information of and belonging and/or pertaining to the Defendant that was and is confidential and/or prejudicial such as the Defendant's financial records, accounts, statements, books of account etc. and which is now being used by the plaintiff and/or Jiaoji Savou against the Defendant in this matter.
 - (viii) Prior during and after those proceedings Jiaoji Savou would have received instructions from and being given documents, financial records, accounts, statements, books of accounts etc. of the Defendants by Sophia Khan, then a Director of the Defendant.
 - (ix) When Jiaoji Savou acted for the Defendants, the Defendant's financial records, accounts, statements, books of accounts etc. were given to Jiaoji Savou for him to represent the Defendant effectively, efficiently and competently.
 - (x) Jiaoji Savou, the Plaintiff and Sophia Khan are now using that very same information disclosed to Jiaoji Savou or which is still in the custody or possession or within the knowledge and/or memory of Jiaoji Savou to act against the interests of and prejudice to the Defendant.
9. The Plaintiff opposes the application and the various orders sought by the Defendant and have filed the affidavit of Sophia Khan deposed on the 4th of September 2024 and filed on the same day.
10. The Plaintiff opposes the Defendant's application on the following grounds: -
- (i) The Plaintiff denies the Defendant's allegations that they had been given consent to stay free of charge on the land in CT 42542 by the Plaintiff. The Plaintiff denies any such agreement.
 - (ii) The Plaintiff and Defendant were sister entities until that relationship ended in 2018 when Hansell Pillay and his mother took over the Defendant.
 - (iii) Sophia Khan states that she and the late Gopal Pillay, her de facto partner, were shareholders and Directors of both companies, the Plaintiff and the Defendant.

- (iv) Sophia Khan remained with the Defendant until 2018 when Hansell Pillay and his mother took over the business.
- (v) She denies any allegation that she has concealed relevant factors and misrepresented the true state of affairs in the litigation for vacant possession of CT 42542. She further contends that the Plaintiff is a profitable entity which has been managed by her since it was incorporated in 2006.
- (vi) She responds more particularly to each allegation against her from paragraphs 9 to 44 of her affidavit.
- (vii) With respect to the allegations against Jiaoji Savou she deposes that his retainer with the Defendant was terminated at the same time as she resigned as Managing Director of the Defendant Company in 2018.
- (viii) She further states that none of the confidential information of the Defendant was given to Jiaoji Savou or accessed by him at any time while she was the Managing Director of the Defendant. She also contends that Hansel Pillai has not particularised what confidential information Jiaoji Savou accessed and how that relates to, and is prejudicial to the Defendant in this litigation.
- (ix) The relevant facts, which are not confidential, is that the Plaintiff is the registered proprietor of CT 42542; the Defendant has no license or tenancy or right to occupy CT 42542 and so vacated it; and the Plaintiff claims mesne profit.
- (x) The Plaintiff submits that this current application is the latest in a pattern of oppressive conduct from the Defendant against the Plaintiff as follows: -
- Illegally registered a Caveat against the Plaintiff's land to force the Plaintiff to pay it money
 - Taken unfounded legal action to force the Plaintiff to transfer to the Defendant land, for no consideration, at the behest of the Defendant and its Directors
 - Attempted to take over the Plaintiff Company by unlawfully registering new Directors in August 2018
 - Stopping Sophia Khan from running the Plaintiff Company and hand over the Company to their control.
 - Despite Sophia Khan's forced resignation from the Defendant's Board in 2018, the Defendant Company continued to use her Personal Director's guarantee to the ANZ Bank to fund its operations, and operate its overdraft. She was only released from the same in 2021 after she warned the Defendant of legal action if the Defendant continued to use her Guarantee.
 - Dumping rubbish on the lots of the Plaintiff at Veisari.

11. The Hearing of both applications was held on the 15th of November 2024, parties had prepared written submissions and oral arguments. The parties also presented their list of authorities to supplement their written submissions and oral arguments made in Court at the hearing.
12. After considering the applications before the Court, the Court directed that the parties address the Defendant's application first and make submissions on the same, for the Court to rule on the same, before addressing the Plaintiff's application for summary judgment.
13. I am grateful to counsel for the extensive and well researched submissions.

The submissions of the Plaintiff

14. In their submissions, the Plaintiff confirms that Mr. Jiaoji Savou had previously acted for the Defendants as lawyer up to 2018. He represented them on matters unrelated to the present proceedings.
15. The legal principles for disqualifying a lawyer from acting for a subsequent client on the grounds of access to confidential information was articulated by the House of Lords in the case of Prince Jeffrey Bolkihah vs KPMG (a firm) [1998] UKHL 52, [1999] 1 All ER 517.

Lord Millet characterised the Court's jurisdiction to intervene and prevent a lawyer from acting for a subsequent client in the following terms: -

“...where the Court's intervention is sought by a former client, however the position is entirely different. The Court's jurisdiction cannot be based on any conflict of interest, real or perceived for there is none. The fiduciary relationship which subsists between the solicitor or client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligations to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence...

Accordingly, it is incumbent on a Plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to show:

- (i) That the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented; and

- (ii) That the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.”

16. This authority has been applied in Fiji in the case of RC Manubhai vs Herbert Construction Company (Fiji) Limited [2014] FJCA 175. In this case, the Court of Appeal stated that the test to be applied in Fiji is as follows: -

“Is there a nexus between the cause of action together with the claim contained in the Statement of Claim of the new client and the confidential information he might be said to be in possession through his relationship with the former client that could be regarded as material and might be detrimental to the former client?”

That JIAOJI SAVOU be restrained and/or be enjoined from appearing and/or acting and/or representing the Plaintiff and/or SOPHIA KHAN as and/or its and/or her solicitor in this matter as against the Defendant.

17. Hansell Pillay has not particularised what specific confidential information of the Defendant, relevant to the present litigation, is in the possession of Jiaoji Savou and /is at risk.

18. The documents that Hansel Pillai has appended relates to past litigations involving the Defendant against a Company called Koorda Limited and against an entity called Asha Investments Ltd, which have no relation at all to the current action between the Plaintiff and the Defendant.

19. There are further generalised allegations by Hansel Pillai of unspecified Financials and accounts which he alleges may have come into the possession of Jiaoji Savou.

20. The Plaintiff submits that the Defendant’s application to restrain Jiaoji Savou from acting for the Plaintiff has failed to meet the threshold set in Prince Jeffrey Bolkiah vs KPMG (a firm) (supra) and RC Manubhai & Co Ltd vs Herbert Construction Company (Fiji) Limited (supra).

21. The Plaintiff therefore submits that there is no basis to restrain Jiaoji Savou from remaining on the record as counsel for the Plaintiff.

THAT SOPHIA KHAN be restrained and/or injuncted from instructing any solicitor to represent the Plaintiff and/or SOPHIA KHAN in this matter as against the Defendant.

22. Sophia Khan is the sole Director and shareholder of the Plaintiff. The Companies Act 2015 prescribes the basis for disqualifying an Officer of the Company. The Act defines an officer of the Company as a director or secretary of the Company. The disqualification criteria are set out at sections 132 to 134 of the Companies Act 2015.
23. There is no evidence before the Court, in any of the affidavits filed by the Defendant, that Sophia Khan has been convicted of any of the offences set out at section 133 of the Companies Act warranting her disqualification from acting as Director.
24. There is also no application of the Registrar, on the grounds set out in the Companies Act for the Court to disqualify Sophia Khan from acting as a Director of the Plaintiff.
25. In the circumstances it is submitted that there is no jurisdiction available for an Order restraining Sophia Khan from carrying out her statutory duties as Director of the Plaintiff and issuing instructions to solicitors to represent the Plaintiff.

THAT the Honourable Court grant leave to VIJAI WATI as the Administrator of the Estate of Gopal also known as Gopal Pillay to intervene in these proceedings for the purpose of discontinuing these proceedings.

26. Applications for an intervenor to a proceeding in the High Court must proceed according to Order 15 Rule 6 (2) (b) (i) and (ii) of the High Court Rules 1988, which provides: -
 - “2. Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –
 - (b) order any of the following persons to be added as a party, namely –
 - (i) any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
 - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to

determine as between him and that party as well as between the parties to the cause or matter.”

27. The right to intervene arises when a question in issue in a litigation cannot be settled without the inclusion of the intervener (Amson vs Raphael Tuck & Sons Ltd [1956] 1 QB 357.)
28. There is no evidence from Vijai Wati, as the executor of the Estate of Gopal Pillay as to exactly what legal interest of hers is affected by the Plaintiff’s application for setting aside of the Statutory Demand issued by the Defendant.?
29. There is therefore no basis in law for Vijai Wati, as executor of the Estate of Gopal Pillay, to intervene in the proceedings.

THAT the Honourable Court appoint a Receiver or Manager of all the Company’s properties.

30. The jurisdiction of the Court to appoint a Receiver is only exercisable for the purpose of protecting or enforcing a legal or equitable right which needs to be identifiable as a cause of action (Channel Tunnel Group and France Manche SA vs Balfour Realty Construction [1993] AC 354 HL.)
31. The scenarios in which a Receiver is appointed are:
 - (a) To enable persons with property rights to secure those rights and preserve the property pending the realisation of those rights (Cummins vs Perkins [1869] 1 CH16, 19).
 - (b) Under section 177 (1) (h) of the Companies Act, on the application by a member of the Company to protect the property.
32. It is submitted that there is no basis in law for the appointment of. Receiver or Manager to the Plaintiff’s property because:
 - (a) There is no legal or equitable right to the Plaintiff’s property shown as belonging to the Defendant, requiring protection. Nor indeed is there an identifiable cause of action in that regard.

- (b) The defendant is not a member of the Plaintiff Company and does not meet any of the categories set out under section 178 of the Companies Act 2015. The Defendant has no locus standi to seek orders for receivership against the Plaintiff under section 177 of the Companies Act or any other provision of the Act in that regard.
- (c) There has been no jurisdiction of this Honourable Court invoked to warrant the determination of an application for an Order of Receivership of the Plaintiff. The Court's discretion can only be judicially exercised subject to parameters laid down by legislation and/or established precedent authoritative principles of common law and equity.

THAT the Plaintiff pays the Defendant the costs of these application on an indemnity basis.

33. The Plaintiff rejects the basis for an award of costs on an indemnity basis.
34. The Plaintiff's application seeks relief against a statutory demand under the Companies Act. There is no evidence in the affidavits filed by the Defendants that this is an abuse of process.
35. The Plaintiff submits that this application is an abuse of process. The Defendant has sought 5 orders in its Summons dated 11th July 2024 which are not supported by any evidence in the affidavits files by the Defendants and therefore cannot be proved.
36. The Plaintiff prays that the Defendant's Summons be dismissed with costs.
37. Those were the submissions for the Plaintiff.

The submissions of the Defendant

38. The Defendant relies on the affidavit of Hansel Pillai deposed on the 20th of August 2024.
39. The Defendant maintains that Jiaoji Savou and Sophia Khan are in possession of information that is being used to prejudice the Defendant and the second, that Savou may be a witness in the matter.

40. They rely on the authority of Prince Jeffrey Bolkiah vs KPMG (a firm) (supra).
41. The facts that they rely on is set out at paragraphs 91 to 99 of Hansel Pillay's affidavit.
42. It is not in dispute that previously on numerous occasions and in numerous matters Savou acted for the Defendant and took instructions in that regard from the late Gopal also known as Gopal Pillai and Khan. This fact has not been denied by Savou or the Plaintiff.
43. The facts and the confidential information that the Defendant says that the Defendant is set out at paragraphs 91 to 99 of Hansel Pillay's affidavit.
44. The confidential information and this action have a material and intimate connection and relevance.
45. Khan was a Director and Secretary of the Defendant at the time that confidential information was given to Savou.
46. Khan is a director and secretary of the Plaintiff.
47. The Plaintiff and Defendant were sister companies.
48. Now the Plaintiff and the Defendant have adverse interest.
49. The Defendant cites the following passage from the Bolkiah case: -

“In my view, no solicitor should, without the consent of his former client accept instructions unless viewed objectively, his doing so will not increase the risk that information, which is confidential to the former client, may come into the possession of a party with an adverse interest.”
50. The Defendant has never consented to Savou acting against it.
51. Savou has in his possession information confidential to the Defendant that is now being passed onto the Plaintiff to press for a claim for damages against the Defendant.

52. The Defendant also relies on RC Manubhai & Co Ltd vs Herbert Construction Company (Fiji) Ltd (supra), where Justice Gunaratne stated as follows: -

“Given the nature of the work Mr. Ram had been performing on behalf of the respondent company, a presumption may be reasonably drawn that, Mr. Ram would have been in possession of information pertaining to the affairs of the respondent, including its financial status.”

53. A similar presumption can be reasonably drawn here in regard to Savou, viz a viz in having acted for the Defendant previously.

54. Savou and Khan must be restrained from acting for and giving instructions to the Plaintiff in this matter.

55. There exists a purported Terms of Distribution, annexed in the affidavit of Hansel Pillay.

56. The purported document came about after negotiations with Khan and Savou present. As such Savou is a material witness in this matter and cannot act in the matter.

57. With respect to the remedies under the Companies Act, the Defendant contends that this Court has the power and jurisdiction to make these orders pursuant to sections 176, 177, 178, 180 and 183 of the Companies Act 2015.

58. The factual matrix and basis and foundation to make these orders are set out plainly and clearly at paragraphs 1 to 90 of Hansel Pillai affidavit.

59. The late Gopal had 7, 500 shares in the Plaintiff.

60. Khan held 2, 500.

61. Khan says Gopal transferred 2, 500 shares to her. She exhibits a purported share transfer document, but this is not good enough.

62. The Plaintiff is a limited liability company, and the transfer of its share is restricted. The directors must approve the transfer, and the transfer must be noted in the register of members. None of these documents/evidence is produced by Khan.

63. The Defendant submits that Sophia Khan has committed fraud and deception therefore the remedies under sections 177 of the Companies Act is available to the Defendants.
64. The application to intervene in these proceedings is made under section 180 of the Companies Act and not Order for joinder or to intervene under the High Court Rules 1988.
65. If the Court is not minded to grant these orders, the Companies Act allows this Court to wind up a Company pursuant to section 177 of the Companies Act.
66. The Defendant therefore prays for costs on an indemnity basis because of the nature of the fraudulent, oppressive and unfair conduct against the Estate of Gopal and/or the Defendant.
67. Those were the submissions for the Defendant.

Analysis

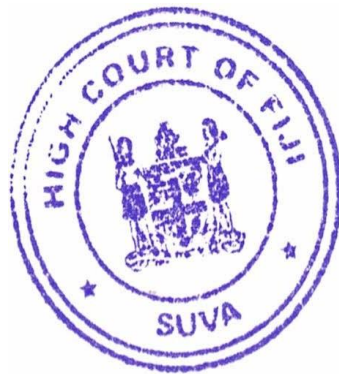
68. This is an application by the Plaintiff seeking mesne profits at the rate of \$80, 000 (eighty thousand dollars) per annum for the period of 5 years from 1st September 2018 to 18th September 2023, a total of \$400, 000 (four hundred thousand dollars) together with interest from the date of judgment until payment.
69. The Defendant has filed this application pursuant to the High Court Rules (although no specific rule has been identified) and pursuant to Parts 16, 21, 37, 38 and 39 of the Companies Act 2015.
70. The affidavits have set out serious allegations of fraud and misleading conduct levelled against Sophia Khan, Director of the Plaintiff and also against Mr. Jiaoji Savou, counsel on record for the Plaintiff.
71. The current law on the issue has been set out by the Court Of Appeal in RC Manubhai Co Ltd vs Herbert (supra) a case which adopted the decision of the House of Lords in Prince Jeffrey Bolkih vs KPMG (a firm) (supra).

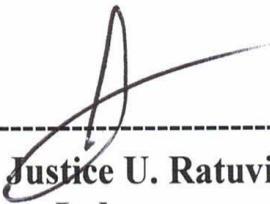
72. I have considered the submissions filed by counsel and I form the view that these allegations ought to be properly pleaded and the dispute determined by proper discovery and viva voce evidence with the other party being given the opportunity to challenge the evidence against them through cross examination. This is not the appropriate forum to ventilate these issues

73. I therefore find that the application by the Defendant must fail. Parties will bear their own costs.

This is the Ruling of the Court

1. The Summons filed on the 21st of August 2024 by the Defendant is dismissed in total.
2. Each party will bear their own costs.





Mr. Justice U. Ratuveli
Puisne Judge

cc: -Mr. Jioji Savou Esq.
-Gordon & Co.