

IN THE HIGH COURT OF FIJI 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

AND

VUNABAKA BAY FIJI LIMITED a limited liability company
incorporated in New Zealand and registered as a foreign company in
Fiji.

1ST DEFENDANT

AND

VUNABAKA BODY CORPORATE (FIJI) LIMITED a company limited
by guarantee and not having share capital.

2ND DEFENDANT

BEFORE

Master P. Prasad

Counsel for Plaintiff: Mr. K. Chang

Counsel for Defendants: Ms. N. Choo

RULING

1. The Plaintiff is a sublessee under Sublease No. 789123 (**Property**). The 1st Defendant is the trustee for the Vunabaka Bay Joint Venture and also the owner/developer of Vunabaka Development on Malolo Island. The 2nd Defendant is the relevant body corporate for the said Vunabaka Development.
2. The Plaintiff through his Statement of Claim (**SOC**) alleges the following:
 - a. By agreement between the Plaintiff and the 1st Defendant, the 1st Defendant agreed to provide temporary power supply, solar power, data connection, water connection, pedestals, gas connection to the Plaintiff.
 - b. The said agreement was made partly orally, partly inferred from documents and partly by conduct.
 - c. On 25 January 2019, the 1st Defendant supplied temporary power, gas and water to the Property.
 - d. In reliance on the 1st Defendant's representation that the Plaintiff would be provided with the temporary power supply, water connection and gas connection, the Plaintiff paid \$41, 667.00 to the 1st Defendant.

- e. On 04 March 2020, due to a dispute between the Plaintiff and the 2nd Defendant, the 2nd Defendant cut off the temporary power supply, water connection and gas connection to the Property.
- f. As a result of the 2nd Defendant's actions, the Plaintiff was forced to demobilise the building contractors and could not resume construction of the house on the Property.
- g. On 13 December 2019, the Plaintiff and the 2nd Defendant entered into a contract for the Plaintiff to purchase a share of the power station and data connection (**Power agreement**).
- h. The Power agreement provided that the Plaintiff would pay the 2nd Defendant \$200,154.00 for purchase of permanent power supply, data connection and outstanding payment for gas connection.
- i. \$50,000.00 was supposed to be paid on 19 December 2019, which was paid on 24 December 2019. The Plaintiff paid the \$50,000.00 by way of direct deposit to be applied as follows: \$3,728.00 for balance of gas connection; and \$46,272.00 for part payment of Power agreement.
- j. As at 19 December 2019 no money was owing to the 2nd Defendant for water connection.
- k. Further \$150,154.00 was to be paid on 29 February 2020.
- l. On 20 February 2020, due to disagreements between the Plaintiff and the 2nd Defendant, the Plaintiff repudiated the Power agreement and sought refund of \$46,272.00.
- m. On 21 February 2020, the 2nd Defendant accepted the repudiation by seeking the Plaintiff's bank account details to refund the \$46,272.00.
- n. The Plaintiff provided the bank account details but the 2nd Defendant refused to refund the said sum.
- o. The 1st Defendant also refused to register the Plaintiff as part owner of the assets supplying water and gas.
- p. The Plaintiff thus claims as follows:
 - i. Against the 1st Defendant:
 - 1. Restoration of temporary power, water and gas connection to the Property.
 - 2. Damages for breach of contract.
 - 3. Registration by the 1st Defendant of the Plaintiff as part owner of the assets supplying water and gas.
 - ii. Against the 2nd Defendant:
 - 1. Refund of \$46,272.00.
 - 2. General damages.
 - 3. Special damages.
 - iii. Against both Defendants:
 - 1. Post judgment interest of 4% per annum from the date of judgment to the date of full payment pursuant to section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.
 - 2. Costs on an indemnity basis.
 - 3. Such further relief as the Court may deem just.

3. The Defendants state as follows in their joint Statement of Defence (**SOD**):

- a. The 1st Defendant initially agreed to provide the utility services to all lot owners in the Vunabaka Development.
- b. On 2nd May 2018, by way of a Deed, the ownership and management of the assets and utility services was assigned to the 2nd Defendant.
- c. The 2nd Defendant then became responsible for facilitating the utilities to all lot owners.
- d. The Plaintiff, on his own volition and without approval and knowledge of the Defendants, illegally connected power from the power grid to the Property.
- e. Water and gas services were connected to the Property and no power supply was facilitated. Any temporary power supply to the Property was connected illegally by the Plaintiff.
- f. As per the Power agreement the Plaintiff owed the 2nd Defendant outstanding payment for certain utilities totalling \$200,000.00.
- g. The Plaintiff failed to honour the Power agreement and on or around March 2020, the 2nd Defendant rightfully and legally suspended the utility service to the Property.
- h. At the time of suspension of the utility service, the Plaintiff had not paid for the power connection.
- i. The Defendants do not owe the Plaintiff any money as it was the 2nd Defendant's right to offset any monies held against any outstanding money due to the 2nd Defendant.

4. By way of counter-claim the Defendants also claim as follows:

- a. The Plaintiff has paid \$41,689.47 for water and gas connection.
- b. A credit note was issued to the Plaintiff in the sum of \$86,927.78 for pontoon and water pedestal.
- c. The balance owed by the Plaintiff on or around December 2019 was \$200,154.00.
- d. On 13 December 2019 the Plaintiff and 2nd Defendant entered into the Power agreement.
- e. The Plaintiff breached the Power agreement and failed to pay a balance of \$150,154.00. Following this, the 2nd Defendant suspended the supply of the utility services to the Plaintiff.
- f. In addition to the debt of \$150,154.00, the Plaintiff owes the 2nd Defendant a sum of \$43,379.28 for body corporate fees for the period of 2019 to 2020.
- g. The Plaintiff also hired machinery from the 1st Defendant where he raised a local purchase order for the sum of \$6,744.00.
- h. The total debt owed by the Plaintiff to the Defendants is \$200,277.00.

- i. The Defendants claim an offset against any monies already paid by the Plaintiff.
 - j. The Defendants thus claim the following reliefs:
 - i. Judgment against the Plaintiff in the sum of \$200,277.66.
 - ii. Interest at 4% per annum pursuant to section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act until date of judgment.
 - iii. Post judgment interest at 4% per annum.
 - iv. Costs on an indemnity basis.
 - v. Such further orders as the Court may deem just.
5. Plaintiff filed a Summons pursuant to Order 24 Rule 7 of the High Court Rules (**Summons**) seeking discovery for a list of documents.

6. Order 24 Rule 7 states as follows:

7 (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described in the application or any class of document so specified or described is, or has at any time been, in his or her possession, custody or power, and if not than in his [or her] possession, custody or power when he or she parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he or she may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom the discovery is sought under this rule has or at some time had, in his or her possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

7. This Order confers a wide jurisdiction for orders for discovery and inspection of documents. In **Singh v ITLTB** [2025] FJHC 460, Banuve J, adopting and applying the principles articulated by Master J. Udit in **Singh v Minjesk Investment Corporation Ltd & Anor**, Civil Action No. 148 of 2006 (5 May 2008), set out the applicable principles in the following terms:

3. The onus lies with the Plaintiff, as Applicant to establish by or through affidavit evidence:

- (i) Particular document(s) or class of documents he seeks to be discovered by an opposing party;
- (ii) A prima facie case that a specific document or class of documents exist or have existed;
- (iii) Establish that the documents are relevant, relate to a matter in question (either directly or indirectly enable an applicant to advance his case or damage the adversary's case), Alternately, it is sufficient if information in a document fairly leads to a train of enquiry which may have either of these consequences.

4. Relevance is to be tested against issues and/or questions raised by pleadings. What is not pleaded cannot ordinarily be presumed to be related to the matter in issue, because it is assumed that only matters in dispute are contained in pleadings, and that relevant matters would not have been excluded from the pleadings. Thus unless a matter was put in issue in the pleadings, or later admitted, it cannot subsequently be regarded as a matter in issue.

[emphasis added]

8. At paragraph [5] in **Singh** (supra), Banuve J relied on **Berkely Administration v McClelland** (1990) F.S.R 381, and stated as follows:

5. In **Berkely Administration v McClelland** (1990) F.S.R 381, the Court stated the principle governing specific discovery as follows;

(i) There is no jurisdiction to make an order under RSC O.24,r.7, for the production of documents unless; (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the documents relates to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.

(ii) When it is established that those three prerequisites for jurisdiction exists, the Court has jurisdiction whether or not to order disclosure.

(iii) The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself/herself in serious trouble for swearing to a false affidavit even though doing his/her best to provide an honest disclosure.

9. The Plaintiff in his Affidavit in Support of the Summons has identified the documents that he seeks to be discovered. The Defendants, through an Affidavit in Opposition deposed by one Mohini Lata Deo, Company Director of the 2nd Defendant, have disclosed 8 documents and denied existence of 6. The Defendants have refused to disclose the remaining 9 documents. For each of

the said 9 documents, the relevance and objection as stated by the Plaintiff and the Defendants respectively is as follows:

- i. *Copies of Tax Return for each joint venture parties in New Zealand, Fiji and USA with specific reference to treatment of assets write off in 1st Defendant in 2017.*

Relevance – it will show how the joint venture treated assets and flow through the values in their accounting should match up with the Defendants value.

Defendants' objection – the joint venture partners are not parties in this proceeding. The individual joint venture partners only declare their portion of profit/loss from their accounts in New Zealand. The assets have been written off in the 1st Defendant (Fiji branch). These matters are not pleaded in the SOC.

- ii. *Copy of tax advice on value of electricity assets prior to 2018 by auditors.*

Relevance – this relates to whether the assets were transferred with an auditor ratifying the same and concluding that the transfer was both correct from an accounting and taxation perspective.

Defendants' objection – no such matter is pleaded in the SOC and the same is not relevant.

- iii. *Copies of the connection agreements to switch on temporary power for each site built between Toll Construction and the 2nd Defendant.*

Relevance – to show that the Plaintiff's connection to the temporary electricity was not illegal.

Defendants' objection – Toll Construction is not a party to these proceedings and Plaintiff is not privy to any information relating and or correspondence relating to between Toll Construction and the Defendants.

- iv. *Copies of the Sale and Purchase Agreements between the 1st Defendant and each lot owner.*
- v. *Schedule of power station ownership of each body corporate member.*
- vi. *Schedule of ownership of gas, water and other assets of the Defendants.*

Relevance – to show whether the lot owners purchased their share of the various assets and who they purchased from. In particular clause 10.10 in each Sale & Purchase agreement. Also

to show that the Defendants are the legitimate owners of the assets under their agreements.

Defendants' objection – these are confidential documents and not relevant as the other lot owners are not parties in this proceeding. The utility assets are owned by 2nd Defendant and are well encompassed in the Sale & Purchase agreements and the Articles of Association.

- vii. *Notices sent out in violation of build timeline and proof of repurchase of lots from defaulting parties.*

Relevance – to show that despite being one of the few parties who have built on timeline, the Defendants are harassing the Plaintiff only and not issued notices to other lot owners.

Defendants' objection – not relevant as other lot owners are not parties to the proceeding and the same is not pleaded in the SOC.

- viii. *Proof of payment for all of the directors of the 2nd Defendant for service connection to water, gas and power on all lots owned by each director directly or indirectly.*

Relevance – to show that the directors treat the Plaintiff differently although body corporate rules are for everybody.

Defendants' objection – the Plaintiff is not privy to this information as the directors are also lot owners and they are not made parties in this proceeding in their individual capacity.

- ix. *Final notice of the 2nd Defendant's AGM from 2017 to 2020.*

Relevance – this is sought on ownership of utilities as the Plaintiff has made considerable payments to the Defendants for this.

Defendants' objection – the Plaintiff is a member of the 2nd Defendant and has copies of these.

10. The Plaintiff's counsel submitted that some of the documents sought were to possibly amend the SOC to include (but not limited to) "unconscionable conduct" and to assist in the assessment of damages if the Plaintiff was successful in his claim. The counsel further submitted that the confidential documents could be disclosed pursuant to a *Harman undertaking (Harman v Home Office* [1983] 1 AC 280) and all commercial and confidential information could be redacted.

11. The Defendants' counsel submitted the following in opposition:

- a. The Plaintiff is going on a fishing expedition and seeking documents which do not relate to and are not relevant to the Plaintiff's claim.
- b. Tax Returns of the joint venture are not discoverable as no such information has been pleaded in the SOC and the joint ventures in New Zealand and USA are not a party to the proceedings.
- c. Plaintiff is not privy to: (i) the respective Sale & Purchase agreements with the other owners for the other lots; (ii) correspondence between Toll Construction and the Defendants; and (iii) any other information of any other lot owners or directors, as they are not party to the proceedings.
- d. The utility assets (power, water, gas and data infrastructure) are owned by the 2nd Defendant and each member pays utility fee to access the same.
- e. The Plaintiff, if he so wishes, is at liberty to subpoena any lot owner to give evidence at trial.

12. The Plaintiff has clearly provided the list of documents he seeks discovery of from the Defendants and there is no question as to the existence of the same. The only question before this Court now is whether the requested documents are relevant and/or whether the Plaintiff is embarking on a "fishing expedition" to discover a new cause of action.

13. Nanayakkara J in *Lowres v Deo Construction Ltd* [2016] FJHC 229; HBC183.2014 (8 April 2016) stated the following in relation to "fishing expeditions":

I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards obtaining a proper examination and determination of the matter in issue – not towards assisting a party upon a "fishing expedition". Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of inquiry which would, either advance a party's own case or damage that of his adversary.

What is meant by the phrase "fishing expedition"?

In this regard I adopt as appropriate the statement of Chilwell J. when his Lordship said in AMP Society v Architectural Windows Ltd. [1986]2 N.Z.L.R. 190 at p.126:

"In my view, the description of 'fishing' in the authorities ... comes to this: an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discover

circumstances which may or may not support a baseless or speculative cause of action..”

14. The Plaintiff's claim as per his SOC is:

- a. 1st Defendant breached an agreement for supply of temporary power supply, solar power, data connection, water connection, pedestals and gas connection. The Plaintiff is as such entitled to damages arising from the same as well as to be registered as part owner of the assets supplying water and gas.
- b. 2nd Defendant breached the Power agreement, and the Plaintiff is entitled to damages arising from the Plaintiff's repudiation of the same. The Plaintiff is also entitled to a refund of \$46,272.00.

15. The Plaintiff's claim is one of breach of contract for temporary and permanent power provision. The claim is against the named Defendants only. The joint venture parties, 2nd Defendants' directors, Toll Construction and other lot owners are not parties to this proceeding. Any dealing between the Defendants and these unnamed parties (including any violation notices sent to any other lot owner) is not relevant to the Plaintiff's claim. There is no pleading to this effect whatsoever in the Plaintiff's SOC.

16. Moreover, the Articles of Association which is attached to the Defendants' Affidavit in Opposition provides sufficient details of the utility services and ownership of the same. Hence the 'schedule of ownership' sought is also irrelevant to the Plaintiff's claim.

17. In terms of the AGM notices, as pointed out by the Defendants' counsel, the Plaintiff is a member of the 2nd Defendant body corporate and should already have in his possession the AGM notices, agenda and minutes.

18. The documents which may be relevant to the Plaintiff's claim have already been disclosed by the Defendants. These documents are:

- a. Copies of the Defendants Tax Returns from 2017 – 2020.
- b. Audited financial statements as at 30 June 2020.
- c. Copies of year-to-date financials till September 2020.
- d. Annual budgets for 2021.
- e. 2nd Defendant's 2020 report covering all relevant aspects of its operations.
- f. Auditor's memo explaining the utility assets ownership, 2nd Defendant's management and transaction with Liku Bay Resort Management.
- g. Deed of Variation including a letter from Defendants' legal counsel explaining the purpose of the deed.

h. 2nd Defendant's Articles of Association updated as per 29th November 2019 AGM.

19. Therefore, applying the principles in *Singh* [supra] I find that the 9 documents sought by the Plaintiff are irrelevant. Matters arising from the said 9 documents are not pleaded as issues in the Plaintiff's SOC, and what is not pleaded cannot be presumed to be related to the matter in issue. Documents that pertain to third parties who are not parties to this proceeding are also irrelevant.

20. Accordingly, I make the following Orders:

- a. The Plaintiff's Summons for Specific Discovery is dismissed; and
- b. The Plaintiff is to pay costs summarily assessed in the sum of \$1000.00 to the Defendants within a month from today.



P. Prasad
Master of the High Court

At Lautoka
20 March 2026