

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

HBC NO. 186 OF 2017

BETWEEN : **SHAREEN LATA HANS**

PLAINTIFF

A N D : **MAHENDRA DEO**

DEFENDANT

Before : A.M. Mohamed Mackie- J

Appearance : Mr. S. K. Ram with Mr. N. Padarath for the Plaintiff
Mr. A. K. Narayan for the Defendant

Date of Hearing : 26th September 2018

Written Sub. : By the Plaintiff on 26th September 2018

: By the Defendant in Response on 29th October 2018

: By the Plaintiff in Reply on 12th November 2018

Date of Judgment : 16th November 2018

R U L I N G

A. INTRODUCTION

1. This Ruling pertains to the Inter-Parte Summons (the Application) filed by the Plaintiff on 1st May 2018, supported by her affidavit sworn on 30th April 2018, for discharge of the Additional Orders dated 28th February 2018 made by this Court when granting leave for Committal proceedings against the Plaintiff.
2. The Committal Proceedings, commenced against the plaintiff pursuant to the leave granted, now stands terminated with the plaintiff being acquitted by my judgment dated 24th August 2018, which can be accessed through "PaCLii" in *Hans v Deo [2018] FJHC 791; HBC186.2017 (24 August 2018)*.
3. The remaining task before this Court is to decide whether the additional Orders of

this Court, that were made as aforesaid, should remain in force till the learned Master makes the appropriate orders after hearing the summons before him or be vacated by this court as prayed for by the plaintiff in her Inter – Parte Summons dated 1st May 2018 filed before me. These options were left open for the parties by this court, when it made the additional orders.

B. BACKGROUND

4. Though, the background to these proceedings has been expounded in detail in my judgment dated 24th August 2018, for the purpose of lucidity and easy comprehension of the actual dispute, I shall, at the cost of repetition, give a brief description as follows.
5. The plaintiff and the defendant, who have now terminated their matrimonial relationship, however, remain as the shareholders of an entity called 'Pacific West Builders Limited' (the Company) though, the degree of shareholding between them is in dispute, which, among other things, has led the parties to number of lawsuits before this Court.
6. The plaintiff on 31st August 2017 commenced proceeding before the learned Master (Master) of this Court against the defendant by her Originating Summons cum Ex-parte Summons and moved for the following reliefs in her Ex-parte summons;
 - a. *THAT the Plaintiff shall be permitted to execute all payment vouches notes and memorandums authorizing just payments for and on behalf of Pacific West Builders. (Emphasis mine)*
 - b. *THAT the Plaintiff be permitted to make and execute cheques and make payments as required for the operation of Pacific West Builders Limited (Emphasis mine)*
 - c. *THAT the Plaintiff shall be at liberty to provide and instruct Australia New Zealand Banking Corporation of Fiji, other commercial Banks, the suppliers, contractors and all statutory entities in all matters in relation to Pacific West Builders Limited.*
 - d. *THAT the Defendant be restrained from acting in any manner adverse to the interest of Pacific West Builders Limited.*
7. The Master on 31st August 2017, having heard the ex-parte summons, instantly granted the above orders as prayed for in paragraphs (a), (b) & (c) of the prayers thereto, which are, apparently, permissive orders in nature. However, the order sought in paragraph (d) thereof, which is an injunctive order against the defendant, was not granted.
8. After few mention dates, when the matter came up before the Master on 18th January 2018, upon hearing the learned counsel for both the parties, on an

Inter-parte application made by the defendant, the Master made the following orders enabling the defendant to have access to the banking information of the company and fixed the matter for hearing of the plaintiff's summons on 19th March 2018. The orders made in favor of the defendant were;

- a. *THAT the Defendant (Mr. Mahendra Deo) should have liberty to have access to all the information relating to the banking of the company.*
 - b. *THAT the Plaintiff (Ms. Shareen Lata Hans) and the respective bankers to facilitate the Defendant (Mr. Mahendra Deo).*
 - c. *THAT the matter is adjourned to 19th March 2018 for hearing together with the other connected matter Civil Winding up HBE 11 of 2017.*
9. Being able to ascertain the banking activities of the Company, carried out by plaintiff by using the permissive orders (a), (b) & (c) granted by the Master on 31st August 2017 as per the plaintiff's ex-parte summons, the defendant, having discovered about various alleged breaches of the said orders, by his ex-parte Application dated 27th February 2018, apart from moving for leave to file committal proceedings against the plaintiff, moved for the variation of the ex-parte orders made by the Master on 31st August 2017, and for certain other orders in order to avoid further breaches of the those orders (a),(b) & (c), which are reproduced in paragraph 6 above.
10. The defendant claimed that the followings are violations of the orders made by the Master, which caused loss, inconvenience and disturbance to him. He alleged that the plaintiff having obtained and/or being aware of the Court orders dated and entered on 31st August, 2017, has defied and breached the said Court orders on days thereafter by carrying out the following acts:
- a. Breaking the term deposits of Pacific West Builders Limited ("the company") at the ANZ Bank, which was in the sums of FJ\$900,000.00 and FJ\$600,000.00 and accruing interest income.
 - b. Making various payments for the company's credit cards which have been used for personal expenses and which has been occurring since the date of the orders and ongoing.
 - c. Making payments to both Milan Deo and Sabrina Deo (being biological children of the parties) in the sum of FJ\$9,000.00 each on 22nd January, 2018.
 - d. Making a further payment to the said children Milan Deo and Sabrina Deo a sum of FJ\$8,000.00 each on 26th October, 2017.
 - e. Increasing director's fees/salary to \$3,815.38 per week without consultation and applying such increment to only the Plaintiff herself and otherwise stopping completely and later paying significantly reduced director's fees/salaries to the defendant.

- f. Paying a sum of FJ\$5,000.00 to the housemaid (one 'Sangeeta Devi') when such payment was unwarranted, exorbitant and otherwise excessive given the said housemaid is on a fixed weekly wage.
 - g. Purchasing a vehicle from abroad on 15th January, 2018 (a 2017 Holden HSV Maloo R8) for which payment was made in the sum of FJ\$146,952.30 (on 18th January, 2018).
 - h. Purchasing a vehicle (a 2017 Toyota Prado) registered number JJ 185 on 22nd January, 2018 at a value of roughly FJ\$170,000.00.
11. Apart from the above alleged violations, the defendant also complained about the cancellation of fuel and service cards used by him, refusal of access to the company's email address, specially, about cancelling his access to the internet banking at ANZ etc.

Orders Granted by this Court on 28th February 2018 in favor of the Defendant.

12. This court, having considered the Application made by the defendant's learned counsel, apart from granting leave for committal proceedings, acting under inherent jurisdiction and in the interest of justice, inter-alia, made the following orders, some of which had the effect of varying the Master's orders made on 31st August 2017, in order to avoid further violation/s and to preserve the status-quo, however, subject to the final order to be made by the Master, after the hearing the pending summons before him or till it is varied, amended or vacated by this Court on application being made to that effect by the parties. The orders that varied the Master's orders and the additional orders made by me are as follows;
- a. *"That the Respondent/Plaintiff be restrained from being a sole signatory to the company's bank/credit/cheques accounts and that the relevant financial institution, being Australia and New Zealand Banking Group Limited, be ordered to reinstate the Applicant/Defendant as a co-signatory to the said accounts".*
 - b. *"That the relevant financial institution, Australia and New Zealand Banking Group Limited, is directed to suspend the operation of the credit cards in the name of the company and not to issue any new credit cards in the name of the company (Pacific West Builders Ltd)".*
 - c. *"That the Respondent/Plaintiff is ordered to allow the Defendant/Applicant to have unrestricted access to the company premises to attend to signing of cheques and making any company related payments".*
 - d. *"That the Respondent/Plaintiff be restrained from making any payments for and on behalf of the company or any other payment through the internet banking facility. If any payment by internet is warranted it shall be with the consent and concurrence of the Defendant/Applicant."*

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 - e. *"That the Respondent/Plaintiff be restrained from instructing, authorizing and/or using any company equipment (including vehicles and supplies) for any other purpose than for official company projects."*
 - f. *"That the Respondent/Plaintiff is ordered to allow the Defendant/Applicant access to email address being pwohl@connect.com.fj"*
 - g. *"That the Plaintiff/Respondent shall grant uninterrupted access for the Defendant to the company premises for the purpose of complying with the order (b) above."*
 - h. *"That the Respondent/Plaintiff be restrained from committing any further breaches of the orders granted by the Court on 31st August, 2017 and these orders and to desist from any further activities which will interfere with the Applicant/Defendant's rights as a director, shareholder and employee of the company".*
 - i. *The Defendant/Applicant shall not misuse any of the orders hereby granted."*
13. It is against the above orders, the plaintiff filed her interlocutory summons along with her affidavit dated 09th March 2018 in reply to the defendant's affidavit and in support of her application to discharge the orders made by me, for which the defendant filed his affidavit in response dated 03rd April 2018.
14. In addition to the above, the Plaintiff also filed an inter- parte Summons on 1st May 2018, supported by her affidavit dated 30 April 2018 with exhibit 1 to 25 moving for the vacation or stay of the orders made by me on 28th February 2018. The defendant filed his affidavit in response dated 16th May 2018, with the annexures MD-1 to MD-4, for which the plaintiff filed her reply affidavit dated 19th May 2018, with annexures SLH-1 to SLH-03.

C. HEARING

15. In addition to the submissions made orally and in writing, during the committal hearings, touching the issue in hand, the learned counsel for both the parties at the due hearing held before me on 26th September 2018, have made lengthy oral submissions and filed extensive written submissions as well dealing with the subject under discussion.

Submissions by the plaintiff's counsel :

16. The learned counsel for the plaintiff Mr. S. k. Ram, argued that the plaintiff has good reasons to have the orders made by this court lifted and took up the position

that once the committal charge is negated, the orders made by this court too should extinct.

17. Counsel also argued to the effect that there is no actual breach of any particular orders of the Master, which specifically restrained the plaintiff from taking action that she had taken, there is no actual breach and the incidences of the alleged breaches ought to form part of the order.
18. Learned plaintiff's counsel contented that when granting leave for committal proceedings and / or at the disposal of such proceedings by acquittal, this court cannot make any other orders of this nature. Counsel also argued that there is no direct order which prohibits the Plaintiff from taking such action and the defendant, who is disgruntled by the order of the Master, being unsuccessful in his attempt to have it set aside on the ex-parte basis, brought the contempt charge and obtained the above additional orders.
19. Commenting on the inherent jurisdiction exercised in granting the additional orders by this court, the learned counsel argued that such jurisdiction is exercised only if there are no provisions allowing for such orders to be made and the orders made by this court are injunction orders, for which provisions are available under order 29 of the High Court Rules 1988.
20. The main stance taken by the learned counsel for the plaintiff both in his oral and written submission were that the orders made by the Master on 31st August 2017 and the additional Orders of this court made on 28th February 2018 are injunctive orders and this court could not have acted under inherent jurisdiction. Vide paragraphs 6 and 7 of the written submission dated 26th September 2018.
21. But, I find that the plaintiff's former counsel at the hearing on 27th April 2018, has admitted that the orders of the Master were 'enabling orders' and not 'restrictive orders'.

Submissions by Defendant's Counsel

22. Learned counsel for the defendant has made submissions justifying the additional orders obtained by the defendant and taken up a stern position that the plaintiff has blatantly violated the orders made by the Master, by acting in the manner alleged in the statement of the defendant.
23. The learned counsel has drawn my attention to the decisions in **Abbas Ali v Chaudhry & others Civil Action No. HBC 0061 of 2001** and *Rewa Co-operative*

Diary Company Limited v Eagle Ridge Investment Fiji Limited HBC 188 of 2004, where courts have made additional orders when dealing with the Applications for committal.

24. Commenting on the alleged individual breaches, learned counsel states that those breaches have already been admitted by the plaintiff in her affidavit and she does not deny or otherwise fails to respond to the various allegations made against her.
25. Learned counsel for the defendant argued further, that if a payment is not “**just**”, **in the interest of the company**” and “**for the operation**” of the company, then it would follow that any such payment is in breach of the orders made by the Master.

D. Analysis and Findings :

26. At the outset, I beg to disagree with the learned counsel for the plaintiff when the counsel calls the Master’s Orders dated 31st August 2017 as injunctive orders, when those ex-parte orders are few clear permissive orders, by which the plaintiff was permitted to execute all payment vouches notes and sign memorandums authorizing just payments, to execute and sign cheques to make payments as required for the operation of Pacific West Builders Limited and to give instructions to the bank and other institutions . (Emphasis mine).
27. The relief prayed by the plaintiff in her ex-parte summons as per paragraph (d) was the only relief she claimed as injunctive order and same was not granted by the Master. Instead the Master made a further order for the plaintiff to file fortnightly affidavits averring the payments she make, presumably, to ensure the transparency of the financial dealings carried out by the plaintiff.
28. The plaintiff too in her affidavit had given an undertaking that no Monies will be paid out where such payment is not required for the benefit and advancement of the company.
29. But, what ultimately happened, according to the defendant’s averments in his affidavit and contents of the documents annexed thereto, appear to be totally contrary to the permissive orders given by the Master.
30. On careful scrutiny of the orders (a), (b) and (c) granted by the Master on 31st August 2017, it appears that these orders have provided the plaintiff unrestricted liberty, not only to authorize and pay just payments really needed for the operation of the company, but also to do anything or to spend on whatever she

wanted, purporting to be just **payments needed for the operation of the company**. This is what made the plaintiff to get acquitted in the committal proceedings.

31. When the above orders given by the Master were cross checked with the alleged payments and activities carried out by the plaintiff as stated in paragraph 10 (a) to (h) above, it appeared to this court that the plaintiff was calculatedly and surreptitiously acting against the interest of the defendant and she was all out to sideline and disentitle the defendant of his rights and shareholding interest, who was, admittedly, an equal shareholder at the time the Master made those orders.
32. It was at this juncture, having ascertained those activities of the plaintiff with the help of the subsequent orders made by the Master in defendant's favour, the defendant rushed to this court with his dual purpose application for committal and for additional orders.
33. Accordingly, this court, being prima- facie satisfied on the grounds adduced, granted leave for committal proceedings. However, after the hearing the plaintiff through her counsel, she was acquitted on being found that she had not violated any specific orders or had not acted against the authority of this court. This was eventuated mainly due to the vagueness embodied in the ex-parte orders made by the Master on 31st August 2017, which I have explained in the judgment on committal proceedings.
34. But, the above acquittal does not necessarily mean that the plaintiff had not acted against the interest of the defendant in this case, particularly, in view of the activities carried out by her under the cover of Master's orders. I must emphasize that this court is presently not in the exercise of scrutinizing the propriety of the activities and expenses done by the plaintiff under the cover of the Master's orders. It is a duty before the Master at the hearing of the substantial application.
35. Learned counsel for the plaintiff was heard to make submissions, that the defendant should have gone before the Master, if he wanted to have the orders revised, amended or vacated. It is not disputed that the committal proceedings do not go before the Master. The alleged activities performed by the plaintiff, prima- facie, had placed the defendant at a considerably vulnerable and disadvantaged position when he made the application before this court moving for leave for committal proceedings. At a precarious situation like this, it is understandable that making of two applications in two different forums would have, undoubtedly, taken time and placed the defendant at a further disadvantaged position.

36. In my view, the above predicament of the defendant compelled him to make the once and for all dual purpose application to this court and the situation duly warranted this court to exercise its inherent jurisdiction in the interest of justice and in order to maintain the status quo of the defendant in the company, when he was at the verge of being virtually pushed out by the plaintiff extinguishing his rights as a shareholder by making use of the ex-parte orders obtained from the Master as a panacea.
37. When the plaintiff initially came to court, the defendant was, admittedly, an equal share holder. The plaintiff, admittedly, transferred the shares held by the defendant unto her name acting on a power of Attorney claiming that those shares were held by the defendant in trust for her. This had been done in the mid part of February 2018, after obtaining the orders from the Master on 31st August 2017 and prior to my orders on 28th of February 2018. This, *prima-facie* shows what the plaintiff was up to, as far as the rights of the defendant are concerned, prior to the final determination of the dispute before the court.
38. The orders given by the Master permitted the plaintiff only to make JUST PAYMENTS REQUIRED FOR THE OPERATION OF THE COMPANY. The propriety of various payments made by the plaintiff, particularly on purchase of two vehicles(which the defendant claims to be luxury **not needed for the operation of the company** and payments for same are **not just** expenses), the breaking of two term deposits, which were of high value, shutting down the internet banking access, pruning the payments due to the defendant in the absence of any resolution to do so, transferring his shares unto her name and finally locking out the defendant from the company premises have to be deeply gone into before the Master and a just decision has to be arrived at. Until such time, it is the duty of the judge and/ or the Master to maintain an even ground for both the parties to proceed with their respective claims. In other words, the status quo of the parties that existed when the plaintiff came to court should remain intact until the final determination of the summons.
39. Though, the vagueness in Master's Orders set the plaintiff free of contempt charges, it cannot be allowed to work against the interest of the defendant, until a final decision is arrived at and this is a most appropriate instance the court can be called upon to exercise its inherent jurisdiction in the interest of justice.
40. The learned counsel for the plaintiff was of the view that the earlier arrangement the parties had to sign the cheques by either of them was the status quo that should have been maintained and same was changed by the order of this court by making the parties to co-sign the cheques. I would once again beg to disagree with

the learned counsel on this point. The reason being, such arrangement, to sign the cheques by either of them, would have worked very well when the relationship between them was cordial and things were moving smoothly and not when the marital relationship is no more and parties were at daggers drawn.

41. The status quo, in my view, was not the earlier arrangement to sign cheques by either of them. The real status quo of the parties was their existed degree of shareholding, their rights and duties enjoyed and performed as shareholders and Directors of the company and not the new situation created by the plaintiff making use of the Master's Orders, which at the end of the day placed the defendant at a weak and precarious position. Above all, the entire affairs of the company should not have been left in a single hand in the absence of any consensus or resolutions.
42. The earlier arrangement for either of them to sign the cheque remains intact, though the Master had permitted the plaintiff to sign the cheques. The authority of the defendant to sign was not pruned by the Master's orders nor was any injunction issued against him. Had the defendant alone signed cheques as per the earlier arrangement, having withdrawn the instruction given by his letter to the Bank, there could not have been any bar by the Master's orders for the bank to honor those cheques. In the light of the above vagueness and in the best interest of the company, this court took the view that it was desirable for the Master's order to be varied for both the plaintiff and the defendant to co-sign the cheques.
43. In the light of the above, it is my firm view, that the Master's orders should have been revisited with the shortest possible delay, in order to avoid any further damages or prejudices to the defendant and the intervention of this court by making additional orders at the time of granting leave for committal, avoiding the delay, multiplicity of applications before different forums and cost, cannot be found fault with, particularly, when this additional orders were not to cause any prejudice to the plaintiff.
44. By virtue of the additional and variation order made by this court, the defendant is back at work, the cheques are signed jointly, the affairs of the company are, apparently, conducted smoothly and there has not been any serious complaint by the plaintiff about the day to day affairs of the company. The variation orders made by this court has, seemingly, created a conducive atmosphere for the smooth operation of the company until a final decision is made as far as the right of the parties are concerned.
45. The variation orders of this court do not strictly restrain the plaintiff in any aspect. The only substantial change effected by my orders was the jointly signing of the

cheques, which is beneficial for both the parties and to the interest of the company. Even if, the orders made by this court are treated as injunctive orders made under Order 29 of the HCR, as argued by the learned plaintiff's counsel, I find that these orders withstand the test formulated in the often cited case of **American Cyanamid v Ethicon (1975) 1 All E.R.504** which poses the following questions.

- a. Whether there a serious question to be tried?
- b. Would the damages be adequate remedy?
- c. In whose favor the balance of convenience lies?

a. **Whether there is a serious question to be tried?**

46. The first issue for determination is whether there is a serious question to be tried. This is the threshold question. In **Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016)**, Keith J, referring to the principles set out by Lord Diplock in Cyanamid (supra), stated:

The court first considers whether there is a serious issue to be tried. That does not mean that the court must be satisfied that there is a strong case for granting an injunction at the trial of the action. If an interlocutory injunction is to be granted, the court only has to be satisfied that the claim is neither frivolous nor vexatious.

In Cyanamid (supra) at 406, Lord Diplock stated:

"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction ; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court

must weigh one need against another and determine where "the balance of convenience lies".

47. In this case in hand, there is a serious dispute with regard to the degree of shareholding between the plaintiff and the defendant. When the plaintiff came to court on 31st August 2017, the shareholding between the parties was said to be in equal proportion.
48. It is after obtaining the Master's order on 31st August 2017, the plaintiff has, admittedly, transferred the 48 shares held by the defendant unto her name claiming that those shares were held by the defendant as a trust for her benefit. This is seriously disputed by the defendant. This, undoubtedly, is a substantial and serious issue that begs determination by the court at the substantial hearing of the originating summons.
49. The process of the alleged transfer, the propriety of the documents involved, particularly the validity of the power of Attorney are also in issue.
50. The permissive orders given by the Master on 31st August were for certain limited activities, particularly giving a temporary permission to the plaintiff to authorize JUST payment and sign cheque/s that is REQUIRED FOR THE OPERATION OF THE COMPANY. All the alleged expenses and activities carried out by the plaintiff as stated in paragraph 10 above will have to be cross checked with the permission given by the Master by his order dated 31st August 2017 in order to decide whether the plaintiff has acted in the way expected of her.
51. Some of the expenses incurred and payments made by the plaintiff, particularly, purchasing luxury and sport vehicles, as alleged by the defendant need serious consideration whether they were JUST PAYMENTS and REQUIRED FOR THE OPERATION OF THE COMPANY. Breaking of two terms deposits which were of substantial value is another major activity carried out by the plaintiff and all these seems to have been performed unilaterally by the plaintiff in the absence of any resolutions and by keeping the defendant in dark. The Plaintiff is making a serious allegation on the above activities of the plaintiff.
52. In view of the above, I am satisfied that there are several serious question to be tried at the substantial hearing and if the orders made by me acting under the inherent jurisdiction of this court are not in place, serious prejudice and an irreparable loss will occur to the defendant. Hence, the orders made by this court on 28th February 2018 should remain intact.

53. The above revelations warn the court that it is unsafe to completely rely on the contents of the conflicting affidavits filed, particularly, in a matter of this nature, when the defendant is in the verge of being completely shout out from the business activities of the company, of which he is said to be a director and the chief engineer.
54. I do not think the defendant's claim is frivolous or vexatious. Rather, I am convinced of the existence of serious issues to be tried.

Adequacy of Damages & Balance of Convenience

55. In Cyanamid (supra) at 408, Lord Diplock explained the principles relevant to a decision on where the balance of convenience lay, as follows:

...the governing principle is that the court should first consider whether, 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 the trial. If damages in the measure recoverable at common law would be 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.

In Fiji, the Court of Appeal has dealt with the principles pertinent to the balance of convenience and it is, I think, apt to refer to some of these decisions.

In *Professional West Realty (Fiji) Ltd v Professionals Ltd, Civil Appeal No. ABU 0072 of 2008 (21 October 2010) at [37]*, the Court (per Byrne AP and Calanchini JA) stated:

"Having determined, correctly in our opinion, that the material did raise a serious question to be tried, the learned judge was required to consider the balance of convenience. In some decisions the balance of convenience test is considered under two separate heads and in others the approach is that there are a number of factors that need to be considered in determining the balance of convenience. However, regardless of the approach adopted, the learned judge was required to consider whether an award of damages would be an adequate remedy for the Respondent if successful on the question of liability at the trial of the action".

In Honeymoon Island (Fiji) Ltd v Follies International Ltd, Civil Appeal No. ABU0063 of 2007S (4 July 2008) at [13], the Court of Appeal (per Pathik, Powell, and Bruce JJA) stated:

As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "If 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": American Cyanamid...

In Chung Exports Ltd v Food Processors (Fiji) Ltd., Civil Appeal No. ABU0012 of 2003 (26 August 2003) at [13], the Court (per Eichelbaum, Tompkins, and Penlington JJA) stated:

The court will consider whether there is a serious question to be tried, and if so, where lies the balance of convenience. The latter will require consideration of such factors as the relative strength of the plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages, and any other relevant factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end, the court is required to determine where the overall justice lies.

In Professional West Realty (supra) at 43, the Court had this to say :

"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".

56. The defendant's position is that he will suffer irreparable damage for which it is more than likely to be unable to recover any damages if the plaintiff is not restrained. The plaintiff with the permissive order of the Master in hand has so far carried out number of activities that, seemingly, have caused serious prejudice and loss to the defendant. The defendant was at the verge of losing all his rights and entitlement and at the brink of being shut out from his own company, if not for the

orders made by this court. The plaintiff also went to the extent of curtailing his due payments and other benefits enjoyed by him as a director of the company.

57. Nowhere in her affidavit in opposition the plaintiff speaks about any losses or damages occurred or possibility of it to her on account of the orders made by this court. These orders were obtained by the defendant on the 28th February 2018. This court clearly reserved the right for the plaintiff to have it vacated or varied either before this court or before the Master. The plaintiff was not serious about having them lifted or varied at the earliest possible opportunity. When the matter came up before the Master for hearing on 19th March 2018, she could very well have moved the Master's Court to have it lifted or altered. She did not even make a complaint to the Master about any prejudices or difficulties caused to her. But, her then learned counsel simply got the hearing adjourned for a further date.
58. I am satisfied that the balance of convenience lies with the defendant. If the orders are vacated as per the application of the plaintiff, the defendant will be placed at serious disadvantaged position and irreparable loss and prejudice will result. The damage that could befall on the defendant, on account of vacating the existing orders made by this court, are not quantifiable, when compared to the damages that could occur to the Plaintiff in the event the existing orders are not lifted.
59. I bear in mind that it is the defendant who in this case has the burden of satisfying the Court that the orders made by this court should continue. I am also mindful that when making the variation orders, no order has been made making provisions for any possible damages and the learned Counsel for the plaintiff at the hearing before me, though initially took up this issue, subsequently has relinquished his claim for such undertaking for any possible damages. I don't foresee any possible damages that could befall on the plaintiff as a result of co-signing the cheques of the company by the defendant. I consider that the balance of convenience favors the continuation of the orders granted by this Court.
60. Though, the defendant opted to make the application for additional orders along with the application for leave for committal proceedings, this court exercised its jurisdiction independently and the outcome of the committal proceedings need not, necessarily, have influenced the orders made by this court. The committal is an affair between the court and the person charge with the offence of contempt. On the other hand, any other orders made by the court touching the subject matter of the action is a matter between the contending parties in the action. Therefore, the argument of the plaintiff's learned counsel, that the orders made by this court should stand vacated when the plaintiff is acquitted of contempt charge, does not hold water.

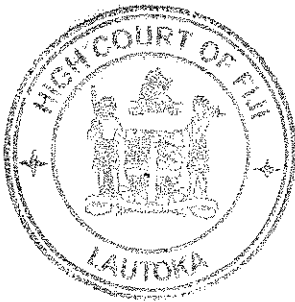
61. Conviction in a contempt proceeding is not a must for the making of any other orders at the commencement, during or at the termination of the contempt proceedings. Irrespective of the outcome of it, if the facts and circumstances of the case demand the making of such orders in the interest of justice, the court can do so under inherent jurisdiction and need not have engaged in the voyage of discovery for a specific Order or Rule under HCR to make such orders.
62. The ex-parte orders made by Master are surrounded by ambiguity and liberal in nature. The plaintiff's counsel Mr. G.I. Sharma during the committal hearing conceded the above position and stated that the master's orders did not inhibit or restrict the plaintiff from doing any act.
63. The allegation about the conduct of the defendant in the company affairs as stated in the written submissions of the plaintiff's does not warrant consideration before me. Further, the question whether the purchases, payments and expenditures made by the plaintiffs are just and needed for the operation of the company has to be decided by the Master at the final hearing scheduled before him.
64. The permissive order made by the Master on 31st August 2017 should not be allowed to be misused or to distance the defendant and his interest from the company. The orders made by this court on 28th February 2018 should exist, and these orders, particularly, the variation order for co-signing of the cheque/s, will ensure a level ground for both the parties in the pending proceedings.
65. In view of the forgoing observations and reasons, I decide that the orders made by the Master on 31st August 2017 are permissive orders granting authority for the plaintiff to perform certain limited activities without prejudice to the defendant.

The orders made by this court on 28th February 2018 including the order to vary the Master's order are not strictly injunction orders. Those orders were made by this court under the inherent jurisdiction of this court, to avoid any prejudice or injustice to the defendant, pending the final disposal.

I conclude that the orders including variation orders made by this court should remain in force till the final orders are made by the Master after hearing the Originating summons, together with or without the connected matters.

FINAL ORDERS :

1. The summons filed by the plaintiff on 1st May 2018 for the setting aside of the variation order and the additional orders made by this court on 28th February 2018 is hereby dismissed.
2. The additional orders and the order made by this court varying the order of the Master on 28th February 2018 shall remain intact until the Master makes final orders on the originating summons of the plaintiff.
3. This Ruling shall not affect or influence any orders that the Master would make in this regard after hearing the originating summons.
4. The plaintiff shall pay unto the defendant \$2000, 00 being the summarily assessed costs.
5. The matter shall be referred to Master for the hearing.



A. M. Mohammed Mackie
Judge

At Lautoka
16th November, 2018