

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

CIVIL ACTION NO. HBC 51 OF 2018

**BETWEEN** : **MAKERETA SAUKILAGI** of Nawamagi Village, Sigatoka,  
Businessperson.

**PLAINTIFF/APPLICANT**

**AND** : **SEAN GRIFFITHS** of Beach House Backpackers Accommodation,  
Colova, Sigatoka.

**DEFENDANT/RESPONDENT**

**Appearances** : Mr K. Siwan for the plaintiff/applicant  
: Mr G. O'Driscoll for the defendant/respondent  
**Date of Hearing** : 17 May 2018  
**Date of Ruling** : 24 May 2018

## **R U L I N G**

### **Introduction**

[01] On 13 March 2018, the plaintiff/applicant ('the plaintiff') filed an *ex parte* application seeking certain injunction orders particularly an order requiring the defendant/respondent ('the defendant') to immediately release the custody and possession of Marine Vessel/Boat known as *Adi Lisa* official Number 003300, No. 115 in the 2016 and port of Registry Suva together with the Yamaha Outboard Engine ('the boat') to the plaintiff ('the application').

[02] Having heard the application *ex parte*, I found that there was no real urgency in the application. I then directed that the application had to be served on the defendant by affixing a copy of the application on the boat and on the defendant by way of serving a copy of the application on the defendant at his last known address. I set the *inter partes* hearing on 16 March 2018.

[03] When *inter partes* hearing came before me on 16 March when counsel Mudunaivalu appeared for the defendant on behalf of his principal, Messrs

O'Driscoll. He sought 21 days to file response to the application and at the same time informed the court that his principal had filed an action in Suva in respect of the same matter.

[04] In response to the defendant's application, Mr Sharma counsel appearing for the plaintiff submitted that the defendant is not ready for the hearing. They seek 21 days to respond and say there is another case instituted in Suva in respect of the same matter without providing particulars and nature of that action. He further argued that this application was coming as an urgent matter and that the court should make an order for the preservation of the subject matter of the case.

[05] I, having heard the argument and having considered the application and the supporting affidavit and annexed documents, made a limited interim order releasing the custody and possession of the boat to the plaintiff. At the same time, I granted 21 days to the defendant to file and serve a response to the application and 21 days to the plaintiff to file and serve a reply thereafter. The parties have complied with that direction. The hearing was fixed on 17 May 2018.

[06] At the hearing, both parties orally argued their respective points.

### **The Background**

[07] The background facts are briefly as follows: Makereta Saukilagi, the plaintiff ('Makereta') is the registered owner of the boat which is in dispute. Sean Griffiths, the defendant ('Sean') is a friend of Makereta. When Sean comes to Fiji alone he used to stay in Sigatoka. Makereta provided accommodation and transport for him from and to Nadi Airport. This happened quite some time. In June 2015, according to Makereta, to repay for the kindness and help she extended Sean brought the boat and gifted to her. The boat is registered in her name. Makereta says the boat was moored in the lagoon in front of her parents' house in Korolevu, Sigatoka. Sometime in November 2017, Sean removed the boat away from the lagoon and took it to Navola Beach, Sigatoka. She seeks an injunction against the defendant to immediately release the Boat to her.

### *The Legal Framework*

- [08] The jurisdiction to grant injunction derives from Order 29 of the High Court Rules 1988 which states:

#### *Application for injunction (O.29, r.1)*

*"1.-(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.*

*(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by notice of motion or summons.*

*(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

### *The Governing Principles*

- [09] The proper approach to the exercise of the jurisdiction was outlined by the *Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975] AC 396* which set out the following test.
- a) Is there a serious question to be tried?
  - b) Are damages an adequate remedy?
  - c) Who does the balance of convenience favour?
  - d) Are there any special factors?
- [10] The Courts in Fiji have repeatedly used these guidelines when considering interim injunction application, especially in cases such as *Vivorass Development Ltd*

*v Fiji National Provident Fund* [2001] FJLawRp 67; [2001] 1 FLR 260 (10 August 2001) and *Digicel (Fiji) Ltd v Fiji Rugby Union*, Civil Action No.: HBC 30 OF 2014S.

*The plaintiff's argument*

- [11] Counsel for the plaintiff, Mr Siwan argues that the plaintiff is the registered owner of the boat. The defendant had gifted the boat to the plaintiff for kindness. The plaintiff has a strong prima facie case. The plaintiff has given an adequate undertaking as to damages. There are issues to be tried in the circumstances, the interim injunction should be granted in terms of the plaintiff in order to maintain the status quo. The plaintiff has served a notice only issued by Suva High Court in respect of the action the defendant filed concerning the boat.

*The defendant's argument*

- [12] The defendant conversely advances the argument that the defendant has strong opposition. The undertaking given by the plaintiff is insufficient. She has relied on her father's vehicle, which is a financed one. The plaintiff has obtained a limited interim injunction in this court when Suva action brought by the defendant in respect of the boat is still pending. The Suva action has been initiated before this action and notice of that action has been served on the plaintiff.

*Affidavit in Support*

- [13] The plaintiff in her affidavit filed in support of the interim injunction states that she owns the boat. In June 2015, Sean brought the boat and gifted to her to repay her for the kindness and help. The boat was registered under her name and, she further states that sometime in November 2017, Sean took the vessel away from the lagoon in front of her parents' home in Korolevu, Sigatoka.
- [14] The defendant in his affidavit deposes that the plaintiff does not own the boat. He has applied as a plaintiff in Suva High Court Civil Action No. 344 of 2017 for a declaration that he is the owner of the boat under a constructive trust. The documents of Suva action were served to the plaintiff as a defendant on 18 January 2018. He did not gift her (the plaintiff) the boat, the boat is his own

property and he does not feel that he did anything wrong by taking his property back.

## **Discussion**

[15] While filing a writ of summons, the plaintiff also seeks an interim injunction pending determination of the substantive matter. She asks an order for possession and custody of the Boat, the subject matter of this action. The application is based on the ground that the defendant unlawfully removed the Boat when it was moored in the lagoon in front of the plaintiff's parents' home in Korolevu, Sigatoka.

### *A serious question to be tried*

[16] The plaintiff did not say she bought the vessel for valuable consideration. She says the defendant gifted it to her for kindness she and her family extended towards the defendant over the years. The plaintiff had even acknowledged to the defendant over Messenger that he was the owner of the Boat in August 2017 (See para 20 of the affidavit in opposition and copy of the Messenger texts exchanged between the plaintiff and the defendant).

[17] The vessel is registered under the plaintiff's name.

[18] The defendant denies gifting the Boat to the plaintiff for the kindness. He says he has used their car and paid all expenses for fuel. And, he admits that he has been picked up from Nadi Airport by the plaintiff/her family, but only from 2015 to February 2017, which might be on 6 or 7 occasions. He deposes he had tiled their floor and bought other materials in exchange for that kindness.

[19] Ownership is a question of fact. Registration is not an absolute proof for ownership.

[20] Lord Diplock also stated that 'it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration' (at 407H).

- [21] The plaintiff claims that the Boat was gifted to her by the plaintiff for and in consideration of the kindness. Whereas the defendant states that the plaintiff holds the Boat under a constructive trust. This brings to a conclusion that there is a serious question to be tried.
- [22] I now go on to the second stage whether damages are inadequate. If damages would not adequately compensate the plaintiff for the temporary damage, and he is in a financial position to give a satisfactory undertaking as to damages, and award of damages pursuant to that undertaking would adequately compensate the defendant in the event the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a financial position to honour his undertaking as to damages, and an appreciable damage to the defendant is likely, an injunction will usually be refused (*Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113).
- [23] Usually, failure to offer the usual undertaking as to damages will be fatal to an application to obtain an interlocutory injunction. However, there are some possible exceptions to the rule, such as where an impecunious plaintiff is acting in their personal capacity who is seeking injunctive relief (see *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252).
- [24] The plaintiff states that his monetary loss for the purchase of the Boat exceeds \$90,000.00 alone. He also states the condition of the Boat was deteriorating due to the plaintiff not taking good care of the same. The Boat, according to the plaintiff, was worth \$75,000.00, when it was new.
- [25] As to the usual undertaking as to damages, the defendant submits that the plaintiff relies on his father's undertakings as to damages. The father is not a party to this action and in any event, the undertaking only seems to be for approximately \$61,000.00, when the defendant's monetary loss for the purchase of the Boat exceeds \$90,000.00.
- [26] The plaintiff has annexed an affidavit of her father. Her father offers the usual undertaking as to damages on behalf of the plaintiff with his two vehicles. The father says there is a debt of about \$54,000.00 owed on the vehicles to Fiji Development Bank. The father offers his two leased vehicles for the usual undertaking as to damages. The offering of leased vehicle as undertaking as to

damages is unacceptable. It has depreciable value and there is no guarantee that the vehicle will be available to compensate the defendant if he succeeds at trial.

- [27] An appreciable damage to the defendant is likely. The plaintiff is not in financial position to honour her undertaking as to damages. The plaintiff fails to offer the usual undertaking as to damages in order to seek the grant of an interlocutory injunction.

*The balance of convenience*

- [28] The balance of convenience comes to pay where there is doubt as to the adequacy of remedies in damages available to either party. 'It is where there is doubt as to the adequacy of remedies in damages available to either party or to both, the question of balance of convenience arises' (at 408E, *American Cyanamid case*).
- [29] Both parties are claiming the right to the Boat. The remedies in damages are available to both parties. Therefore, the question of balance of convenience does not arise.

*Special factor*

- [30] Lord Diplock concluded in *American Cyanamid case* that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases'.

*The Suva action*

- [31] The defendant (as plaintiff) has instituted an action in the Suva High Court (Civil Action No.344 of 2017) against the plaintiff (as defendant), where he seeks a declaration that he is the owner of the Boat under a constructive trust. The notice of that action has been served to the plaintiff on 18 January 2018. The defendant had filed and served the Suva Action before the present action. It seems that the plaintiff did not appear and defend the Suva proceedings brought by the defendant in this case. Instead, she has filed another action in Lautoka and obtained a limited interim injunction until the hearing of the application for the grant of interim injunction. As the plaintiff had received the notice of the Suva Action, she ought to have appeared in that action and made her application. It was not open for the plaintiff to file a fresh action and obtain an interim

injunction after receiving the notice of the action the plaintiff filed in Suva in respect of the same matter.

### **Conclusion**

[32] Remedies in damages are available to both parties. The plaintiff is not in a financial position to offer the usual undertaking as to damages. The plaintiff cannot rely on her father's leased vehicles for that purpose. The plaintiff seeks an interim injunction releasing the Boat into her custody after the defendant had issued and served an action in Suva. She could have made such an application in the Suva action. In the circumstances, I would refuse to issue an interim injunction pending the outcome at trial. Accordingly, I discharge the limited interim injunction issued on 24 March 2018 in favour of the plaintiff pending the hearing of the plaintiff's application for an interim injunction. I would order the plaintiff pay a sum of \$500.00, which is assessed summarily, as costs to the defendant.

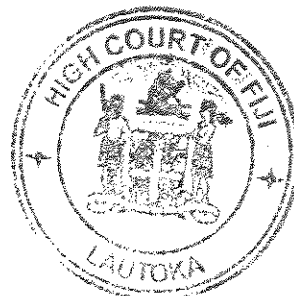
### **The Results**

1. Interim injunction refused.
2. Interim order granted on 16 March 2018 be discharged.
3. The plaintiff will pay summarily assessed costs of \$500.00 to the defendant.

*M. H. Mohamed Ajmeer*  
24/5/18

M. H. Mohamed Ajmeer

JUDGE



**At Lautoka**

**24 May 2018**

Solicitors:

For the plaintiff: M/s Janend Sharma Lawyers, Barristers & Solicitors

For the defendant: M/s O' Driscoll & Co, Barristers & Solicitors