

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 168 of 2016

BETWEEN : **R. PRASAD LIMITED** a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva.

Plaintiff

AND : **QUEST APARTMENT HOTELS (NZ) LIMITED** (formerly Quest Serviced Apartments (NZ) Limited) a limited liability company incorporated in New Zealand and having its registered office at Crowe Horwath Level 29, 188 Quay Street, Auckland Central, Auckland, 1010, New Zealand.

Defendant

Appearances : Mr J. Apted for defendant/applicant
Mr C.B. Young for plaintiff/respondent

Date of Hearing : 21 June 2017

Date of Ruling : 12 October 2017

RULING

Introduction

[01] This ruling concerns with an application filed by the defendant to convert the action brought by way of originating summons into a writ action.

[02] By summons filed 29 November 2016 and supported by an affidavit of Stephen Kenneth Mansfield, the Managing Director of Quest Apartment Hotels (NZ) Limited, the defendant (*"the application"*) sworn on 25 November 2016 seeks the following orders that this matter:

1. *Continue as if it was a cause or matter begun by writ and that:*
 - (a) *The Plaintiff file within 28 days file a Statement of Claim*
 - (b) *The Defendant 28 days thereafter file a Statement of Defence and the*
 - (c) *The matter then follow the course usually followed in a matter begun by writ*
2. *Be transferred to the Suva Registry of the Court.*
3. *Costs.*
4. *Such further or other orders as the Court considers fit.*

[03] The application is made under O.28, r. 9 of the High Court Rules, 1988 (*"HCR"*).

[04] The plaintiff opposing this application filed an affidavit of Abhishek Abhimannu in reply.

[05] Before the hearing of the matter, counsel for the defendant informed the court that the defendant does not pursue prayer 2 of its Summons to have these proceedings transferred to Suva High Court Registry and that seeks orders as prayed in paragraph 1 of its Summons. It also seeks costs of this application.

[06] At the hearing, both the parties orally argued the matter and they also tendered their respective written submissions. I am grateful to counsel for their comprehensive written submissions, which was of great assistance to me in drawing this ruling.

Background

[07] Quest Apartment Hotels (NZ) Limited, the defendant (*"Quest"*) is the master franchisor of the Quest Apartment Hotel franchise System in New Zealand and Fiji. Quest's business model involved contracting with third parties to manage specific apartment hotel premises under the Quest branch on a franchise basis.

[08] In early 2009, the Plaintiff, R. Prasad Limited (“RPL”), expressed interest in operating a Quest apartment hotel franchise business at its premises in Nadi. At that time, *renovations of the premises “for hotel accommodation was still to be designed and completed”*.

[09] The parties subsequently entered into a Letter of Understanding (“LOU”).

[10] The LOU in clause 2 contained a number of conditions regarding the proposed franchise agreement with RPL. Among other things, RPL agreed that renovation of its premises would be completed strictly in accordance with Quest’s certification and that the parties would enter into a formal franchise agreement once the renovations were completed and the premises were able to be in operation to a Quest standard.

[11] Clause 3 provided that RPL would pay Quest NZ\$68,000 within three days of signing the LOU for –

- (a) Quest establishment fee of NZ\$45,000; and
- (b) Quest training and management support fee of NZ\$23,000.

[12] Clause 4 provided –

“That this Letter of Understanding is binding on both of us provided that it is to be signed by you and returned to Lizandra Baily, Fortune Manning by 4.00 pm Friday, 13 February 2009...”

[13] Clause 7 provided –

“Quest shall be able to immediately terminate this LOU if ...

(a) ...

(b) The conditions in paragraph 2 are not satisfied by 27 February 2009 or such other date agreed to by Quest in writing.

On termination, Quest shall be entitled to retain as liquidated damages the amounts paid pursuant to paragraph 3."

[14] In accordance with Clause 4, RPL signed the LOU on 12 February 2009 and returned it to Quest within time. The LOU thus became binding on the parties Quest signed it on 22 February 2009.

[15] As required under Clause 3, RPL subsequently paid NZ\$68,000 to Quest.

[16] Following a 6 year exercise, RPL refused Quest's offer of a Quest franchise and chose to operate the hotel as "*Ratsun Hotel*" in November 2015.

[17] On 15 August 2016, RPL filed the Originating Summons, without giving any particulars to identify the cause of action.

LAW

Contents Summons

[18] Of the contents of an originating summons, HCR O.7, r.3 (1) states –

*"3.-(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with **sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.**" (Emphasis provided)*

Proceedings which must be begun by originating summons (O.5, r.3)

[19] HCR O.5, r.3 provides:

- “3. Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorized to be made by some other means.”

Proceedings which may be begun by writ or originating summons (O.5, r.4)

[20] HCR O. 5, r. 4 provides:

- “4.-(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorized to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings –

- (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or
- (b) in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.” (Emphasis provided).

Continuation of proceedings as if cause or matter begun by Writ (O.28, r.9)

- [21] O.28, r. 9 give the Court a discretion to order an Action commenced by Originating Summons to continue as if begun by Writ if it considers appropriate to do so for any reason –

“9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.”

- [22] Fiji’s O. 28, r. 9 is identical to the former O. 28. R. 8 of the English Supreme Court Rules. Of the effect of this rule, the White Book at Paragraph 28/8/1 says of the –

“Effect of rule – When this rule is invoked, the usual order will be for pleadings to be served very quickly and then for the matter to be restored for final directions. It is better not to let affidavits to stand as pleadings because affidavits cannot be amended nor can particulars be ordered of them.”

Plaintiff’s argument

- [23] Mr Young counsel for the plaintiff contended that these proceedings are correctly commenced by way of originating summons, for the originating summons procedure is appropriate to determine the question of law concerning the interpretation of the Letter of Understanding. He heavily relies on *Reserve Bank of Fiji v Gallagher* [2006] FJCA 37 (Barker JA).

Defendant’s argument

- [24] Mr Apted counsel for the defendant conversely argued that conversion is necessary as the originating summons does not contain sufficient information to justify the orders sought or enable the causes of action to be discerned. His argument continues that it is clear that the originating summons does not comply with O. 7, r. 3 (1). The plaintiff’s grounds for relief and causes of action cannot be discerned from the originating summons and affidavits. It is not clear why the plaintiff is seeking relief in the nature of declaratory orders. He further submits that in light of the highly contentious matters in the parties’ lengthy and detailed

affidavits, it would be appropriate to have the affidavits stand as pleadings as they cannot be amended nor particulars be ordered of them.

Discussion and determination

- [25] The defendant seeks an order that the proceedings brought by the plaintiff by way of originating summons to continue as if it has been instituted by writ. The defendant also seeks a consequential order, if the conversion were ordered, that the plaintiff should file pleadings.
- [26] The plaintiff's claim stems from a Letter of Understanding ("LOU") entered into between the parties in February 2009. The LOU is binding on both parties upon the defendant signing and returning it to Lizandra Baily, Fortune Manning by 4.00 pm **Friday, 13 February 2009** (See Cl.4, LOU). In compliance with Clause 4, the defendant signed and returned the LOU on 12 February 2009.
- [27] LOU Clause 3 provides that the defendant would pay the plaintiff NZ\$68,000, being defendant's establishment fee of NZ\$45,000 and defendant's training and management support fee of NZ\$23,000.
- [28] The plaintiff agreed that renovation of its premises would be completed strictly in compliance with the defendant's certification and that the parties would enter into a formal franchise agreement once the renovations were completed (See LOU clause 2). If this conditions in clause 2 are not satisfied by 27 February 2009, the defendant had a right to termination the LOU immediately. And, upon the defendant was entitled to retain as liquidated damages the amount paid by the plaintiff.
- [29] The plaintiff did not complete the renovation by 27 February 2009 as agreed. As a result, the defendant terminated the LOU and retained NZ\$68,000 paid by the plaintiff as liquidated damages pursuant to clause 7, LOU. The defendant was entitled to terminate the LOU immediately after 27 February 2009, for there was non-compliance of the conditions in clause 2 by the plaintiff.
- [30] By these proceedings originated by the originating summons filed on 15 August 2016, the plaintiff seeks the following declaratory relief:

- (a) *The LOU lapsed due to non-fulfilment of the conditions of Clause 2 and that it was not extended, varied or replaced;*
- (b) *There was no binding franchise agreement for the Quest branch;*
- (c) *The NZ\$68,000 RPL paid to Quest under Clause 3 of the LOU became repayable to the plaintiff on or about 28 February 2009 or some other date as the Court may determine and that Quest became the trustee of the NZ\$68,000 on the date the LOU lapsed; and*
- (d) *Quest pay interest on the NZ\$68,000 from 28 February 2009 or some other date as determined by the Court.*

[31] In addition to the above declaratory relief, the originating summons seeks 3 Orders: –

- (a) *Quest to pay RPL the NZ\$68,000 and all accused interest within 7 days;*
- (b) *Quest to pay RPL indemnity costs and*
- (c) *Such further or other relief as the court deems just.*

[32] It will be noted that the originating summons contains the relief only. It does not carry the particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy. It does not include a statement of the questions on which the plaintiff seeks the determination or direction to the High Court.

[33] O.7, r. 3 (1), HCR requires an originating summons to state, in addition to the relief sought, sufficient particulars to identify the cause of action which the plaintiff relies on.

[34] I find the originating summons has been filed against rule 3 (1).

[35] Mr Young contended that originating summons procedure is appropriate to determine the question of law concerning the interpretation of the LOU.

- [36] According to Mr Apted's contention there is a central issue as to whether the LOU lapsed or was terminated. As such, the originating summons process is not appropriate.
- [37] The plaintiff seeks a declaration that the NZ\$68,000, the plaintiff paid to the defendant under Clause 3 of the LOU became repayable to the plaintiff on or about 28 February 2009 or some other date as the Court may determine and that Quest became the trustee of the NZ\$68,000 on the date the LOU lapsed.
- [38] The plaintiff states that the NZ\$68,000 became payable to the plaintiff on or about 28 February 2009 or some other date as the Court may determine. If the cause of action for that claim arose in or about February 2009, the plaintiff's claim appears to be caught by Limitation Act. The originating summons is filed on 15 August 2016 without any particulars.
- [39] The plaintiff has raised the question of trust and trusteeship between the parties. The defendant has denied it. There are no particulars as to why the plaintiff claims trust and trusteeship. There is nothing about the trust or trusteeship between the parties in the LOU.
- [40] The plaintiff tends to contend that the trust or trusteeship arose by operation of law and not by the agreement of the parties. The plaintiff fails to state the specific law that operates in favour of the trusteeship between the parties.
- [41] Persisting the point of trusteeship, the defendant submits that raising the point as one of fact in the hope of creating a dispute to require oral evidence.
- [42] In Reserve Bank of Fiji (above), Barker JA said:

"[57] Order 5 Rule 4 (2) reflects the normal use of originating summons procedure; indicating that the procedure is appropriate for interpretation arguments or cases where there is unlikely to be any substantial dispute of fact..." [Emphasis added]

His Lordship continued at [60]:

"[60] Order 28 Rule 9 empowers the court, in effect, to convert an originating summons procedure into writ and for the proceedings thereafter

to continue as if they had been commenced by way of writ, subject to any direction of the court...” [Emphasis added]

- [43] In the current matter, the parties’ lengthy and detailed affidavits contain a wide range of issues of fact in dispute between them which will require discovery and/or oral evidence to resolve. The plaintiff says the LOU lapsed by itself for non-performance. In contrast, the defendant takes up the position that the LOU was terminated because the plaintiff failed to meet the conditions of the LOU within the stipulated time.
- [44] In my opinion, the issue between the parties is not pure interpretation of an Act or some other question of law or contract. It is one of construction of the LOU coupled with facts in dispute.
- [45] In *Investors compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, the Court said that any interpretation of that document which is at the heart of this case will require the Court to take into account the “background matrix of facts”. Oral evidence and discovery are necessary to establish that matrix.
- [46] In the matter at hand, the parties are variant at several facts. This will require the court to take into account the background facts that led to the signing of the LOU and the subsequent termination of it as alleged by the defendant. Oral evidence and discovery are necessary to establish the background.

Conclusion

- [47] The originating summons filed by the plaintiff contains only the relief. It does not contain sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claim the relief of remedy. There is no statement of question on which the plaintiff seeks the determination or direction of the High Court. The originating summons is filed against O.7 r.3 (1). There are substantive disputes of facts between the parties. The issue between the parties is not pure construction of an Act or some other question of law or contract. In the circumstances, originating

summons process is not appropriate. I would, therefore, order the action to continue as if begun by a writ.

- [48] I accept the defendant's contention that it is better not let affidavits to stand as pleadings because affidavits cannot be amended nor particulars be ordered of them. I accordingly order the plaintiff to file and serve writ of summons within 28 days of the date of this ruling. I would also order the plaintiff pays the sum of \$1,500.00, which is summarily assessed, to the defendant within 28 days.

Final outcome

1. Originating summons process is not appropriate in this case.
2. The proceedings are to continue as if the matter had been begun by writ.
3. The plaintiff will pay \$1,500.00, which is summarily assessed, to the defendant in 28 days from the date of this ruling.
4. The plaintiff will file and serve writ of summons within 28 days from the date of this ruling.
5. Upon filing the writ of summons, the matter will take its normal course.

M.H. Mohamed Ajmeer
12/10/17

M.H. Mohamed Ajmeer

At Lautoka

12 October 2017

Solicitors:

For plaintiff: M/s Young & Associates, Solicitors

For defendant: M/s Munro Leys, Solicitors

