

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No.192 of 2013

BETWEEN : **SATISH CHANDRA GOSAI** of Melbourne, Australia,
Businessman.

Plaintiff

AND : **PRIME LAND DEVELOPMENT LIMITED**, a limited liability
Company having its registered office at Nadi.

1st Defendant

AND : **DAVENDRA NARAYAN CHAND** trading as **SJS Construction**
of Malolo Nadi, General Building Contractor.

2ND Defendant

Appearances : Mr. Janend Sharma for the Plaintiff.
Mr. Anu Patel for the Defendant.

R U L I N G

INTRODUCTION

[1]. If an owner of land (**A**) is erecting, repairing, adding to, or painting, whether in whole or in part, any building, wall, fence or other structure on his land, and the only practical way for him to approach the job, or any part of the job, is from the adjoining land of another (**B**), (**A**) may apply to this Court for an Order to authorize him to enter onto (**B**)'s land for that purpose. Any such application by (**A**) will have to be made pursuant to section 108 of the Property Law Act (Cap 132) which provides as follows:

- (1) The owner of any land may at any time apply to the court by originating summons for an order authorizing him, or any person authorized by him in writing in that behalf, to enter upon any adjoining land for the purpose of erecting, repairing, adding to or painting the whole or any part of any building, wall, fence or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose as aforesaid.
- (2) On any such application the court may make such order as it thinks fit, and any such order, or any provision thereof, may be made upon and subject to such terms and conditions as the court thinks fit."

[2]. Section 128 of the old New Zealand Property Law Act was similar in wording to section 108. In **De Richaumont Co Ltd v OTW Advertising Ltd** [2001] 2 NZLR 831, Mr. Justice Priestly resorted to the Hansard Report to explain the purpose of section 128:

The new provision enables an owner of property adjoining other land to erect, repair, add to, or paint a building or other structure belonging to him which is close to the boundary-line. The idea of the provision is to get over an awkward position which sometimes occurs when buildings are very close to a boundary-line. When an owner wants to effect repairs or do some painting on such a building, he has often to go on to the adjoining land to carry out this work.

- [3]. Section 108 does not require the applicant to have first *sought-but-refused-entry* from the adjoining landowner before he or she may apply to this Court. However, that is a choice open to any intended applicant. More often than not, it will be the logical and practical thing to do before applying to this Court. As Priestly J opines in **De Richaumont**.

Some neighbours are neighbourly and would allow such work to be done, but others are fussy, and in such cases the owner of the building concerned may now go to the Court and obtain the necessary permission.

.....

It goes without saying that the Court Order will only be required in a situation where a neighbour, for whatever reason, declines access. In such a situation the person seeking access has only three options, to do nothing, to trespass, or to seek an order.....

.....

With respect, Hardie Boys J is undoubtedly correct when in Blackburn v. Gemmell he describes the section as providing "a method of dealing with the practical difficulties...". It may well be that the neighbour refusing access may be "unco-operative or hostile". But that need not necessarily be the case. The balancing exercise which [s. 108(1)] requires the Court to undertake is to consider whether the order being sought authorises entry which is "reasonablynecessary for any such purpose..."

BACKGROUND

- [4]. Mr. Satish Chandra Gosai, the plaintiff, is the registered proprietor of Certificate of Title No. 9904¹.
- [5]. Between May 2012 and September 2013, Gosai was accessing the adjoining land of Prime Land Development Limited (“**PLDL**”) in order to get to CT 9904. That access was granted pursuant to an understanding between Gosai, PLDL, and one Mr. Shah (see further below), to enable Gosai, his builder and his suppliers to get to the rear of a building being erected by Gosai on CT 9904.
- [6]. However, as it turned out, PLDL backtracked on its permission some two months ago. This prompted Gosai to file the Originating Summons which is before me now. The Originating Summons is filed pursuant to section 108 and to Order 7², Order 28 and Order 32 Rule (2) of the High Court Rules 1988. What Gosai seeks is an Order from

¹ a copy of the Plans for the said Commercial Building is annexed to his affidavit marked “S-2”.

² Order 7 Rule 1 of the High Court Rules, 1988 reads

the provisions of this Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class, made by these Rules or by or under any Act.

Order 7 Rule 3(1) of the High Court Rules, 1988 reads

Contents of Summons (O.7, r.3)

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.

this court which will give him, his builders and his suppliers to enter PLDL's land³ to get to Gosai's land in order to complete all construction work.

- [7]. As a preliminary point, the defendants raise issue with the form of Gosai's Originating Summons. They have also filed a summons dated 24 October 2013 under Order 18 Rule 18(1) (a)⁴ to strike out the Originating Summons as disclosing no reasonable cause of action and/or is scandalous, frivolous or vexatious and/or is otherwise an abuse of process. The defendants also argue that Gosai has failed to provide sufficient particulars to identify any cause or causes of action.⁵ However, I am of the view that the Originating Summons in question is quite regular and will leave at that.

UNDISPUTED FACTS

- [8]. Gosai's Lot is zoned "Commercial C". Provision 9 Schedule B of the Town Planning Scheme applies to Gosai's land and prescribes the minimum front, side, and rear yard setbacks. The parties agree that Commercial "C" Lots are permitted to load and off-load goods in a front-service lane to which they (Lots) front. Schedule F paragraph 21 is the relevant planning law. And Namaka Lane is in fact such a front service lane in the busy commercial area of Namaka in Nadi town.

³ The Originating Summons is worded as follows:

- (a) whether pursuant to Section 108 of the Property Law Act, the Applicant being the owner of Certificate of Title Number 9904 is entitled to an Order authorizing him, or any person authorized by him in writing in that behalf, to enter upon **Certificate of Title Number 35743 being Lot 3** being an adjoining land, for the purpose of erecting, repairing, adding to or painting the whole or any part of any building, wall, fence or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose aforesaid.

And for a Declaration that:

- i) The Applicant being the owner of Certificate of Title Number 9904 is entitled to an Order authorizing him, or any person authorized by him in writing in that behalf, to enter upon **Certificate of Title Number 35743 being Lot 3** being an adjoining land, for the purpose of erecting, repairing, adding to or painting the whole or any part of any building, wall, fence or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose aforesaid.

And the Plaintiff Seek an Order

- 1) That the Respondent give the Applicant or any other persons authorized by it, including but not limited to Builders, Consultants of the Applicant and any other persons acting on behalf of the applicant, access into **Certificate of Title Number 35743 being Lot 3** for the purpose of erecting, repairing, adding to or painting part of or whole of the building on the Applicant's land being Certificate of Title No. 9904, and to do so on the land so entered such things as may reasonably be considered necessary for such purpose.
- 2) That the Defendants pay costs of this Application.

⁴ Order 18 Rule 18(1)(a) of the High Court Rules 1988 reads

"Striking out pleadings and endorsements (O.18, r.18)

18-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) It discloses no reasonable cause of action or defence, as the case may be: or

⁵ The defendants rely on the Fiji Court of Appeal case of **Reserve Bank of Fiji v Trevor Robert Gallagher & Alan Charles Newham** and **Alan Charles Newham v Nadi Contractors Limited**, Fiji Court of Appeal, Civil Appeal Nos ABU 0030 of 2005S, ABU 0031 of 2005S, ABU 00032 of 2005S where his Lordships at paragraph 58 held:

Order 7, Rule 3(1) requires an Originating Summons to state in addition to the relief sought, sufficient particulars to identify the causes of action on which the Plaintiff relies. This rule was ignored in the 1999 Originating Summons filed by Mr. Newham.

And upon the decision of Mr. Justice Nawana in **Reddy v India Sanmarga Ikya Sangam [2012] FJHC 1389; Action 163.2012 (29 October 2012)**:

"25. I am of the view that it was mandatory under O7 r3 for the Originating Summons to have included a statement of questions upon which determination from court was sought or sufficient particulars to identify the cause or causes of action against each Defendant upon which relief or remedy was sought. The adherence to these rules is particularly essential in this case as it was imperative for the Plaintiffs to show that the Deferment of the Annual General Meeting was due to mala fide or some other reasons but not due to the reason of the devastating catastrophe in April 2012."

PLDL actually has three lots⁶ which are arranged consecutively along a row of commercial lots.

- [9]. Gosai's CT 9904 fronts on Namaka Lane. PLDL's lots front on a different street, the name of which is unclear to me at this time. Although fronting on different streets, Gosai's and PLDL's lots share a common rear lot line⁷.
- [10]. At present, Gosai and PLDL are both erecting a commercial building on their respective properties. From photographs exhibited in the affidavits, it is clear that both parties will, if unhindered, complete construction in a matter of months. Both are eager to complete at the earliest in order to start letting out and earn rental income from their office and retail space.
- [11]. Gosai began construction on 07 May, 2012. He has completed 3 storeys and was to begin work on the 4th when access was denied him⁸. The building is estimated to be worth over FJD\$3 million dollars after it is completed⁹.
- [12]. PLDL started construction in April 2013.
- [13]. It appears that shortly after he began construction, Gosai sought an audience with a Mr. Vijay Kumar, the Managing Director of PLDL, for permission to enter PLDL's land. They did eventually enter into an informal arrangement. A Mr. Shah, the Financial Controller of ATS, the tenant of PLDL¹⁰ was also part of the discussion.
- [14]. Pursuant to their arrangement, Gosai was then allowed access to the rear of Gosai's building vide PLDL's land. This arrangement worked well for some 18 months. And during that time, Gosai had managed to erect a three storey building.
- [15]. However, things changed on 14 September 2013 when access was denied to Gosai. Following this, Gosai and his lawyers tried to seek an

⁶ These lots are, namely, Certificate of Title No. 35742 being Lot 2, Certificate of Title No. 35743 being Lot 3 and Certificate of Title No. 35744 being Lot 4 on DP 8974.

⁷ or, as Mr. Patel describes it, *"the rear of Gosai's land and the rear of one of PLDL's land share a common boundary"*.

⁸ attached to his affidavit and marked "S-3" is a copy of an Engineer's Report setting out the progress to date of work completed. He also annexes marked "S-4" a bundle of photographs showing the ongoing construction work and the current stage of the building.

⁹ a copy of Market Valuation provided by Westate Consultant dated 17th June, 2011 is annexed to his affidavit marked "S-5".

¹⁰ On 23 April 2012, Gosai met with Mr. Vijay Kumar, Managing Director of PLDL to seek his consent for access via PLDL's Lot 3. Kumar had no objection to the request, and informed Gosai that PLDL's property was in fact being rented out to ATS Pacific.

Gosai says that, in his presence, Kumar then made a telephone call to Mr. Nisar Ali Shah, Financial Controller of ATS and told Shah of his (Gosai's) request and his (Kumar's) position on the matter. Gosai says that Kumar then arranged for Gosai to meet Shah on 24 April 2012 to discuss the best way for Gosai to access the rear of his (Gosai's) property vide PLDL's Lot 3.

Gosai says that he and Shah did meet and came to an arrangement. The arrangement was that Gosai and his workers, builders and suppliers would access PLDL's property.

Gosai says that on or about 9 May 2012, he brought in a crane and moved three shipping containers belonging to ATS Pacific from the rear of his property and relocated them to Lot 4 of PLDL's property. ATS charged him around \$300.00 for their labour cost to empty and repack the said containers.

Gosai says that he understood that ATS was the tenant of PLDL and that all was fine and that PLDL had no issue with his accessing vide PLDL's property.

audience with the defendants to attempt a resolution, but to no avail¹¹. Chand is the contractor contracted by PLDL in July 2013 to construct PLDL's commercial building.

[16]. On 01 October 2013, Mr. Sharma issued a Notice to Chand. The said Notice alleged that the defendants' actions were detrimental to Gosai¹² and to request dialogue. But, this was only met with a retaliatory threat by Chand¹³. Since then, Gosai has not been able to have building materials delivered. This is hindering the completion of his building¹⁴. He sets out in detail the list of works to be carried out on his building and for which access through PLDL's property is necessary¹⁵.

WHY THE DEFENDANTS RENEGED ON THE ARRANGEMENT?

[17]. The decision to renege was made amidst allegations that a certain vehicle delivering building materials for Gosai had damaged the profile of PLDL's building. Chand had to spend \$1,500.00 to realign the building line.

[18]. Gosai says the allegations are not fair because other businesses in the vicinity were, at the same time, also using PLDL's lot to access their own premises and anyone of them could have caused the alleged damage¹⁶.

¹¹ Gosai deposes as follows:

Upon my instructions, my Counsel, Mr. Janend Sharma invited the 2nd Defendant to a meeting with me to resolve the issue of access but the 2nd Defendant refused to meet advising that he preferred the matter be resolved by the Court.

¹² Gosai deposes:

I then caused my solicitors to issue a Notice dated 01st October, 2013, annexed herewith marked "S-10" to the 2nd Defendant requesting dialogue and putting him on notice that his actions are detrimental to my development and are causing me damages and that if he does not allow me access over the 1st Defendant's property, I will be seeking legal redress.

¹³ Gosai deposes:

On 09th October, 2013 at about 3.26p.m the 2nd Defendant rang and ordered me to remove the scaffold and all other building materials which is located within the fence line. He threatened me if I don't remove the material he will take the matter in his own hands to ensure the building material are removed. I advised him that I will be unable to remove the material until such time he replies to the notice dated 01st October, 2013 given by my solicitors. He then went to police station and lodged a complaint against me for trespass and using the part of the land illegally. I later went to the police station on my own accord to report the threat from the 2nd Defendant and found that the 2nd Defendant was already in the police station. I was interviewed by the police regarding the various complains from the 2nd Defendant made against me.

¹⁴ He deposes as follows:

The refusal of access by the Defendants is causing me much hardship and damages due to the delay in completion of my commercial building.

I am unable to deliver materials to my building and thus not able to move my construction effectively. I am unable to deliver Tiles, Sand, Gravel and like material to my site in large quantity.

I am afraid that the 2nd Defendant will make good on his threats to remove my scaffoldings and building material and may end up causing damage to my commercial buildings as well.

¹⁵ Gosai deposes as follows:

The following is a list of works to be carried out on my Commercial Building for which my access to the 1st Defendant's property is necessary:

1. Plumbing Works, 2. Painting - interior and exterior, 3. Tiling of all 3 floors, 4. Ceiling on 2 floors, 5. Electrical wiring and lighting, 6. Aluminum wall and window framing including, doors and glass works, 7. Joinery works, 8. Wall Partition between shops, 9. Plaster works of external walls, 10. Air Conditions, 11. Railings.

On level 4 - New addition. (Stage 2)

1. Column steel and concrete works, 2. Block work to Beam Level, 3. Beam steel and concrete works, 4. Internal steel columns, 5. Roofing, 6. Ceiling, 7. Electrical wiring and lighting, 8. Air conditioning, 9. Aluminum wall and window framing including doors and glass works, 10. Flooring, 11. Tiling, 12. Railings, 13. Plumbing, 14. Plaster works of internal and external walls, 15. Painting of internal and external walls (at level), 16. Aluminum, Composite Panels (Alco panels), 17. Wall Partitions.

¹⁶ Gosai says:

The 2nd defendant is a general building contractor. The 1st defendant has been engaging him (2nd defendant) to construct a new building on the same PLDL property through which Gosai was given access. According to Gosai, the contractor has been using the same driveway since he began construction works in July, 2013.

[19]. From where I sit, the free access that Gosai enjoyed from PLDL between May 2012 to September 2013 was, but a **bare license**. Such a license conferred no proprietary or contractual interest on Gosai (see **Clerk & Lindsell on Torts 15th Ed** at para 22-35 and **Housing Authority v Khan** [1994] FJHC 58; Hbc0090d.94s (10 June 1994)¹⁷. Hence, whatever bare *parol* license Gosai had was revocable at the whims of PLDL, and was in fact so revoked when Gosai was denied access on 14 September 2013. In that light, it can hardly be said that PLDL was bound by any form of estoppel, as argued by Mr. Sharma.

DISCUSSION

[20]. A section 108 Order is rather intrusive because it gives authority to a landowner to enter the adjoining land of another. But for the sanction of the Order, any such entry would amount to a trespass as it would offend the inviolability of the property rights of the adjoining landowner. Because of this, such Orders are not granted lightly. They are granted, strictly, only for purposes prescribed by Parliament therein section 108 and only if it is reasonably necessary in the circumstances of the case. This means a section 108 Order is made only as a last resort if there is no alternative practical way of doing the work.

[21]. In **De Richaumont**, the Court said:

Gosai had requested the 2nd Defendant to provide full details such as time, truck registration number and the name of the company that the 2nd Defendant alleged had caused the damages but to no avail.

Gosai deposes that apart from his suppliers, other businesses around the vicinity such as Fiji Meats, Fiji Gas and the 2nd Defendant's suppliers use the access over the 1st Defendant's property. They all use big trucks. Anyone could have caused the alleged damage to the 2nd Defendant's construction work.

¹⁷ **Clerk & Lindsell on Torts 15th Ed** at para 22-35 define a bare licence as follows:

...A dispensation or licence to properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful". A licensee has no interest in the land, and accordingly has no remedy against a third party who disturbs him in the exercise of his licence.....

.....
A licensee who exceeds his licence is a trespasser. Where the plaintiff and the defendant were occupiers of adjoining buildings and the plaintiff gave the defendant permission to underpin the plaintiff's wall so that the defendant could get the necessary support for the steel framework which the defendant was proposing to erect in rebuilding his property, it was held that this did not authorize the extension of the concrete foundations under the plaintiff's land and that this extension was a trespass (*Wilcox v Kettle* [1937] 1 All E.R. 223.

In **Housing Authority v Khan** [1994] FJHC 58; Hbc0090d.94s (10 June 1994), Mr. Justice Fatiaki canvassed some essential features of a bare licence as follows:

In my view the defendant's claim may be categorised as that of a '*bare licensee*' with a right to occupy the land without acquiring an estate or interest in it and, being gratuitous, was and is revocable at any time and by any transfer of assignment of the land over which the licence was granted.

In *Wallis v. Harrison* (1838) 51 RR 715, Lord Abinger C.B. in rejecting the plea of license raised in that case said at p 719:

"... a mere *parol license* to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed that because a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said, that the defendant should have had notice of the transfer. That is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *prima facie*, is a trespass."

In this case not only was the defendant's '*bare licence*' revoked upon the transfer of the land to the Housing Authority but whatever remnants of a licence survived such transfer was clearly and unequivocally extinguished by the authority's written **Notice to Quit**.

"In my view, a correct interpretative analysis of [s. 108] requires the Court, as its starting point, to regard the [Respondent's] property rights as inviolate. The Court must recognize that the [Applicant] is only entitled to an order if it is for the purpose specified by Parliament. There is the further requirement that the order is reasonably necessary in the circumstances of the case." (my emphasis)

[22]. I propose that the sentence underlined above should not be read literally. In my view, the Court is not saying that, an applicant has a right to a section 108 Order once it is satisfied that the purpose for which the Order is sought is in accordance with those set out in section 108 (see further below). I say this because, after all, the remedy is still a discretionary remedy as Mr. Justice Inoke spelled out in **Hardip Narayan & Sons v Kellapan** [2009] FJHC 137, HBCo28.S (02 July 2009).

[23]. In **Hardip Narayan's** case, the applicant was the owner of a supermarket building. One of the walls of the said building was incomplete. And the said wall had actually encroached onto the respondent's adjoining lot. The applicant filed a section 108 originating summons in this court to allow him access to the defendant's land to complete the wall. He also applied under section 109 for a Vesting Order to vest in him that part of the defendant's over which he had encroached. In considering the application for access and vesting Orders before him, Inoke J, guided by **De Richaumont** (supra), said as follows at paragraphs 24 to 28:

[24] I have **a wide discretion** to make appropriate orders, a discretion which I must exercise judicially. What criteria do I use to decide whether the order that is sought is reasonably necessary in the circumstances of this case?

[25] Firstly, it is obvious that there must be no other practical way of doing the work unless access is granted. That is, "practical" in the engineering sense and from an economic point of view. Clearly, this case is one of those. There is no physical separation between the two adjoining properties. It is not possible to carry out the works without trespassing on to the Respondent's land and airspace.

[26] Secondly, I need to consider whether the rights of the Respondent land owner is sufficiently protected and if there is damage to his land and other property that he can be compensated. Although I take note of and agree with Priestley J in **De Richaumont Co Ltd** (supra at p. 836, para. 19) that the section does not authorize me to order payment of compensation. That is a matter that has to be pursued in another action should the parties fail to agree on the amount of compensation.

[27] Thirdly, I think the parties conduct is relevant. As noted above, neighbours can be "fussy", "uncooperative" and even "hostile". I think the Respondent in this case falls within those categories.

[28] Fourthly, I must ensure that the order that I make does not give rise to further disputation having regard to the history of the relationship between the parties. The relationship had been cordial but has become strained because of what the Respondent calls betrayal of his trust in that his property has been damaged without appropriate compensation.

[24]. But I would add a fifth category to the above, and that is, that the work being carried out by the landowner, for which entry to the adjoining land is being sought, must have all the requisite regulatory and planning approvals in place, before a section 108 Order can even be considered.

[25]. If the adjoining landowner's property rights over his land are inviolate as Priestly J emphasises in **De Richaumont** , then Inoke J's comment about the remedy (and the jurisdiction) being a discretionary one, does make perfect sense.

[26]. Hence, whereas a remedy for an infringed legal right must be awarded with no discretion to the judge, a judge exercising a section 108 discretionary jurisdiction, for good reason, may still refuse access, even if the applicant's purpose for seeking access seems perfectly in accordance with those set out in section 108. Again, after all, a section 108 Order is meant to be a last-resort, available only when there is no other practical way of doing the work.

[27]. When the case is viewed against the above light, Inoke J's insistence that the rights of the adjoining landowner must be sufficiently protected and that he "can be compensated" in case of damage to his property, also makes perfect sense. However, this then begs the question, whether the basis of any compensation, or indeed the "liability", is to be in torts or on restitution¹⁸? But these questions have not arisen here yet.

APPLYING THE LAW

[28]. Is the order sought by Gosai reasonably necessary in the circumstances of this case? The answer to this depends on a variety of factors which I consider below.

Is there any other practical way of doing the work?

¹⁸ For some background understanding of the theoretical issues that might arise, see **RIGHTS AND REMEDIES**, Friedman, Professor Emeritus, Tel-Aviv University, and Professor of Law, The College of Management, Tel-Aviv. <http://danielfriedmann.com/wp-content/uploads/2011/09/2005-Rights-and-Remedies.pdf>

- [29]. To answer this question, I must consider two things. First, whether the purpose for which entry to the adjoining land is sought amounts to “work”¹⁹ under section 108 and, secondly, whether there is another practical way of doing that “work” without having to enter the adjoining land?
- [30]. Both counsel agree that the purpose for which Gosai seeks entry to PLDL’s land qualifies under section 108. However, as to whether or not there is any other practical way of doing the work without having to enter PLDL’s land, they are in so much disagreement.
- [31]. Gosai argues that the only practical way of getting building material to the rear of his building is through PLDL’s lot. Namaka Lane is an extremely busy one-way thoroughfare and there is no suitable access to the rear of his commercial building for heavy deliveries from Namaka Lane²⁰.
- [32]. Gosai exhibits various photographs to make his point. One of these shows a huge delivery truck, apparently loaded with building material, positioned awkwardly right across the entire width of that portion of Namaka Lane into which his driveway opens. There is enough of the driveway-opening visible in the photos. And from what I see of it, the driveway starts at street-ground level (obviously as all driveways do) but slopes downward rather sharply towards the basement of the building where the parking area is. The photos also show the limited height clearance. The large delivery truck is positioned as if it is about to reverse down Gosai’s driveway. But, from what I see, clearly the truck would not have been able to negotiate the limited height clearance.
- [33]. Apart from the height clearance problem, Gosai argues that offloading building materials at the basement parking area is not practical as he would then have to take all the material up the lift to the first floor and then out to the back of the building. In addition, he says the basement car park is not built to withstand some of the heavy equipment and materials involved.
- [34]. In addition, Gosai argues that the truck, as the photos show, was a public nuisance along Namaka Lane.

¹⁹ i.e. “...erecting, repairing, adding to or painting the whole or any part of any building, wall, fence or other structure on the applicant’s land...”

²⁰ (see paragraphs 8, 9 and 10 of the Affidavit of Satish Chandra Gosai sworn and filed the 15th day of October 2013 in the action herein and hereafter referred to as the Plaintiff’s First Affidavit).

- [35]. The defendants argue that Gosai's land is zoned commercial "C". Off-street loading is permissible in a front service lane along the commercial frontage in Commercial "C" zones. This is provided in Schedule F paragraph 21 of the Town Planning General Provisions. Namaka Lane is such a front service lane.
- [36]. As to the absence of access to the rear of Gosai's building, the defendants say that Gosai should have allowed a 6 meter set back from the rear boundary of his property. This is required by law. And his building methodology should have been tailored accordingly. The defendant submits that the plaintiff has reasonable access to his property from Namaka Lane and could use smaller delivery vehicles to access the basement of his property and/or by scheduling his deliveries to times and days of the week when Namaka Lane is not so busy.
- [37]. Mr. Patel argues that the plaintiff has failed to provide this Court the building plans for his building, let alone, whether it is approved by the Director of Town and Country Planning and/or the Nadi Town Council. Nor, Mr. Patel argues, has he provided proof of relaxation of plot ratio of 1.1 and the rear yard clearance of 6 meters.
- [38]. The point made above cannot be overemphasized. As stated (paragraph [7] above), CT 9904 is zoned "Commercial C". Provision 9 Schedule B of the Town Planning Scheme applies to Gosai's land and prescribes the minimum front, side, and rear yard setbacks. If, as Mr. Patel argues, no relaxation was ever granted, then Gosai would be in breach of the relevant planning regulations. Is it proper for this court to grant an Order to authorize entry for the completion of work that might, after all, be in breach of the appropriate planning laws?
- [39]. Kumar further deposes that he is personally aware that 19 buildings were constructed in the subdivisional lots of CT 7134 and all have provided the rear yard clearance of 6 meters except two lots which have access through the side road²¹.

²¹ He deposes:

I crave leave to the subdivision plan of CT 7134 a true copy whereof is annexed hereto and marked "VK2". I verily believe that had the Plaintiff carefully considered legal access to his land was from Namaka Lane, he need not to have access through the 1st Defendant's land for the construction of his building. If the Defendant is prevented from completing its building in a timely manner it will suffer substantial loss of income and become liable to increased costs of completion of its building. From the 15th day of January 2014 the 1st Defendant would derive rental income at the rate of \$14,400.00 (VEP). Increased costs is unascertainable at this stage. On the other hand the Plaintiff admits that he is invoking the provisions of section 108 for his own convenience and as a cost effective way in completing his building. I crave leave to refer to building plans and the building permit relevant to the construction of the 1st Defendant's building true copies whereof are annexed hereto and marked "VK3A" and "VK3B" respectively. I pray that the injunction granted 16th day of October 2013 be dissolved.

Whether the rights of the Respondent are sufficiently protected? If there is damage to his land and other property – can he be compensated?

- [40]. Like Gosai, PLDL is also erecting a commercial building on his own land. The defendants argue that this Court should also consider the prejudice and the inconvenience that would be caused to PLDL. While that is a genuine concern in itself, the costs to the defendant must be considered in this context. Mr. Patel submits that on a balance of prejudice, the effect of granting a section 108 access to the plaintiff puts the defendants more at risk than it would Gosai.
- [41]. He argues that, not only would it delay the completion of the 1st defendant's own construction works on his own land, which, in turn, will entail loss of income and increased costs of construction, but there is also the risk of structural disturbance and inconvenience with heavy vehicles passing through.

The parties conduct.

- [42]. In his submissions, Mr. Sharma hints at a suggestion that the principles of estoppel should be applied in the circumstances of this case in favour of the plaintiff. He emphasises that the plaintiff had relied on Kumar's earlier agreement to access his land and Kumar's reneging on the agreement is causing his client to suffer.
- [43]. The defendant has not acted unreasonably at all towards the plaintiff. After all, he did allow free access to the plaintiff over a period of some 18 months or so during which time Gosai was able to complete three stories out of the four. The issues in this case only began when PLDL started building a commercial block on his own land – which they are perfectly entitled to do.
- [44]. My view, as discussed above (see para [21]), is that what the defendants gave Gosai was a bare license, which gave Gosai no special interest in PLDL's land, and which was revocable at the defendants' whims, but which, in any event, the defendants did revoke for good reason considering the hindrance that was being caused.
- [45]. The particular discretionary jurisdiction in this case is not to be confused with any equitable jurisdiction involving the application of equitable doctrines.

Likelihood of further disputation between the parties.

[46]. I am of the view that if I were to grant full access to the plaintiff to allow his delivery vehicles to enter the defendant's land, there is likelihood of further disputes between the parties because the defendants are proceeding with their construction to near-completion after which they plan to build a car park in the space concerned whereas the plaintiff estimates a 4- month completion time through his counsel in court.

[47]. On the other hand, if some control were placed on the plaintiff's access, some compromise could be reached. But then again, I am conscious of the point argued by Mr. Patel, which I think is a valid argument, that prima facie, the plaintiff's building breaches the planning laws applicable for Commercial C lots in Namaka. And that without evidence otherwise, or that these have been relaxed, this court should not grant access.

ORDERS

[48]. I am not inclined to grant the Order sought because:

- (i) It is not clear to me yet whether or not Gosai has obtained a relaxation in terms of the relevant planning laws.
- (ii) The argument that there is an alternative way of doing the work without accessing the defendant's land is more convincing to me in light of all the evidence placed before me.

Accordingly, I strike out the Originating Summons with costs to the defendants in the sum of \$1,500 (one thousand five hundred dollars).

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Anare Tuilevuka
JUDGE
29 November 2013