

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 371 of 2013

BETWEEN : **TOKUSO CORPORATION LIMITED** a company incorporated in the
Fiji Islands and having its registered office at 46 Millet Road, Vatuwaqa,
Suva.

Plaintiff

AND : **NAVNITA DEVI** of Lot 9, Kings Road, Nasinu, Landlady.

Defendant

Appearance: **Mr Ramanu R of Veretawatini Law** for the **Plaintiff**
Mr Shelvin Singh of Shelvin Singh Lawyers for the **Defendant**

Date of Judgment: **27 May 2014**

INTERLOCUTORY JUDGMENT

1. The Plaintiff filed the writ of summons dated 24 December 2012 together with the statement of claim seeking following reliefs.
 - a. *Special damages to be assessed by the Court.*
 - b. *Financial loss in the sum of \$2,022,498.10 as per paragraphs 18 (i) to (xx).*
 - c. *Interest pursuant to Section 3 of Law Reform (Miscellaneous) (interest) Act Cap 27.*
 - d. *Post Judgment interest.*

- e. *Costs.*
- f. *Such other relief as Court deems just and equitable in the circumstance.*

2. Notice of Motion also filed on 24 December 2013 seeking the following orders supported by the Affidavit dated 24 December 2013 Mohammed Imran Qamer deposed on behalf of the Plaintiff Company stated inter-alia.

1. **THAT** he is the appointed director and business consultant and official representatives of the Plaintiff for its local dealing and am authorized to make this affidavit on behalf of the Plaintiff. Annexed hereto and marked with “TCL 1” is the copy authority.
2. **THAT** the Plaintiff is a Japan-based company and is a local registered business entity incorporated as a limited liability company having its branches in Suva and Lautoka mainly deals with second hand motor vehicle spare parts, used machines and second hand motor vehicles. Annexed hereto and marked with “TCL 2” is the copy of business registration certificate.
3. **THAT** the Defendant is the lawful proprietor of the property more-fully described in the Certificate of Title No. 10215 Lot 9 under DP No. 1962 (hereinafter referred to as “the property”) and situated at Kings Road, Nasinu. Annexed hereto and marked with “TCL 3” is the copy of title.
4. **THAT** the Plaintiff has authorized me to make, negotiate, sign and register its car sale and display business for the expansion of its car/motor vehicle business operation as part of its long-term plan.
5. **THAT** on 15th August 2013, I had a meeting with the Defendant and discussed the Plaintiff’s interest to lease the said property for its car sale and display operation and finally a Memorandum of Understanding (**MOU**) was signed by the Defendant

agreed to let, rent and/or lease out her property to the Plaintiff on a monthly basis. Annexed hereto and marked “TCL 4” is the copy of Memorandum of Understanding.

6. **THAT** according to signed MOU the monthly rent will be \$1,500.00 for the first two years and will be increased to \$2,000.00 for another five years upon obtaining the necessary approvals from the appropriate authority and commencement of business on the said property.
7. **THAT** upon signing the MOU, the Defendant agreed to make the necessary application to the Nasinu Town Council and Town and Country Planning for the purpose of Car Sale & Display on the said property. Annexed hereto and marked “TCL 5” is the copy of application.
3. Statement of Defence and affidavits in oppose were filed by the Defendant dated 11 February 2014 and 5 February 2014.
4. Affidavit in Response dated 16 April 2014 was filed by Iliveti Waqa on behalf of the Plaintiff and the matter was taken up for hearing on 2 May 2014.
5. The brief facts of the case is that the Plaintiff entered into a Memorandum of Understanding (MOU) dated 15/8/2013 with the Defendant to lease her property and it is important to note the terms of the said Memorandum of Understanding and I reproduce same which states:

“15/8/13

Memorandum of Understanding

14 August 2013 the meeting happened in Mrs Navnita Devi home between her and Tokuso Corporation with (M. Imran and Pervaize Akram)

1. *That Mrs Navnita Devi is giving her property on lease \$1500 + vet per month.*

2. *That the Rent will increase after two years and will be \$2000 for another 5 years as per month.*
3. *That her responsibility to make it commercial for all the expenses not more than \$5000.*
4. *That her responsibility to renovate residual area.*
5. *That if in the mean while if she wants to sell the property she prefers Tokuso Corporation.*

The Tokuso corporation will be tenant as a

1. *That Tokuso Corporation is taking the responsibility to make it commercial (relaxation for commercial temporary basis) and they will not charge more than \$5000 to her.*
 2. *That Tokuso Corporation is taking the property for sale the vehicles as car showroom.*
 3. *That responsibility to pay yearly basis business license of land transport license OHS license fire authority license.*
 4. *That Tokuso Corporation to keep the yard clean grass cutting wear n tear.*
 5. *That Tokuso Corporation will spend no more than \$5000 to make it commercial and after make it commercial they will deduct that money from rent.*
 6. *That in the mean while town council take time to make it commercial Tokuso Corporation will start paying the rent for residential property only not more then \$650 after occupy the building start paying the rent for residential property only not more then \$650 after occupy the building.*
- *Valid for 2 months.”*

Signed (Navita Devi)

Signed (M. Imran Qamer)

(Tokuso Corporation)”

6. In terms of the above MOU and the Defendant was to give her property to the Plaintiff on a lease inter alia the rezoning of the property from residential to commercial and the plaintiff alleged that Defendant had given property to a third party.
7. Oral and written submissions were made by the both counsel and now I would consider the submissions made.

7.1 The Plaintiffs alleged that after MOU was signed and approval was granted by the Nasinu Town Council by letter dated 23 September 2013 for the proposed car sale subject to conditions and the Defendant refused to give the property on lease to the applicant in terms of the MOU. The application fee was paid by the Plaintiff and referred to the paragraph 10 and 11 and 12 of the affidavit dated 24 December 2013 which states:

10. ***THAT** after the death of the Defendant's husband, sometime on 7th April 2010 the Defendant applied to the Nasinu Town Council for same purpose for re-zoning on the said property from Residential to Commercial "C" vide Reference No. 72/10 & TP 3/31/3-35 which was refused. Annexed and marked with "TCL6" is the copy of letter.*
11. ***THAT** upon being advised of the Defendant's plan of her said property, I approached the Defendant to allow and permit the Plaintiff to rent/lease the said property based on Relaxation Provision and Public Notification under Town and Country Planning Act Cap 139.*
12. ***THAT** the Defendant appointed me as her agent to assist her in obtaining the necessary approval for the proposed car sale and display for the Plaintiff.*

7.2 The Plaintiff submitted that the as stated in the above paragraphs the approval was granted for rezoning to commercial purposes due to the intervention of Mohammed

Imran Qamer on behalf of the Plaintiff at the Nasinu Town Council which shows that the MOU was partially performed by the Plaintiff.

8. The Defendant's Counsel in his oral submissions stated:

8.1 The applicant has not given as to undertaking to damages.

8.2 Both counsel for the parties relied on the Principles governing of an interlocutory Injunction elaborated in case of *American Cynamid V. Ethicon [1975] AC 396* detailed below:

1. *As to whether there is a serious question to be tried.*
2. *As to whether damages could be adequate remedy.*
3. *As to whether balance of convenience lies infavour of granting an interlocutory injunction.*

8.3 In addition to the above principles the Defendants Counsel raised the issue of undertaking as to damages quoting the case of *Natural Viti Ltd V. The Registrar of Titles and Others High Court case No. 371/05* (underreported – decided on 20 December 2005) where Hon Singh J. stated:

“The plaintiff has given no undertaking as to damages and this is a serious omission. Not only undertaking as to damages must be offered but the Plaintiff also have provided sufficient evidence of its financial worth in support of its undertaking...”

The Defendant submitted that on this ground alone the Plaintiffs application for injunction fails.

8.4 I find that there was no undertaking as to damages was given by the Plaintiff and I concur with the Defendant.

8.5 The Plaintiff citing Lord Diplock in *Case of American Cynamid V. Ethicon Ltd [1975] AC 396*, and the Statements made by Lord Justice Laddie in *case of Series 5 Software V. Clarke [1996] 1 All ER 853 and New Zealand Case Authority Kilssers Farm House Bakeries Ltd V. Harvest Bakeries Ltd [1985] 2 AZLR 129* at 142 [paragraphs 23 – 30] submitted either grant or refusal of Interlocutory injunction is a discretionary power of the Court which I concur and I state such discretion should be exercised considering the facts of each case.

8.6 Now I consider the principles of American Cynamid case which were detailed in paragraph 8.2.

8.6.1 **Is there a serious issue to be tried?**

(a) The Plaintiff submitted that the Defendant entered into the MOU dated 15 August 2013 for the lease of property of the Defendant to the Plaintiff which was not denied by the Defendant. However, I find the terms agreed in the MOU do not construe a binding agreement. There is no evidence placed before me on how the Plaintiff intervened in obtaining the approval for rezoning. The application made by the Defendant to the Nasinu Town Council (marked TCL 5 and annexed to the affidavit of the Plaintiff dated 24 December 2013) is dated 7/4/2010. That was long before the MOU dated 15/8/2013. The application made by the Defendant TCL 5 states:

*“Name and occupation of the proposed occupant:
Navita Devi
Managing Director (Drive Smart Suva Limited)”*

There is no application made on behalf of the Plaintiff by the Defendant.

(b) The Plaintiff states the said application was refused by the Nasinu Town Council (Annexure TCL 6).

- (c) The Plaintiff stated in his Affidavit in paragraph 12 he was appointed as the agent of the Defendant to get the approval however the Plaintiff did not substantiate such appointment by documentary evidence.
- (d) The Plaintiff further stated that by annexure TCL 7 approval was granted on 23/9/2013 on his intervention and no evidence is produced before me.
- (e) It is my conclusion that the only issue to be tried at a proper trial is as to whether the MOU is binding over the parties as such there is no serious issue to be tried by this court for an injunction order on the documents filed for the said purpose.

As to whether the damages could be adequate remedy.

The Plaintiff in his submission stated that damages would not be adequate remedy in view of the nature of the breach and on the grounds that the Plaintiff has suffered huge loss as a result of the breach of the agreement, which result in loss of business reputation. The Defendant does only domestic duties with very limited assets. The submission further state the Defendant has not provided any evidence to meet the Applicants damages. There is no basis for this argument. The loss suffered and the claim of the Plaintiff is based on the MOU and the claim of the Plaintiff will depended upon on a decision on the MOU whether it construe a proper agreement at a proper trial. The Plaintiff company itself had not provided any undertaking as to damages for its injunction orders. Further the Plaintiff has claimed damages in the sum of \$2,022,498.01 which establish the damages shall be the adequate remedy if the Plaintiff's claim is successful. As such I conclude the Plaintiff failed to establish that damages could not be adequate remedy and the Plaintiff fails.

Balance of Convenience

The Plaintiff had submitted there will be irreparable harm if the Defendant is not restrained from dealing with 3rd parties and not maintained by fulfilling its obligation through the MOU. As I

stated in the preceding paragraphs of this judgment as to whether MOU tantamount to a formal agreement should be decided at a proper trial first. Further there is no specific clause in the MOU preventing the Defendant dealing with a 3rd party. Even if so the Plaintiff can claim damages. There is no evidence to establish the balance of convenience lies with the Plaintiff and the argument fails. I too agree with the submission made by the Defendant that the Plaintiff is a foreign company and section 6 of the Land Sales Act is applicable and no evidence placed before this court that the Plaintiff complied with the requirements under Section 6.

Accordingly, I make the following Orders:

- (a) *Notice of Motion dated 24 December, 2013 struck out/dismissed.*
- (b) *The Plaintiff is ordered to pay summarily assessed costs in the sum of \$1000.00 to the Defendant within 30 days of this Judgment.*

Delivered at Suva this 27th Day of May 2014.



A handwritten signature in blue ink, appearing to read "Kotigalage".

.....
C. Kotigalage
JUDGE