In the High Court Fiji at Suva
Civil Jurisdiction
Civil Action No. 50 of 2014

Between:

James Alexander Trusler
Plaintiff

And:

Ratu Jope Uqeuqe Ratu
First Defendant

And:

Ratu Nacanieli Uqeuqe-Ratu
Second Defendant

And:

Fonetek Limited
Third Defendant

Appearances : Ms S. Devan for the plaintiff
Ms L. Macedru for the first and third defendants
Date of hearing: 1st May,2014

Judgment

1. *Introduction*

1.1. Fontek Ltd, the third defendant company, which I shall refer to as the "*company"* was incorporated by the plaintiff on 10th December,2012. The first defendant was appointed Managing Director of the company. He owned 51% of the shares in that company. The plaintiff owned the balance 49% and is a dormant director. The second defendant is the father of the first defendant. He was subsequently, made a director of the company. The plaintiff states that he incorporated the company, to operate the mobile phone repair centre of his business "*Foneology*", in order to give him "*more time to concentrate on*"(his new venture) *the e-ticketing project*".

1.2. In these proceedings, the plaintiff alleges that the company has failed to pay him for the the assets and equipment of "*Foneology*", which he transferred to the company.The first and second defendants had issued a notice of a shareholders' meeting to remove the plaintiff, as a Director of the company, since he had raised objections that the company is being mismanaged. The plaintiff also alleges that the second defendant is wrongfully holding himself out as a

shareholder and director of the company, and the first and second defendants are using his registered trade mark and design.

1.3. By ex-parte notice of motion filed on 20th February,2014,the plaintiff sought five interim orders, namely that:

a) the defendants deliver to the plaintiff all his "*assets and equipment*".

b) the first and second defendants be restrained from holding a special general meeting to remove him, as a Director of the company.

c) the second defendant be restrained from acting as a Director of the company.

d) the first and second defendants be restrained from using the plaintiff's graphic design or any other design resembling the design of the plaintiff in trade mark certificates no.301 of 2009 and 569 of 2009 and/or the words "*FONEOLOGY*" and "*FONEOLOGY ESHOP*".

e) the first and second defendants be restrained from withdrawing any moneys from the company's bank account at Westpac bank or any other of its bank accounts.

f) The Police render assistance to the plaintiff to enforce the orders.

1.4. On 6th,March,2014, I heard the ex parte summons. Ms Devan, counsel for the plaintiff submitted that the first defendant had failed to formalise a sale and purchase agreement and pay the plaintiff the value of the stock, assets, goodwill and the business of *"Foneology*" he transferred to the company. In support, the plaintiff had attached to his affidavit in support, email correspondences between the plaintiff and the first defendant. I made an ex parte order that the defendants preserve the assets and equipment set out in the plaintiff's affidavit in support.

1.5. Ms Devan also contended that, the first and second defendants had issued a notice of shareholders meeting dated 30th January, 2014, to remove the plaintiff as a Director, since he had raised several objections as to the mismanagement of the company. I made an ex parte order restraining the first and second defendants from removing the plaintiff, as a Director of the company, until further order.

1.6. I directed the plaintiff to notice the defendants, in respect of the other interim reliefs sought.

2. ***The determination***

A. *The inter partes hearing*

2.1. The plaintiff moves that the second defendant be restrained from acting as a Director of the company. It is alleged that the second defendant is wrongfully holding himself out to be a shareholder and director of the company.

2.2. The plaintiff states that he executed a resolution of the company appointing the second defendant as a Director of the company, "*on the representations of the second Defendant that the company needed funds*". It is contended that the resolution is invalid and incapable of enforcement, since none of the resolutions have been effected .

2.3. The resolution of the company reads:

> *1. Ratu Nacanieli Uqeuqe Ratu is accepted to acquire shares in Fonetek Limited at the current value per share of $1 per share.*
>
> ***2. Ratu Nacanieli Uqeuqe Ratu be appointed a member of the Fonetek Limited board with immediate effect.***
>
> *3. The current management of Fonetek Limited will remain as it is.*
>
> *4. The current share capital of Fonetek Limited shall be increased to accommodate all contributions made by James Trusler, Ratu Jope Uqeuqe Ratu and Ratu Nacanieli Uqeuqe Ratu at the value of $1 per share.*
>
> *5. Resolution No. 4 above should be done within 30 days and share certificates will be issued to each party*.(emphasis added)

2.4. I find the plaintiff's argument unconvincing. On a reading of the resolution, I do not find that the second defendant was appointed as a Director of the company, on the condition that resolution nos 4 and 5 was to be complied with, as the plaintiff make-believes. Rather, the second defendant was appointed as a member of the board with immediate effect, as expressly provided in resolution no.2. It also transpired in the first defendant's affidavit in reply that that the second defendant had injected monies to the company, as depicted in the bank statements of the company It follows that his appointment is justified.

2.5. I decline to restrain the second defendant from acting as Director of the company.

2.6. Next, the plaintiff alleges that the first and second defendants are unlawfully using his graphic design or a design resembling his design in his trademarks and/or the words "*FONEOLOGY*" and "*FONEOLOGY ESHOP*".

2.7. The plaintiff's registered mark no 569/2009 is:

2.8. Ms Devan invited my attention to the company's logo as depicted in the right hand side of its letter head. This is as follows:

2.9. I find that the word "*Foneology*" is a common feature in both marks. But that word is insignificantly depicted in both the plaintiff's mark and the company's logo, in comparison to the bold and distinctive words "*e shop*" in the plaintiff's registered trademark. What strikes the eye are the words "*e shop*", in particular, the letter "*e*" highlighted as it is in an imposing font. In contrast, the distinctive features in the company's logo are the two crescents and the name of the company "*Fonetek*" in bold letters.

2.10. In my judgment, the two marks are clearly distinctive and distinguishable. The plaintiff's registered trademark and design is dissimilar to the company's logo. In my view, there is no likelihood of deception or confusion between the two.

2.11. Finally, the plaintiff moves that the first and second defendants be restrained from withdrawing any moneys from the company's bank account at Westpac bank or any other of its accounts.

2.12. The plaintiff alleges several acts of mismanagement of the company by the first and second defendants. It is alleged that the first defendant has failed to (a) prepare accounts and conduct meetings of the company,(b) file tax returns with FIRCA and the Registrar of Companies,(c) pay FNPF to its employees and, (d) withheld financial and management and daily sales reports from the plaintiff. Ms Macedru quite correctly pointed out that the company was incorporated in December, 2012. Accordingly, the plaintiff's laments in his prolix affidavit of February, 2014, are premature.

2.13. Next, it is alleged that the company was in arrears of rent and in arrears of payments to DHL. These allegations are denied by the first defendant.

2.14. In my view, allegations of mismanagement of a company are matters to be determined in a substantive hearing, not in interlocutory proceeding.

2.15. The plaintiff's complaint is that the first defendant has withdrawn $ 20,000 from the bank account of "*Foneology*" as director's drawings, without informing him. It is alleged that the first defendant can "*misuse and mismanage*" the monies held in Westpac Bank account owned by "*Foneology*", as he is the sole signatory.

2.16. The first defendant points out that there was no agreement that the plaintiff's consent had to be obtained for any drawings, as contended by the plaintiff. The first defendant has drawn my attention to a pertinent email addressed to Westpac by the plaintiff, which has not been disclosed by the plaintiff, in these proceedings. This email provides that the company *"is the rightful owner of this account and not JT/TA FONEOLOGY(me)*".

2.17. In my judgment, the plaintiff's application to restrain the first and second defendants from withdrawing moneys from the company's bank accounts is flawed.

B. *The reliefs obtained ex parte*

2.18. On 6th,March,2014,I made an ex parte order that the defendants preserve the assets and equipment of the plaintiff. I also made an ex parte order restraining the first and second defendants from removing the plaintiff, as a Director of the company, until further order.

2.19. At the hearing, Ms Macedru, in moving for a dissolution of the injunction, submitted that the plaintiff had sought ex parte interim relief without a full disclosure of two documents, namely, the Memorandum of Intent entered into by the plaintiff and the first defendant on 3rd December,2012, and an email to Westpack from the plaintiff, as regards the operation of the "*James Trusler T/A Foneology*" bank account, which I have already referred to.

2.20. Ms Devan's riposte was that the contents of the Memorandum of Intent are recited in paragraphs 13 to 17 of the plaintiff's affidavit in support.

2.21. The Memorandum of Intent reads:

> *We the undersigned hereby understand and agree:*
>
> > ***a)*** *that a* ***new business entity shall be formalised and it will utilise some of the transferred complaint assets and resources of Foneology (list will be provided in detail on the MOU)***
> >
> > *b) that the substantial shares of the new business entity shall be allocated with James Alexander Trusler having 49% share interest and Ratu Jope Uqeuqe Ratu with 51% .*
> >
> > *c) that Ratu Jope Uqeuqe Ratu shall solely be responsible for the daily management of the new business entity including all aspects of finance and operations.*
> >
> > *d) Foneology will not compete with the repair and retail business with Fone Tek*
> >
> > ***e) Fone Tek Head Office/Workshop will continue to operate from 6 Harper Place with no rental fees.***
> >
> > ***f) that James Alexander Trusler shall remain a silent partner and may be involved in major shareholding decisions.*** (emphasis added)

2.22. I do find that the material aspects of the Memorandum of Intent are referred to in the plaintiff's affidavit evidence. Nonetheless, it was desirable that this important document should have been expressly disclosed by the plaintiff, particularly, as he moved for ex parte relief.

2.23. One of the disputes at the forefront of the plaintiff's case is that the first defendant failed to formalise a sale and purchase agreement and pay the purchase price for assets and equipment transferred by the plaintiff to the company. At the ex parte stage, Ms Devan brought to my attention emails exchanged between the plaintiff and first defendant in October and November, 2013, which state that the items are to be transferred to the company, as part of a sale and purchase agreement.

2.24. Be that as it may, it is not the plaintiff's case that his assets and equipment are being dissipated or are otherwise in jeopardy. It follows and I hold that there is no serious issue that warrants the ex parte injunction granted in this regard, to continue. There is no imminent threat to the plaintiff's assets and equipment. Accordingly, in all the circumstances, I discharge and dissolve the injunction granted to preserve the assets and equipment of the plaintiff.

2.25. Lord Diplock in ***Siskina v Distos SA,***(1979)AC 210 at page 256 stated that a right to obtain an interlocutory injunction is "*ancillary and incidental to the pre-existing cause of action*..(and) ***dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff ...***(emphasis added)

2.26. In ***London Borough of Islington v Elliot and Morris***,(2012) EWCA Civ 56, the Court of Appeal reviewed the principles that apply in the grant of a *quia timet* injunction before damage has taken place. The basis of the claim was an allegation that roots of a tree from a property owned by the council constituted an actual or potential nuisance to the neighbour's property. The claimants sought a *quia timet* injunction to have the trees removed, even though actual damage had not yet occurred. The Court of Appeal held that the justification for granting a *quia timet* injunction depended on whether the prospect of damage was sufficiently imminent and certain.

2.27. I would also note that the plaintiff has not disclosed his assets, and merely stated he is giving an undertaking in damages. In ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Limited,***(Civil Appeal No. ABU 0011 of 2004),the FCA stated:

> *Applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy.*

2.28. In ***National Bank Ltd v Bon Brewing Holdings Ltd & Ors,***(1990) 169 CLR 271 as relied on by Pathik J in ***Whittaker v Bhindi,***(Civil action 218 of 1998) it was held that an ex parte order should not have been made without an undertaking as to damages.

2.29. The other ex parte relief granted was futile, since the plaintiff had already been removed as a director of the company, at the stage the matter was supported. The plaintiff had moved for the adjournment of the shareholder's meeting of 21st February, 2014,on two occasions. The meeting was adjourned to 25th and then 28th February, 2014. On 28th February 2014, the plaintiff was not present at the meeting and he was removed as Director.

3. ***Orders***

(a) I discharge and dissolve the ex parte injunctions granted on 6th March, 2014.

(b) I decline to grant the plaintiff orders nos 3, 4, 5 and 6 set out in the plaintiff's notice of motion filed on 20 February,2014.

(c) The plaintiff shall pay the defendants costs in a sum of $ 2750 summarily assessed within 14 days of this judgment.

30th July, 2014

A.L.B.Brito-Mutunayagam
Judge