

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 168 of 2012

BETWEEN : **FIFA HOLDINGS LIMITED**

PLAINTIFF

AND : **PREM ISHWAR CHAND** trading as **PREM'S GRADING & HIRE SERVICES** of Votualevu, Nadi.

DEFENDANT

Counsel : Mr. Koya for the Plaintiff
Mr. Janend Sharma Lawyers for the Defendant

R U L I N G

INTRODUCTION

1. On 01 August 2012, Mr. Justice Fernando granted the following orders:
 - a) Interim injunction of 45 days restraining the Defendant from proceeding with winding up advertisement and proceedings against the Plaintiff.
 - b) Injunction expires on 14/9/12.
 - c) Orders to be served immediately on Defendants returnable on 4/9/12 at 10.00am.
2. On 14 September 2012, Fernando J extended the above injunctive Orders until further orders. It is these Orders that the respondent now wishes to dissolve. The background to this case might be stated as follows. On 12 January 2012, the plaintiff, Fifa Holdings Limited (purchaser) and the defendant, Prem Ishwar Chand (vendor) entered into a verbal agreement for the sale and purchase of a Rock Breaker. The agreed price was \$45,000. In due course, Chand delivered the Rock Breaker to Fifa, upon Fifa making an initial down payment of \$20,000. And Fifa took delivery of the same. There is a balance of \$25,000 outstanding.

FIFA'S CASE

3. Fifa alleges that the Rock Breaker that Chand delivered to it was not fit for its purpose. In its statement of claim, Fifa alleges at paragraph 10 that the Rock Breaker was not able to fit on the Excavator Machine that it was bought for and that Chand had failed to supply the attachment tools. Fifa also alleges that the Breaker contains faults and defects. Fifa alleges that it had specifically told Chand of the purpose for which it required the Rock Breaker and that Chand, in response, had warranted that the equipment was fit for that purpose.

4. Apart from the above, Fifa pleads that there is a debt of \$21,252.98 which Chand owes to Excavator Parts & Machinery (Fiji) Ltd. The benefit of that debt has been transferred by the said company to Fifa.

CHAND'S CASE

5. Chand pleads that the Rock Breaker was good for its purpose and was sold on an "as is where is" basis. Chand also pleads that the Rock Breaker "**was brand new and came with 2 chisels, 2 hoses and rock breaker attachment pins**".
6. Chand pleads that he did not hand over to Fifa the said attachments due to Fifa's failure to settle the balance of \$25,000 for the rock breaker. That appears to me to be saying that Chand would hand over to Fifa the attachments upon settlement of the balance outstanding on the purchase price.

COMMENTS

7. It is common ground between the parties that out of the \$45,000 agreed price for the Rock Breaker, Fifa had paid Chand \$20,000. The balance outstanding on the purchase price is \$25,000. Fifa has not settled that balance. In its statement of claim, Fifa pleads at paragraph 9 that it had to instruct its bank to stop payment of that balance on a cheque that Fifa had drawn to that amount in favour of Chand.
8. It appears from the statement of claim that the reason why Fifa stopped further payment was because of the alleged breach by Chand of their "partly oral and partly written" contract. The alleged breaches are set out in paragraph 10 of the statement of claim as follows:

PARTICULARS OF BREACH

- i) the Rock Breaker was not of good quality and was not able to fit on the Excavator Machine on which it was bought for.
 - ii) failed to deliver the attachment tools.
 - iii) failed to pay the sum of \$21,252.98.
9. Chand on the other hand pleads at paragraph 3 of his defence that he "**did not hand over the attachments due to the Plaintiff's failure to pay the balance of \$25,000 ...for the Rock Breaker**".

SECTION 221 NOTICE

10. It was that balance of purchase price for the Rock Breaker upon which Chand issued a section 221 Companies Act (Cap 247) against Fifa. That notice was served on 06 July 2012.

11. Before Mr. Justice Fernando on 11 August 2012, Mr. Koya for Fifa relied on the supporting affidavit of Firoz Jan Mohammed which sets out Fifa's case as above. Fernando J granted Order in Terms.

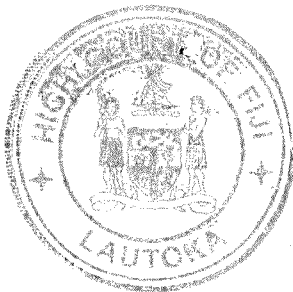
FERNADO J'S OBSERVATIONS

12. The application now before me by Chand is to dissolve the injunctive Orders granted by Fernando J.
13. Fernando J had noted in his minutes of 01 August 2012 that:

The Defendant has served a Demand Notice marked as FJM2 to the affidavit of Firoz Mohammed under section 221 of the Companies Act. There appear to be a likelihood of the Defendant proceeding to advertise winding up proceeding and thereby cause the Plaintiff irreparable damage unless the Defendant is restrained from doing so till the dispute is resolved. On a balance of convenience, if the plaintiff is in fact not solvent then there is not much harm in the delay of the winding up proceeding, however on the other hand, if the plaintiff is solvent then, the winding up advertisement could well affect the Plaintiff and could result the Plaintiff in becoming insolvent which would in turn affect the Defendant's chances of recovery of the Debt due. On the other hand, there is much less harm to both parties if winding up proceeding and advertisement is stopped or otherwise the Defendant would be using such proceedings in abuse of the process of Court knowing that the debt is disputed and the plaintiff is not insolvent. Mr. Koya submits another document signed by Fariz Javed Jan a document of the Plaintiff setting out the properties of the Plaintiff amounting to \$1,405,000.

COMMENTS

14. I would agree with the observations of Fernando J. on the papers before me, the debt is clearly disputed on genuine grounds. The issues raised are triable and cannot be determined summarily. Accordingly, I dismiss the application to dissolve the interim injunctive orders granted by Fernando J. Costs in the cause. Interim injunction extended until further orders of the court.
15. Chand would be well advised to amend his statement of defence to include a counter-claim. Case adjourned to **25 September 2014** at 8.30 a.m. before Master Ajmeer.



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Anare Tuilevuka
JUDGE
09 September 2014