

**IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CIVIL JURISDICTION]**

Civil Action HBC: 154 of 2015

BETWEEN : **PETER ALLAN LOWING** of Unit 6.2, Fairfax Apartments,
Hunter Street, Port Moresby, Papua New Guinea, Legal
Practitioner.

PLAINTIFF/APPLICANT

A N D : **PETER HOWELL** of 30A Lynwood Avenue, Killara, New
South Wales, Australia.

DEFENDANT/RESPONDENT

Counsel : For plaintiff: Ms Tupau Draunidalo

: For defendant: Ms Barbara Doton

Date of Hearing : 17 March 2016

Date of Ruling : 21 March 2016

R U L I N G

Application

1. This is an *inter partes* notice of motion filed 11 March 2016 seeking an interim injunction against the defendant/respondent ('the *application*').
2. By the application the plaintiff/applicant seeks the following orders:

- a) *The Defendant herein be forthwith restrained and enjoined either by himself, his servants, counsel, workmen and agents or otherwise howsoever from executing and/or enforcing in manner howsoever whether directly or indirectly the judgment or consent order obtained and/or delivered on or about 11 February 2016 (copy annexed as "A" to the Affidavit of Peter Allan Lowing sworn on 9 March 2016 annexed to the Affidavit of Suzie Cheer sworn on 10 March 2016 and filed herein support) in the Foreign Proceedings more particularly the proceedings being case number 2015/00113044 in the Local Court of Ryde in New South Wales, Australia instituted by the defendant against the plaintiff herein claiming breaches of an Employment Contract entered into by the plaintiff and the defendant herein on or about 30 March 2014 until the final determination of the within action or further orders of this Honourable Court.*
 - b) *Time of service of this application be abridged to one (1) day due to the urgency of this application.*
 - c) *Any other or further order that the court deems just and appropriate.*
 - d) *Costs of this application be in the cause.*
3. The Plaintiff relies on all affidavits of Peter Allan Lowing sworn in the within proceedings including his affidavits dated: 8 September 2015 and filed 18 September 2015; 2 February 2016 and filed 17 February 2016; 9 March 2016 annexed to the Affidavit of Suzie Cheer dated 10 March 2016; 11 March 2016 annexed to the Affidavit of Suzie Cheer dated 11 March 2016 and filed herein support and the affidavits of Suzie Cheer dated: 9 September 2015 and filed 10 September 2015; 2 February 2016 and filed 2 February 2016; 10 March 2016; 11 March 2016 and filed herein in support.
 4. At the hearing, both parties made oral submissions. Counsel for the plaintiff also tendered written submissions when counsel for the defendant sought leave of the court to file her written submission in a day. Then counsel for the plaintiff also sought leave of the court to file

supplemental written submission. The court accordingly allowed both applications and directed both parties to file their submissions by 18 March 2016. The matter was set down for ruling on 21 March 2016. In compliance of the direction both parties had filed their respective submissions.

The Facts

5. The Plaintiff, Peter Allan Lowing is a legal practitioner in Papua New Guinea and Fiji. He is citizen of Fiji as well as Australia. He ordinarily resident in PNG. He is operating a law firm under the name and style of Lowing and Associates ('the *Firm*'). Peter Howell, the defendant is also a legal practitioner in Sydney, Australia and a barrister and solicitor admitted to the High Court of Fiji. He is a citizen of Australia and ordinarily resident in Australia. In March 2014 the plaintiff entered into a written contract with the defendant ('the *Employment Contract*'). The Employment Contract provided, *inter alia*, that the defendant would practise as barrister and solicitor and manage the Firm for a period of three years from the date of the defendant's arrival in Fiji (the *Term*). The defendant arrived in April 2014 to commence employment with the plaintiff at the Firm. Clause 14 of the Employment Contract states that, '*this agreement is governed by the laws of Fiji. Each party irrevocably submits to the exclusive jurisdiction of the Courts of Fiji.*' In September 2014 dispute emerged between the parties. The defendant gave notice to the plaintiff that the defendant intended suing the plaintiff for damages for breach of the Employment Contract. On 24 July 2015 the plaintiff brought these proceedings against the defendant and sought declaration, injunction and damages for breach of the employment contract. On 10 December 2015 the defendant filed acknowledgement of service and on 22 December 2015 summons to set aside the writ of summons. On 2 February 2016 the plaintiff filed affidavit in opposition to the defendant's

application to set aside together with notice of motion to enter judgment against the defendant.

Background to the Application (Foreign Proceedings)

6. In April 2015 the defendant issued proceedings under case number 2015/00113044 in the Local Court in New South Wales at Ryde (the *Local Court*) claiming breaches of the Employment Contract (the *Foreign Proceedings*). The plaintiff applied for permanent stay of the foreign proceeding. The local court refused that application. The plaintiff did not appeal the refusal order. Instead, he filed statement of defence. On 11 February 2016 the foreign proceedings were settled by way of consent orders. The plaintiff now seeks injunction to restrain the defendant from enforcing the consent orders.

The Law

7. The jurisdiction to grant injunction derives from Order 29, rule 1 (1) of the High Court Rules 1988, as amended which provides:-

'1.-(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.'

8. The proper approach to the exercise of this jurisdiction was outlined by Lord Diplock in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 which set out the following test:

- (1) is there a serious question/issue to be tried?
- (2) are damages an adequate remedy?
- (3) if not, where does balance of convenience lie?

- (4) Are there any special factors?
9. I will deal with, in turn where necessary, the above test questions applicable in an application for interim injunction.

Plaintiff's argument

10. Ms Draunidalo, counsel for the plaintiff submits that, the court must assert its jurisdiction over the employment contract and the parties to the employment contract because they have agreed to be bound. The submission goes on that, the work to be performed under the employment agreement was to be performed in Fiji. Therefore the defendant is accountable to Fiji laws including taxation laws. The foreign proceedings has failed to take this into consideration including laws on Exchange Control. She also submits that, this court needs to assert its jurisdiction and regulate contractual arrangements entered into under Fiji Law. The court needs to protect its process as a matter of public policy.

Defendant's submission

11. Ms Barbara, counsel for the defendant submits that, the plaintiff seeks orders that this court restrain the defendant from executing and/or enforcing an order that the defendant obtained in his favour in the foreign proceedings by consent on the grounds that this court was the proper forum for any such order to be made as this is what the plaintiff claims in his statement of claim. She further submits that, by entering consent judgment in the foreign proceedings the plaintiff has submitted to the jurisdiction of the foreign court. It is noteworthy that the plaintiff who is a senior lawyer in his own right was represented by Dr.

Christopher Ward, S.C. at the time the consent orders in the foreign court were negotiated and agreed.

The Decision

12. By his application the plaintiff seeks a restraining order that the defendant be restrained from enforcing a consent judgment delivered on 11 February 2016 in the foreign proceedings. The order the plaintiff seeks more or less is an anti-suit injunction. The applicant does expressly say in his application that he has applied for an anti-suit injunction. However, the order in effect, if granted, will stop the defendant from proceedings with the foreign proceedings.
13. This is the second attempt by the plaintiff to obtain an anti-suit injunction. This time the plaintiff attempts to obtain an order against the defendant to restrain the defendant from executing the consent judgment delivered in the same foreign proceedings.

Plaintiff's previous application for anti-suit injunction

14. Previously, on 10 September 2015 the plaintiff filed an ex parte summons and sought an order restraining the defendant from continuing to pursue the foreign proceedings. That application was argued by a different counsel. The plaintiff cited cases that decided issue of anti-suit injunction. The court [I] after hearing that application refused to issue anti-suit injunction against the defendant on the ground that the plaintiff failed to establish that the foreign proceedings commenced by the defendant in Sydney are vexatious or oppressive (see my ruling delivered on 11 September 2015). Under para 32 of my ruling of 11 September 2015 I stated that:

'32. It is of interest that the defendant (plaintiff in the foreign proceedings) under para 8 of his amended statement of claim filed in the foreign proceedings states that, *on 12 September 2014 at a meeting between the plaintiff and the defendant, the defendant (plaintiff here) agreed and warranted to the plaintiff to pay all and any amounts and entitlements owing to the plaintiff in Sydney and the plaintiff accepted this oral representation as either a novation or collateral oral warranty in addition and in variation to the Employment Contract.*'

15. The plaintiff did not appeal the refusal order made in his previous application for anti-suit injunction.

Non-disclosure of previous application

16. The plaintiff does not state anything about the previous application for anti-suit injunction in the current application. The plaintiff applies for injunction. It is a discretionary remedy. In an application for injunction the applicant must disclose all material facts that may be relevant to the case. In this application the plaintiff has suppressed his failed attempt to obtain ex parte an anti-suit injunction against the defendant. The fact that his previous application for anti-suit injunction brought against the defendant to restrain him from continuing with the same foreign proceedings is a material fact the plaintiff ought to have disclosed it in this application which the plaintiff failed to do so. The plaintiff caused a different counsel to appear and argue the second application. This shows that he has not come to court with clean hand.
17. Counsel for the plaintiff strenuously argued that if the injunction is not granted the plaintiff will suffer irreparable loss. She heavily relied on

American Cyanamid's principle. I will therefore ask myself the first question that is there a serious question/issue to be tried.

Is there a serious question

18. Lord Diplock in *American Cyanamid* said (at page 407 H):

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial"

19. The plaintiff brought this action against the defendant and seeks *inter alia*:

(a) a declaration that the choice of Fijian law governs the Employment Contract and the irrevocable submission to the exclusive jurisdiction of the courts of Fiji is valid and enforceable in accordance with its terms.

(b) an injunction restraining the defendant from continuing to pursue the foreign proceedings or any orders made in the foreign proceedings; and

(c) Damages for breach of the Employment Contract.

20. In the previous *ex parte* application for anti-suit injunction the court refused to issue injunction against the defendant to restrain the defendant from continuing to pursue the foreign proceedings.

21. In current application (second application for anti-suit injunction), the plaintiff seeks to restrain the defendant from executing the consent

judgment entered in the foreign proceedings. The consent judgment has been entered with the consent of both parties. Both Counsels have signed in agreement for the consent judgment (see annexure "C" of Soro Alumecei Tarai filed on 17 March 2016).

22. In the previous application the court refused to issue the injunction against the defendant to restrain the defendant from pursuing the foreign proceedings. Proceedings include the period between commencement of proceedings and termination of the proceedings with judgment by consent or otherwise. Judgment or consent judgment is part of the proceedings. Therefore making a second application to restrain the defendant from enforcing the consent obtained in the foreign proceedings in an abuse of process.
23. The primary issue that has been raised by the plaintiff in this action is jurisdiction. The issue at the trial then would be whether or not the defendant breached the employment contract by initiating the foreign proceedings against the plaintiff having irrevocably submitted to the exclusive jurisdiction of the courts of Fiji.
24. The defendant initiated the foreign proceedings on the same employment contract against the plaintiff before he brought this action in this court against the defendant. The plaintiff made an application for a permanent stay of the foreign proceedings. That application was refused by the local court. The plaintiff opted not to appeal that order. Instead, he filed statement of defence. And to make things worse, a consent judgment has entered against the plaintiff. He has made part payment in respect of costs ordered in the judgment. This clearly shows that the plaintiff has acquiesced to the jurisdiction of the foreign court.

25. The plaintiff is a senior lawyer. He was represented by a counsel. His counsel has signed acknowledging the consent judgment. The plaintiff did not appeal the consent judgment on the ground that it has been made under duress as he has alleged in these proceedings. The court therefore cannot accept the contention that the consent judgment in the foreign proceedings was entered under duress.
26. The plaintiff has acquiesced to the foreign jurisdiction by his conducts as mentioned above. By this acquiescence he has waived his right to raise jurisdiction issue subsequently. As a result, the jurisdictional issue has diminished or extinguished. This follows that there is no serious issue to be tried at the trial.
27. In my assessment of the plaintiff's case it would be unlikely that the plaintiff will be able to obtain a permanent injunction against the defendant after trial as the jurisdiction issues has diminished.
28. I have decided that there is no serious issue to be tried at the trial. As such the case will not proceed to the next stage.
29. In American Cyanamid Lord Diplock stated that:

'The court should go on to consider whether ... if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages ... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appear to be at that stage.' (at 408B-C).

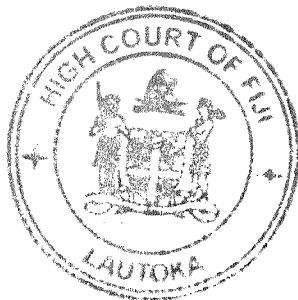
30. The questions such as, damages as an adequate remedy, balance of convenience and any other special factors will not arise in this case as I have held that there is no serious issue to be tried at the trial.

Conclusion

31. There is no serious question to be tried at the trial. I am not satisfied that the plaintiff would succeed at the trial in establishing his right to a permanent injunction against the defendant. I would therefore refuse to issue injunction against the defendant. I would further order the plaintiff to pay costs of \$850.00 which is summarily assessed to the defendant in 21 days.

Final outcome

- (a) Plaintiff's application for interim injunction is refused.
(b) Plaintiff will pay summarily assessed cost to the defendant in 21 days.



M H Mohamed Ajmeer
21/3/16

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M H Mohamed Ajmeer

JUDGE

**At Lautoka
21 March 2016**

Solicitors

For plaintiff: Messrs Reddy & Nandan Lawyers, Barristers & Solicitors

For defendant: Messrs Rams Law, Barristers & Solicitors