

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 249 of 2016

BETWEEN

FIJI ROADS AUTHORITY a statutory body established under the
Fiji roads Authority Decree 2012 as amended of Fiji Development Bank Building,
Level 4, 360 Victoria Parade, Suva, Fiji.

PLAINTIFF

AND

MWH NEW ZEALAND LIMITED a company incorporated in New Zealand
and having its place of business at Kadavu House, Level 4, 414
Victoria Parade, Suva.

DEFENDANT

Counsel : Mr. D. Sharma for the Plaintiff
Mr. R.G. Craig with Mr. W. Clarke for the Defendant

Date of Hearing : 29th March, 2017

Date of Ruling : 26th April, 2017

RULING

[1] The plaintiff filed writ of summons dated 29th September, 2016, seeking an order that the defendant forthwith return to the plaintiff the information.

[2] On the same day the plaintiff filed ex-parte summons under and in terms of Order 29 rules 1(2), 2(1) and 4 of the high Court rules seeking the following orders;

1. An order that the defendant, its servants and agents preserve and not deal with any document and other information created or received by the defendant between 1st January, 2012 to date in relation to the contract in writing dated 27th January, 2012 between the plaintiff and the defendant until further order of the court.
2. An order that the defendant or its agents or servants within 24 hours of this order give access to the duly authorised officer of the plaintiff all information and the location thereof.
3. An order that the defendant or its agents or servants do immediately deliver to the plaintiff at a place designated by the plaintiff all of the information requested by the plaintiff.
4. An order that the defendant to pay costs of this summons.
5. An order that all documents be served on the defendant and a returnable date be given by the court.

[3] Upon hearing of the summons the court granted the order (1) above ex-parte and ordered that it to be served on the defendant. On 30th September, 2016 when the matter was mentioned before this court the defendant appeared and undertook to allow the plaintiff to collect hard copies of all relevant documents available on the following Monday from the defendant's Suva office and also to have to soft copies of the relevant documents transferred to an external hard drive.

[4] The case was mentioned before the court to see whether the defendant had complied with the undertaken given on 30th September, 2016. On 20th March, 2017 the learned counsel for the plaintiff submitted that the defendant had failed to supply all the relevant document and upon inquiry by the court the learned counsel informed that the 'timesheets' have not been provided by the defendant. The learned counsel for the defendant submitted that this

issue has to be decided at the hearing of the writ of summons. The court then fixed the matter for hearing on the following questions;

- i. Whether the defendant has supplied all the relevant documents to the plaintiff; and
- ii. Whether this issue can be decided in this interlocutory application.

[5] When the matter was taken up for hearing there was no objection to this issue being determined without hearing the writ of summons.

[6] At the hearing the learned counsel for the plaintiff tendered written submissions and when the court inquired from the learned counsel for the defendant whether he intends filing written submissions he responded in the affirmative and the learned counsel for the plaintiff sought time to file submissions in reply in the event the defendant is granted time to file submissions. The learned counsel for the defendant then informed court that he was not filing written submissions. On 31st March, 2017 the solicitors of the defendants wrote a letter to the Senior Court Officer seeking permission to file written submissions but the court refused to grant time to file written submissions for the reasons that firstly; the counsel informed court that he was not filing submissions and secondly; the court had already fixed the date for the ruling and it would not have had sufficient time to prepare its ruling if time was granted to file submissions by the defendant and submission in reply by the plaintiff.

[7] The nature of the information that the plaintiff intended to obtain from the plaintiff is clear from the prayer (1) of the statement of claim which I have reproduced at the commencement of this ruling.

[8] In the statement of claim the plaintiff has averred that the defendant, in breach of clause 11.3 of the agreement, has failed and/or neglected return the information. It is thus clear that the plaintiff while seeking to have the information provided to the defendant, returned pursuant clause 11.3 of the agreement, in the ex-parte summons seeks certain information in excess of what it is not in fact entitled to under the agreement.

[9] Clause 8.4 of the contract provides as follows;

Upon request, and except as in clause 11.3, the Consultant must promptly return to the Client or destroy all Confidential Information which is in the Consultant's possession or control.

[10] Clause 11.3 of the contract reads thus:

At the end of the Services, the Consultant must return to the Client any property, including Client's Intellectual Property, including the Client's Intellectual property, or equipment of the Client which is in the consultant's possession or control.

Notwithstanding any other provision in this Agreement the consultant shall be entitled to retain a copy of all documentation Including confidential Information, drawings, drawings, specifications, reports, correspondence, computer files and records of every description for its record keeping purposes only. Such documentation shall include all relevant New, Pre-existing and client's Intellectual Property. The consultant shall treat all such documentation as Confidential Information and shall mark it confidential.

[11] Clause 12.8 of the agreement provides that the provisions of clauses 2.11, 5, 6, 8, 9, and 10 shall continue in effect after its termination.

[12] I do not see any ambiguity in clause 8.4 of the agreement. It clearly says that the plaintiff is only entitled to what has been given to the defendant. The learned counsel for the plaintiff submitted that according to the letter written by Howards Lawyers on 28th March, 2017 not only what has been provided by the plaintiff to the defendant, certain other materials outside clause 8.4 of the agreement has also been provided to the plaintiff. For the reason that the defendant has given any information which they are not legally bound to give the plaintiff cannot be heard to say that such an act of the defendant has the effect of altering the terms of the agreement. If the defendant so desires, it can provide the plaintiff with whatever the material that is in its custody. The question is whether the court can compel the defendant to provide the plaintiff with such material which it is not liable to part with in terms of the agreement. In my view it cannot.

[13] The learned counsel submitted that the word "relevant" must mean relevant to the application made in the summons and not to some arbitrary and as yet unknown standard determined by the defendant.

[14] When parties informed court the terms of the understanding between them none of them informed court what was meant by "relevant". Whatever the meaning given to it, the parties cannot retract from the terms of the agreement and they are bound by clause 8.4 of the agreement even after its termination.

[15] It is common ground that “timesheets” are not something that was provided by the plaintiff to the defendant. The only dispute is that the defendant failed to provide the plaintiff with the “timesheets”. In view of the above the court is of the view that the “timesheets” are not documents relevant to the applications of the plaintiff and therefore, the plaintiff’s application for an order on the defendant to handover the “timesheets” (or copies thereof) is without merit.

[16] The learned counsel for the plaintiff also submitted that in the even the defendant makes a claim the plaintiff will not be able to assess the claim without “timesheets”. If the defendant makes a claim it is up to them to provide all the materials relied on by them in arriving at the amount claimed. The court cannot and in fact, not entitled to make orders based on assumptions. If such a claim is made and if the matter is brought before the court, it can make necessary orders facilitating the parties to have necessary information relevant to the matter before it.

[17] For the reasons aforementioned the court makes the following orders:

1. The application for an order on the defendant to handover the “timesheets” (or copies thereof) to the plaintiff is refused.
2. The plaintiff is order to pay the defendant \$1000.00 as costs within 14 days from today.




Lyone Seneviratne

JUDGE

26th April, 2017