

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 300 of 2017

BETWEEN : BA PROVINCIAL HOLDING COMPANY LIMITED

PLAINTIFF

AND : PUBLIC RENTAL BOARD

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms P. Mataika, Mr K Vuataki with her, for the Plaintiff
Ms S. Devan for the Defendant

Date of Hearing : 1 February 2018

Date of Interlocutory Judgment : 8 February 2018

INTERLOCUTORY JUDGMENT

1. This is the Plaintiff's Inter-Partes Motion for the following Orders:
 - (1) An injunction that the Defendant by itself, its servants, employees or howsoever does not process any tender received by it for the construction of the Simla Low Cost Housing Project, Lautoka (Project) until further order.

- (2) Costs
 - (3) Such other orders as the Court deems just.
2. The grounds for the application are as follows:
- (a) The Defendant had accepted the Plaintiff's tender for the construction of the Project, as Contract A.
 - (b) The Plaintiff had accepted the Defendant's terms of Contract as Contract B.
 - (c) The Plaintiff and the Defendant had a process contract where the Defendant was to act fairly and in good faith.
 - (d) The Defendant was acting unfairly and in bad faith in breaching Contract A and not proceeding to sign Contract B and re-advertising its tender.
3. The Application is supported by the affidavit of Isimeli Bose (Bose), the Chief Executive Officer of the Plaintiff. He deposes as follows:
- (1) Circa November 2016, the Defendant called Tenders to carry out the Project to be deposited with them on 18 November 2016 with one of the requirements being for a 5% bond to be provided.
 - (2) That the Defendant as a public body had an implied obligation and undertaking to act fairly and in good faith in their tender process.
 - (3) That the Plaintiff relying upon the above had engaged its architects, engineers and quantity surveyors to prepare an offer to the Defendant for which the Plaintiff spent \$31,000 and obtained a 0.5% (sic) Bank guarantee from the Fiji Development Bank (Bank).

- (4) By its letter dated 14 July 2017, the Defendant accepted the Plaintiff's offer on conditions which included that a performance bond (bond) of 10% to be paid in cash or Bank guarantee within 2 weeks of signing the contract.
- (5) The Defendant thereupon sent a draft contract to the Plaintiff which it accepted and the Plaintiff instructed the Bank to prepare a 10% bond guarantee, and communicated this to the Defendant.
- (6) The Defendant did not send a hard copy of the contract and by its letter dated 12 October 2017 stated that:
 - (a) The acceptance of the tender was subject to the Plaintiff fulfilling conditions, none of which it had fulfilled.
 - (b) An extension of time was offered to the Plaintiff for the bond to be provided.
 - (c) Because of such matters, the Defendant "is not legally bound by the acceptance of tender".
 - (d) The Defendant was "at liberty to re-advertise tenders for the above project".
 - (e) "Furthermore given that (the Plaintiff) has failed to provide the 10% performance bond (the Defendant) are now retracting the offer."
- (7) Bose objected to the Defendant's breach of its obligation to act fairly and in good faith by its alteration of the conditions and in cancelling the contract when the bond would only be due after the signing of the contract which had not then been signed.

- (8) Unless restrained by an injunction, the Defendant will continue its breach of fair and good faith process and breach its contract with the Plaintiff.
 - (9) The Plaintiff has \$16,944,759 in assets and can undertake damages (sic) if an interim injunction is granted to stop the Defendant from accepting any other tenders for the project.
4. The Defendant's Acting Development Officer, Michael Vaurasi (MV) in the Affidavit in objection deposes as follows:
- (1) The Defendant (PRB) advertised a tender circa 12 November 2016 and the Plaintiff submitted its tender offer circa 10 February 2017.
 - (2) However upon further consideration the PRB Board agreed to increase the bond percentage to 10% and this was relayed to the Plaintiff in an email on 27 July 2017.
 - (3) The PRB formally accepted the Plaintiff's tender offer but subject to the fulfillment of certain conditions, one of which was that the Plaintiff would provide a performance bond of 10% to be paid in cash or provided by a bank guarantee within 2 weeks of signing the contract.
 - (4) The PRB provided a draft building contract to be reviewed by the Plaintiff.
 - (5) MV denied that the PRB had any legal obligation or was under any duty of care to act in good faith or fairly. Both parties were contracting on a purely commercial basis and at arm's length.

- (6) On 24 August 2017 the PRB decided to further postpone the signing of the contract until the Plaintiff submitted the bond and confirmed other matters.
- (7) By 13 September 2017 the Plaintiff had still not furnished the bond despite being fully aware that the PRB would not sign the contract until the Plaintiff submitted a bond.
- (8) The PRB Board decided to inform the Plaintiff that it was no longer bound by its letter of acceptance, given the non-fulfillment of conditions.
Thereafter they proceeded to re-advertise their tender on 14 October 2017.
- (9) MV states that the Plaintiff's own conduct and inaction led to the Defendant's retraction of the award of the tender to the Plaintiff and the Plaintiff is thus not entitled to an injunction, for the following reasons:
- (a) There was no enforceable or legally binding contract formed between the parties.
 - (b) The Plaintiff has not come to Court with clean hands and failed to disclose to the Court that it is not in a position to provide a 10% bond.
 - (c) The Plaintiff has failed to identify to the Court from where the so called fair and good faith process is imposed on the PRB.
 - (d) The undertaking provided is insufficient as the Plaintiff has a non-current liability in the sum of \$11,568,552 which is exorbitant.
 - (e) The PRB will be severely impacted if the injunction is granted because:
 - (i) It will not be able to provide affordable homes.

- (ii) It will have to reimburse the Government its grant of \$3.6m.
- (iii) On grounds of public policy and interest the injunction application should be dismissed.

5. At the hearing of the Motion, the Counsel for the Plaintiff submitted that there was a tender for the Project and the Plaintiff's offer was accepted by the PRB. The amount of the bond was increased from 5% to 10% which the Plaintiff accepted. The draft agreement was approved by the Plaintiff. The Defendant has to date not returned the final agreement, therefore there was no need to provide the bond, as it was required to be provided 14 days after the signing of the contract. Counsel said he was talking about the principle of justice. All the Plaintiff wanted was an injunction to stop the PRB from accepting any tender for the Project.
6. Counsel for the Defendant now submitted. She said she raised a preliminary objection which was that the substantive proceedings were done by an Originating Summons (O.S.) and was not in compliance with Order 7 rule 3 of the Rules of the High Court. The O.S. here only claimed relief in the form of declarations. The proceedings are irregular. The bond was never provided by the Plaintiff. Counsel said the acceptance was retracted by the PRB on the basis that conditions for acceptance were not complied with by the Plaintiff. Therefore there was no legally binding contract.
7. Counsel also said the construction agreement does not provide that the bond was to be provided before signing. She said that damages are an adequate remedy as the sum was \$31,000, which can be paid by the PRB. The balance of convenience favours the PRB.

8. Counsel for the Plaintiff in his reply said they were not talking about \$31,000 but of a question of trust.
9. At the conclusion of arguments, I said I would take time for consideration. Having done so I shall now deliver my decision.
10. As this is an application for an interlocutory injunction I shall get to the starting point for such matters which is the decision of Lord Diplock in : American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396, which laid down the following principles:
 - (1) The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect; it is enough if he shows that there is a serious question to be tried.
 - (2) The grant or refusal of an injunction is in the Court's discretion on the balance of convenience which entails consideration of the following factors:
 - (i) If damages are a sufficient remedy, an injunction ought not to be granted.
 - (ii) Whether more harm will be done by granting or by refusing an injunction.
 - (3) An undertaking from the Plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required.
11. I am also mindful that the purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. (See the White Book, pages 514, 515).

12. Thus, here after considering the affidavits and the submission of Counsel on both sides I am satisfied that there is a serious question to be tried viz whether, there was a legally binding contract between the parties. However I am also satisfied that damages will be a sufficient remedy as the Defendant is likely to be able to pay them. I do not think that the Plaintiff if it succeeds in his claim can be entitled to anything more or other than monetary compensation/damages. Any other asserted claim by the Plaintiff is too nebulous for the Court to consider
13. In the result, in the exercise of the Court's discretion an interlocutory injunction is refused, the Inter-Partes Motion is dismissed and I shall order each party to bear its own costs.

Delivered at Suva this 8th day of February 2018.



A handwritten signature in black ink, appearing to read "D Alfred", is written over a dotted line.

David Alfred
JUDGE
High Court of Fiji