

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 364 of 2020

Mohini Kant

Plaintiff

v

Sarveen Dutt

Defendant

Counsel: Mr D. Nair for the plaintiff  
Mr S. Nand for the defendant

Date of hearing: 3<sup>rd</sup> December,2020

Date of Ruling: 26<sup>th</sup> February,2021

### **Decision**

1. By ex parte summons filed on 26 November,2020, the plaintiff sought the following orders:
  - i. *An Interim Order that the Defendant by his servants and/or agents and whosoever be restrained from interfering howsoever with the Plaintiff's possession and occupation of the said premises located .at Lot 1, Nasinu Road, Valelevu, Nasinu, until further order of the Court.*
  - ii. *An Order that the Defendant by their servants and/or agents and whosoever be restrained from levying distress for rent against the Plaintiff, until further order of ..Court.*
  - iii. *An Order that the Defendant by their servants and/or agents and whosoever be restrained from interfering howsoever with the Plaintiff's possession and occupation of the said premises located at Lot 1, Nasinu Road, Valelevu, Nasiny until further order of the Court.*

2. On 27<sup>th</sup> November,2020, I granted the plaintiff an ex parte interim order restraining the defendant from interfering with her possession and occupation of the premises at Lot 1, Nasinu Road, Valelevu,(the premises) and from levying distress for rent against her, until further order. I adjourned the matter for inter partes hearing on 1<sup>st</sup> December,2020.
3. On 1<sup>st</sup> and 2<sup>nd</sup> December,2020, Mr Nair, counsel for the plaintiff stated that the summons could not be served on the defendant. On 3<sup>rd</sup> December,2020, Mr Nand, counsel for the defendant moved to file affidavit in opposition and written submissions. Mr Nair, counsel for the plaintiff agreed that the matter can be determined by written submissions. I directed that written submissions be filed on 11<sup>th</sup> December,2020. I reserved my Decision and extended the interim orders made until this Decision was delivered.
4. The dispute between the parties arises from termination of a lease by the defendant. On 13<sup>th</sup> June, 2019, the plaintiff, “*t/a GO FRY*” had entered into a Commercial Sub-Lease Agreement, (Agreement) with the defendant “*SARVEEN DUTT t/a SARVEEN DUTT ENTERPRISE*” to lease part of the premises for a period of 5 years commencing on 17<sup>th</sup> June,2019, at \$ 1800.00 a month from the fourth month after the commencement of the Agreement.
5. The plaintiff in her affidavit in support states that the defendant’s solicitors informed her that Sarveen Dutt t/a Sarveen Dutt Enterprise has been de-registered; a new company, Sarveen Dutt Enterprise Pte Limited, (SDEPL) would operate Total Service Station; the Agreement will be terminated within two months; and, SDEPL may enter into a fresh agreement for a period of 1 year at a monthly rent of \$2000 + VAT and 2 month’s rent bond with option to renew.
6. The plaintiff’s solicitors replied that the new terms and conditions were unacceptable and unreasonable. The defendant’s solicitors said that since she declined to enter into a fresh agreement, Sarveen Dutt the registered proprietor and director of the company has instructed them to serve notice to vacate the premises. On 31<sup>st</sup> July,2020, the solicitors sent her a notice stating that Sarveen Dutt gives notice that the Agreement will be terminated at the end of two months.

7. On 1<sup>st</sup> October,2020, the defendant informed the plaintiff's employee that he has disconnected the electricity and water supply to her shop, as the agreement, was terminated. The next day, her shop was locked with a padlock. On 19 November,2020, the defendant's solicitors sent a notice of non payment of rent from August, 2020 to November, 2020, in a sum of \$7,200.00 and stated that the defendant would proceed with distress for rent, if the sum is not paid by 20<sup>th</sup> November, 2020.
8. The affidavit continues to state that on 23 November,2020, the plaintiff was served with a notice of Distress of Rent. A sum of \$8,200.00 was claimed, which included the rent due for August, September, October and November 2020, and the fees of the solicitor and bailiff. The plaintiff states that she did not pay the rent for August and September, 2020, as her business was affected by the pandemic and the defendant had indicated that the rent was going to be increased to \$2000. She has never defaulted on rental payment before. One day's notice to pay rent is very unreasonable. She gives an undertaking as to damages of shop equipment worth around \$150,000.00 and stocks around \$30,000.00.
9. The defendant in his affidavit in opposition states that the business name has been de-registered, but he is still the registered proprietor. The plaintiff was required to pay all the rent due and utility bills prior to vacating the premises. The plaintiff breached the tenancy agreement, as she failed to pay the rent from 15<sup>th</sup> August, 2020, despite continuing to occupy the premises. The rent was last paid on 17<sup>th</sup> July 2020.
10. The electricity and water was disconnected for a very short period, as the tenancy was terminated. It was connected on the same day. He exercised his right of re-entry pursuant to the provisions of the tenancy agreement and the Property Law Act. The plaintiff has not removed her items and is still in occupation, without his permission. The plaintiff deliberately failed to pay rent after the notice of 31<sup>st</sup> July, 2020 was issued and did not state the reason why she cannot pay the rent. He has been suffering loss, as he has a substantial loan to pay as the premises is mortgaged. The plaintiff last paid rent on 15<sup>th</sup> July, 2020.

11. The defendant should be allowed to complete the Distress for Rent process served on the plaintiff on 23<sup>rd</sup> November 2020. The Bailiff took inventory of the items and the plaintiff executed inter alia that the goods so distrained are impounded on the premises. The Notice of Distress for Rent lapsed on 27<sup>th</sup> November, 2020, but the plaintiff failed to pay rent. He obtained a valuation of the goods from a registered Valuer who valued the items at \$13,355.00. The process of distress was completed on 27<sup>th</sup> November, 2020. The plaintiff with the assistance of a Police Officer forcefully removed certain impounded items. The plaintiff intends to remove all the items, close her business without paying the outstanding rent and the costs incurred by the defendant.
12. The principles governing the grant or refusal of an interlocutory injunction are laid down in the *American Cyanamid*, [1975]1All E.R.504. Lord Diplock stated that in granting an interim injunction “*the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.*” (pg 510)
13. On 27<sup>th</sup> November, 2020, I granted interim ex parte orders, as the Notice of Distress of Rent lapsed on that day and the plaintiff complained that she was given 1 days notice to pay the arrears of rent.
14. On 19<sup>th</sup> November, 2020, the defendant’s solicitors sent the plaintiff a notice of non payment of rent from August, 2020 to November, 2020, in a sum of \$7,200.00 and stated that the defendant would proceed with distress for rent, if the sum is not paid by 20<sup>th</sup> November, 2020. On 20<sup>th</sup> November, 2020, a Notice of Distress of Rent was issued.
15. It is not in dispute that the plaintiff is admittedly in arrears of rent from August, 2020. The plaintiff states that she did not pay rent for August and September, 2020, as her business was affected by the pandemic and she was unsure whether to pay \$ 1800.00 or \$ 2,000.00. She also states that she is willing to pay the rents now.
16. In my view, the reasons given by the plaintiff for non- payment of rent are unacceptable. The plaintiff did not accept the increased rent and hence there was no uncertainty in regard to the rent payable.

17. The tenancy was terminated with 2 months notice in writing in accordance with the terms of the Agreement. Accordingly, the plaintiff has no legal right to remain in possession and occupation of the premises.
18. 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)
19. In *Honeymoon Island (Fiji) Ltd v Follies International Ltd*, [2008]FJCA36; ABU0063.2007S (4 July 2008) the judgment of the Court stated:

*The Court must be satisfied that there is a serious question to be tried, in other words whether the applicant has any real prospect of succeeding in its claim for a permanent injunction at the trial. If the Court is satisfied that there is a serious question to be tried the Court must then consider whether the balance of convenience lies in favour of granting or refusing to grant the interlocutory relief sought: American Cyanamid Co v Ethicon Ltd*
20. On the evidence before me, the plaintiff have failed to show that they have a real chance of succeeding at the hearing.
21. The plaintiff, in her originating summons seeks a declaration that the Notice of Distress of Rent issued is irregular, null and void and of no effect and, an order that the defendant be restrained from levying distress for rent and interfering with her possession and occupation of the premises. I note that there is no claim for a permanent injunction.
22. In *Goundar v Feisty Ltd*, [2014] FJCA 20; ABU000001.2013(5 March, 2014) Amaratunga JA stated:

*The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim.*

23. The plaintiff has not satisfied Court that damages would not be a sufficient remedy and the interim reliefs should continue. She has not contended that the defendant is not in a financial position to pay damages
24. The second guideline set out in the *American Cyanide* case is whether damages would be an adequate remedy to the plaintiff. Lord Diplock at pgs 509 to 510 stated:

*The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need for the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against the other and determine where the balance of convenience lies.*

*.....the governing principle is that the court should first 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 application and the time of the trial. If damages in the measure recoverable at common law would be 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 appeared to be at that stage. If on the other hand damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypotheses that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. (emphasis added)*

At pg 511, Lord Diplock said:

*..it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.*

25. In *Honeymoon Island (Fiji) Ltd v Follies International Ltd*, (*supra*) the Court stated:

*As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "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": American Cyanamid (*supra*) at 408.(emphasis added)*

26. The related question is whether the defendant would be adequately compensated by the plaintiff's undertaking as to damages.

27. In her affidavit, the plaintiff states that the net worth of her shop equipments is \$150,000.00 and stock is \$10,000.00 approximately. The plaintiff has not filed any evidence to fortify her undertaking.

28. Calanchini J(as he then was) in *Nand v Prasad*, [2011] FJHC 85; HBC277.2010 (21 February 2011) stated:

*The law is well settled in Fiji that an applicant for interim injunctive relief who offers an undertaking as to damages must also proffer sufficient evidence of his financial position: Honeymoon Islands (Fiji) Ltd –v- Follies International Limited (unreported Civil Appeal No. 63 of 2007 delivered on 4 July 2008). As a result the Plaintiff in the present application was required to proffer sufficient evidence of his financial position. The sufficiency of that evidence was a relevant consideration in determining the value of the undertaking as to damages which in turn was a matter to be taken into account by the Court in deciding whether to exercise its discretion in favour of the applicant....*

29. In *Morning Star Co-operative Society Ltd. V Express Newspapers Ltd*, [1979] FSR 113 at pg 118 , Foster J., said:

*An undertaking as to damages if the plaintiff loses the action is the price which a person asking for an interlocutory injunction has to pay and it is only in very exceptional circumstances that the court will dispense with such an undertaking. No special circumstances were suggested here. But where the damage cannot be quantified and it is clear that the plaintiff is unlikely to be able to pay any appreciable damages, no interlocutory relief should be given.*  
(emphasis added)

30. In my view, the plaintiff would be adequately compensated by an award of damages in the event that she was successful at the substantive hearing. There is no doubt as to the adequacy of damages. The defendant is the registered proprietor of the State Lease of the premises.
31. The plaintiff has admittedly not been paying the monthly rental amount of \$1800.00. She has had adequate time to make payment of the rents admittedly due. I also note that the defendant is being restrained from selling the plaintiff's stock and trade as a going concern to recover the rental.
32. In my view, the appropriate course of action is to discharge and discontinue the interim injunctions granted on 27<sup>th</sup> November,2020.
33. **Orders**
- a. I discharge the interim order restraining the defendant from interfering with the plaintiff's possession and occupation of the premises at Lot 1, Nasinu Road, Valelevu, Nasinu, with effect from 5<sup>th</sup> March, 2021 at 4.30pm.
  - b. I discharge the interim order restraining the defendant from levying distress for rent against the plaintiff forthwith.
  - c. Costs in the cause.



*A.L.B. Brito-Mutunayagam*  
A.L.B. Brito-Mutunayagam  
JUDGE  
26<sup>th</sup> February,2021