IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

ACTION NO. HBC 224 OF 2020

BETWEEN : **DAVID CONRAD PETERSON** and **RUTH ANNE PETERSON** as Trustees of the David Conrad Peterson and Ruth Anne Peterson Trust, both of Maui Bay Estates, Baravi, Korolevu.

PLAINTIFFS

A N D : **CHRISTINE BADIA NKANKA aka CHRISTINE SILVIE BADIA** and **WAYNE DOWN** both of Maui Bay Estates, Baravi, Korolevu.

FIRST DEFENDANTS

A N D : **SIGATOKA TOWN COUNCIL** a body corporate duly constituted under the Provisions of Local Government Act Cap 125, having its registered office in Civic Building, Queens Road, Sigatoka.

SECOND DEFENDANT

A N D : **THE DIRECTOR OF TOWN AND COUNTRY PLANNING** Ministry of Local Government, having its registered office in 1st Floor, Fiji Football Association House, 4 Gladstone Road, Government Buildings, Suva, Republic of Fiji.

THIRD DEFENDANT

Appearance : **Mr Roopesh Singh with (Ms) Arti Swami for the plaintiffs**
Mr. Chen Bunn Young for the first defendants
No appearance for the second defendant
Mr Josefa Mainavolau for the third defendant

Hearing : **Thursday, 01st October, 2020 at 9.00 a.m**

Decision : **Friday, 29th January, 2021 at 9.00 a.m**

DECISION

[A] INTRODUCTION

(01) The matter before me stems from an inter-parte notice of motion filed by the plaintiffs seeking the grant of the following orders;

(a) ***THAT*** *the First Defendant, its agents and servants be restrained from developing or constructing a building or any improvements upon the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters until further orders of this Honorable Court.*

(b) ***THAT*** *the First Defendant, its agents and servants be restrained from doing or causing any act to be done to cause any excessive noise, vibrations, water coming onto the land comprised in Certificate of Title Number 36037, Lot 17 on DP 9022 containing an area of 2920 square meters emanating from the process of construction from the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters.*

(c) ***THAT*** *the First Defendant, its agents and servants be restrained from causing any nuisance to the occupants and residents of the land comprised in Certificate of Title Number 36037, Lot 17 on DP 9022 containing an area of 2920 square meters.*

(d) *Costs of this action on solicitor/client indemnity basis.*

(e) *Any other relief this Honorable Court seems just.*

(02) The application is made pursuant to Order 29, rule (1) and (2) of the High Court Rules 1988 and under the inherent jurisdiction of the Court.

(03) The prayer (a), (b) and (c) in the inter-parte Notice of Motion are for prohibitory injunctions. The first defendants oppose the application.

(04) The following affidavits have been filed;

(*) The affidavit of Ruth Anne Peterson in support of the application filed on 22nd September, 2020 (**the affidavit in support**).

(*) The affidavit of Christine Badia Nkanka (the first-named first defendant) in opposition to the application and in opposition to the affidavit in support, filed on 30th September, 2020 (**the affidavit in opposition**).

(*) The affidavit of David Conrad Peterson in reply to the affidavit in opposition filed on 30th September, 2020 (**the affidavit in reply**).

[B] BACKGROUND

(01) The plaintiffs are neighbors of the first defendants at Maui Bay, resident on Lot 17 Maui Bay. Their land adjoins Lot 2 (the first-named first defendants' land) and both properties share a common fence.

(02) The lots along the seafront were zoned for residential use. In December, 2009, the Director of Town and Country Planning re-zoned the lots from residential use to special use – tourist villa zoning on the conditions that; [Exhibit E referred to in the affidavit of Ruth Anne Peterson sworn on 21-09-2020].

(*) That all development activities and operations carried out on the site shall strictly comply with the Maui Bay Estate Specific Development Guidelines (2009).

(*) That an Environmental Management Plan (EMP) and Operational Environmental Management Plan (OEMP) shall be submitted to the Director of Environment for determination. The Building application shall be submitted with the approved EMP and OEMP to the Director of Town and Country Planning.

(*) That no development work or activity shall be carried out on the site without the prior consent of the Director of Town and Country Planning.

(*) That the approval is valid for two (02) years only.

(03) The plaintiffs allege that the first defendants have commenced construction of a tourist development on their land in 2020 without any proper approval for rezoning. The plaintiffs claim that the land is zoned for residential use and the third defendant's rezoning dated 20th December 2009 from **Residential to Special Use (Tourism Villa)** has already expired.

(04) On 23rd September, 2020 the plaintiffs filed an amended writ of summons and a statement of claim alleging, inter alia, the following; (Reference is made to paragraph (12) to (17) of the amended statement of claim).

12. ***THAT*** *by the act of construction the first defendant, its agents and employees are wrongfully causing excessive noise and vibrations to effect the plaintiffs said land and improvements thereon and the first defendants, its employees and agents are causing disturbance to the residence of the said land and are*

interfering with the comfortable and convenient enjoyment of the said land by the plaintiff and its residence.

13. *THAT the actions of the first defendant, its agents and servants as complained of hereinabove constitutes an interference with the reasonable domestic enjoyment of the plaintiffs property by their residence.*

14. *THAT further and in addition, the first defendant is developing the defendants land in contravention of Section 7 (1), (4), (6) and (7) of the Town Planning (Amendment) Act 1997 and is committing a criminal offence in accordance with Section 44 of the Town Planning Act (as amended by Section 7 of the Town Planning (Amendment) Act 1997).*

15. *THAT in the event the first defendant is allowed to continue with the construction as aforesaid the plaintiffs' interest in the said land will be adversely affected as the first defendants are constructing a structure on their land illegally.*

16. ***THAT** first defendants intend, unless restrained by this honorable court to continue such actions as complained of and act in contravention of Section 7 of the Town Planning Act (as amended by Section 7 of the Town Planning (Amendment) Act 1997).*

17. *THAT the plaintiff has suffered loss and damages full particulars of which cannot be given yet apart from stating that the plaintiffs have already suffered substantial loss of value of its improvements on the said land by the construction.*

(05) On the other hand, the first defendants say that they are carrying out development works on Lot 2 on DP 10404 (on their land) in compliance with;

(a) the approval of their building plans from the Department of Town and Country Planning **("DTCP")** issued on 24 April 2020. The DTCP by letter on 25 September 2020 confirmed that the Department approved the outline and detailed building approvals (See annexure CBN 3 of the Affidavit in Opposition).

(b) the approval of their building plans from the Sigatoka Town Council issued on 28 September 2020 which refers to the 24 April 2020 approval of the building plans by the DTCP (See annexure CBN 2 in the Affidavit in Opposition).

(c) the approved renewal of re-zoning of Lot 2 to special use- tourist villa issued on 28 September 2020 from the DTCP (See annexure CBN 4 in the affidavit in opposition, however the first defendants claim that the re-zoning approval was not needed to commence construction, only the building approvals were required); and

(d) the approval dated 28th July 2020 from the Department of Environment confirming the requirements under the *Environment Management Act 2005* were met (see annexure CBN 5 of the affidavit in opposition).

(06) The first defendants deny the allegation of nuisance by noise, vibration and water seepage caused by the construction of the building and further state; (verbatim)

(*) The defendants have built a retaining wall within their land along the common boundary which has removed any prospect of water seeping off from the defendants' land onto the plaintiffs'

(*) The water seepage is actually from the plaintiffs' land. (Annexure CBN 9)

(*) Mrs Peterson has not disclosed any medical evidence that the defendants' construction works are causing her and her husband "distress and anxiety" as she alleges.

(*) Mrs Peterson has not disclosed any evidence of loud noise and or loud noise into late evenings from machinery on the defendants' land.

(*) Mrs Peterson has not disclosed any evidence that the defendants' workers pass disparaging comments to her and her husband. She has not annexed any police report or any written complaint to the Sigatoka Town Council.

(*) The developments and the use of machinery are strictly monitored by the Sigatoka Town Council on a weekly basis.

(07) As to the first defendants claim that they have all the requirements from the relevant authorities, the plaintiffs reply;

(*) the application for re-zoning made on 17/9/2020 is for hotel expansion but the approval for re-zoning granted on 28/9/2020 is for special use (tourism villa) – for construction of villa.

(*) under the site specific development guidelines (SSDG) a hotel is not permitted to be constructed within the development.

(*) the first defendants laid the foundation and erected the tennis court prior to obtaining the approval for re-zoning on 28/9/2020.

(08) As for nuisance, the plaintiffs further state; (Reference is made to paragraph (5) of the affidavit of David Conrad Peterson in reply).

5. ***THAT*** *as to paragraph 5 and 6 of the said affidavits I say that our claim against the 1st Defendant is clear our case as is based on the nuisance that is now being created by the 1st Defendant from their said land due to the construction works;*

5.1 I annex marked as Exhibit B is a copy of photos taken recently over the plaintiffs land which shows our home and a foundation for a tennis court constructed right up our fence.

5.2 The 1st Defendants have left no space between the said foundation and our fence falling on the common boundary. Thus, causing damage to our fence.

5.3 Further the 1st Defendant has dug along the common boundary where our fence is constructed and also under our own fence, I refer to exhibit M a picture attached our surveyors report.

5.4 The 1st defendants their employees utilize heavy machinery by placing the same beside our window and use the same. These machineries emit loud noises and crushing sounds which disturb my wife and I tremendously.

5.5 The 1st defendants employees whilst working on the said land have been frequently passing disparaging remarks at my wife and taking out pictures. I annex hereto and mark as Exhibit C is a copy of photos of the 1st Defendants employees taking our photos.

5.6 The construction work is carried through the afternoon into the evening and noise continues as well and the unbearable noise continues well into the evening made by the construction works on the said land.

5.7 The construction works causes dust to come into our homes and onto our pool and the patio.

5.8 The employees of the 1st defendant have sprayed water into our home as well and into our laundry inside our house.

[C] CONSIDERATION AND THE DETERMINATION

(01) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "Interlocutory Injunction".

(02) The plaintiffs' application is made pursuant to Order 29, rule (1) and (2) of the High Court Rules, 1988, which provides;

Application for injunction (O.29, r.1)

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, counter claim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

(03) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of **"American Cyanamid Co v Ethicon Ltd"**[1] as follows;

(A) Whether there is a serious question to be tried?
(B) Whether damages would be an adequate remedy?
(C) Whether balance of convenience favour granting or refusing interlocutory injunction?

In that case **Lord Diplock** stated the object of the interlocutory injunction as follows at p. 509;

"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 favor at the trial: but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against 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 favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies."

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[1] **(1975) (1) ALL.E.R 504**

In **Hubbard & Another v. Vosper & Another**[2] Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

> *"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."*

[D] No claim to judgment for a final injunction

(04) The plaintiffs on 23-09-2020, filed an amended writ of summons and a statement of claim seeking, inter alia, the following;

(a) *An order to restrain the first defendants by themselves their servants or agents or otherwise from repeating or continuing the said nuisance or any nuisance or like kind.*

(b) *There be an order for special and general damages in favour of the plaintiffs.*

(c) *Punitive damages or Exemplary damages against the defendants.*

(d) *Interest on any monetary award.*

(e) *Costs of this action on solicitor/client indemnity basis.*

(05) As I said before, the plaintiffs have sought the following interlocutory reliefs, in the inter-parte notice of motion filed on 22-09-2020;

(a) ***THAT*** *the First Defendant, its agents and servants be restrained from developing or constructing a building or any improvements upon the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters until further order of this Honorable Court.*

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[2] **[1972] EWCA Civ 9; (1972) 2 WLR389**

(b) ***THAT*** *the First Defendant, its agents and servants be restrained from doing or causing any act to be done to cause any excessive noise, vibrations, water coming onto the land comprised in Certificate of Title Number 36037, Lot 17 on DP 9022 containing an area of 2920 square meters emanating from the process of construction from the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters.*

(c) ***THAT*** *the First Defendant, its agents and servants be restrained from causing any nuisance to the occupants and residents of the land comprised in Certificate of Title Number 36037, Lot 17 on DP 9022 containing an area of 2920 square meters.*

(06) It is quite clear that the injunction claimed in prayer (a) and (b) in the inter-parte notice of motion filed on 22-09-2020 is not part of the substantive relief claimed in the amended writ of summons and the statement of claim filed on 23-09-2020. There is no permanent injunction (no claim to judgment for a final injunction) sought in the amended writ of summons and in the statement of claim for;

(a) ***THAT*** *the First Defendant, its agents and servants be restrained from developing or constructing a building or any improvements upon the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters until further order of this Honorable Court.*

(b) ***THAT*** *the First Defendant, its agents and servants be restrained from doing or causing any act to be done to cause any excessive noise, vibrations, water coming onto the land comprised in Certificate of Title Number 36037, Lot 17 on DP 9022 containing an area of 2920 square meters emanating from the process of construction from the land comprised in Certificate of Title Number 40987 and Lot 2 on DP 10404 containing an area of 1417 square meters.*

(07) In **Goundar v Fiesty Ltd**[3] Amaratunga JA in the court of Appeal (with whom Chandra and Muthunayagam JJA concurred) held:

> *"32.* ***The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim****. The only claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] 1 All ER 504 at 510 Lord Diplock held;*
>
> > *"...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the*

[3] **[2014] FJCA 20; ABU0001.2013 (5 March 2014)**

plaintiff has any ***real prospect of succeeding in his claim for a permanent injunction at the trial,*** *the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

As to that, 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 the application and the time of the trial' (emphasis is mine)*

33. ***How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected in limine****."*

(Emphasis added)

In the words of Lord Diplock in **American Cyanamid** (at p. 510), the plaintiff must have a *"real prospect of succeeding in his claim for a permanent injunction at the trial"* and here the plaintiff seeks no permanent injunction.

The injunction claimed in prayer (a) and (b) in the inter parte notice of motion filed on 22-09-2020 could never stand on its own without a final judgment for an injunction claimed. A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendants arising out of an invasion, actual or threatened, by them of a legal or equitable right of the plaintiffs for the enforcement of which the defendants are amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. The injunction sought in the notice of motion must be part of the substantive relief to which the plaintiffs' cause of action entitles them; and the thing that is sought to restrain the defendants from doing must amount to an invasion of some legal or equitable right belonging to the plaintiffs and **must be enforceable by the final judgment for an injunction.** Therefore, the application should be dismissed *in limine* as there are no permanent injunctions sought in the statement of claim in relation to prayer (a) and (b) of the notice of motion. This complication weighs, and in my judgment, weighs quite significantly, against the grant of the interlocutory relief that is sought.

That being so, the prayer (a) and (b) of the inter-parte notice of motion is declined.

[E] <u>The plaintiffs' grievance about the building plan approvals and the re-zoning decision</u>

(08) The plaintiffs dispute the approval granted by the third defendant on 28/9/2020 for proposed re-zoning of Lot 2 on DP 10404 from residential to special use (Tourism villa). [Annexure CBN-04 in the affidavit of Christine Badia Nkanka sworn on 29/09/2020.]

(09) David Conrad Peterson alleges that; (Reference is made to paragraph (6) of the affidavit in reply sworn on 30/9/2020).

> *6.* ***<u>THAT</u>*** *I do not agree that the approvals that are attached for the development that the 1st defendant is now undertaking on the said land as;*
>
> *6.1 The application made on the 17 of September 2020 is for Hotel Expansion and not for construction of a Villa. The said land is vacant.*
>
> *6.2 I am aware under the Site-Specific Development Guidelines (SSDG) a hotel is not permitted to be constructed within the Development.*
>
> *6.3 The 1st defendant had commenced construction prior to obtaining any approval from the 3rd defendant.*

Then later on, in paragraph 24 of the affidavit,

Further I say that the approvals recently purported to be granted not legal as advised by counsel as;

24.1 The purported application made was for a hotel expansion.

24.2 The application was made for a new DP 10404 as the previous approvals were set for DP 9022, therefore a renewal application could not made for re-zoning but a fresh application ought to be made.

24.3 The application is made for hotel expansion and the purported approval is for Special Use (Tourism Villa).

(10) As to the allegation of commencing constructions without approval, the first defendants' say that;

(*) The building plans were approved by the third defendant before construction began.

(*) The re-zoning approvals from the third defendant is a condition precedent to the use of the constructed premises. The approval for re-zoning is not a condition precedent to commencing construction works.

(11) As I understand the pleadings of the first defendants, pursuant to a decision of the third defendant made on 28/09/2020 to re-zone the first defendants Lot 2 on DP 10404 from residential to special use (Tourist Villa Apartments), **the first defendants have continued building a commercial building on their above mentioned property.**

(12) The plaintiffs complain that;

(*) The application is made for hotel expansion but the approval given is for Special Use (Tourism Villa).

(*) A renewal application could not be made for re-zoning but a fresh application ought to be made.

(*) Under the Site-Specific Development Guidelines (SSDG) a hotel is not permitted to be constructed within the development.

Confining me for the moment simply to the issue of third defendant's rezoning decision; it seems to me that the plaintiffs' complaint rests primarily upon the third defendant's decision made on 28.09.2020 to rezone the first defendants' lot 2 on DP 10404 from Residential to Special Use (Tourist Villa apartments). It is quite clear that the plaintiffs' primary grievance lies with the third defendant. The plaintiffs' remedy is against the third defendant. Then what is the sense in putting a halt to the continuation of the construction work at the site? The plaintiffs are inviting the court to put a halt to the continuation of the construction work at this stage and have the decision of the third defendant made on 28/09/2020 reviewed without applying for judicial review. I candidly confessed that I am surprised! I venture to say that they ought to proceed by way of application for judicial review under Order 53 of the High Court Rules. The relief is available upon judicial review. What I venture to point out is that this action is a blatant attempt to avoid the protection for the defendants for which Order 53 provides. It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority is arbitrary, unreasonable, unconstitutional, unjustified and/or unlawful, to which he is entitled under public law, to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 of the High Court Rules for the protection of such authorities.

(13) Before I turn to the second question, i.e, the adequacy of damages, I propose to deal with the third question, i.e, the balance of convenience.

[F] Where does the balance of convenience lie?

(14) The plaintiffs are seeking an injunction to stop the continuation of the construction work at Lot 2.

The granting of the injunction has to be considered in the light of the facts before the court and of particular attention is the fact that the first defendants have expended money on the development works.

(15) The first defendants have expended on the development works. Annexure CBN 11, 12 and 13 in the affidavit in opposition show the extent of works completed. Annexure 12 is a report from professional consultants saying that if the works on ground are stopped, the first defendants stand to suffer about $250,000 in reparation costs.

CBN 13 shows that special machinery has been brought in from New Zealand (arrived on 29 September 2020 returnable within 14 days) and an injunction would result in delays and wasted costs.

As a general rule, a man is entitled to build on his own land. No one has a right to prevent his neighbor from building on his own land. In the present case, the third defendant has rezoned the land from residential to special use (tourism villa) permitting the first defendants for any form of development.

The truth is that the first defendants stand to suffer substantial finance damages if their development is stopped halfway; their right to use their land will be prejudiced. Especially, when the undertaking as to damages provided by the plaintiffs at exhibit **S** of the affidavit in support is wholly inadequate.

It is true, as counsel for the first defendants pointed out, out of all the unofficial and unstamped "statements", the plaintiffs' annexure claiming as evidence of a financial standing to undertake damages, only FJD$125,728 is in the Fiji jurisdiction over which the Court can exercise jurisdiction. The only fund available within the jurisdiction to meet any judgment obtained by the plaintiffs in the High court against the defendants is that money which is alleged to be at the ANZ bank although the statement provided as at 21 August 2020 at exhibit **S** does not bear any official bank stamp to establish actual monies in the account.

The affidavit in reply says that Lot 17, the plaintiffs' residence, is an unencumbered property, however no valuation reports have been disclosed as to its value, or whether the plaintiffs as trustees can undertake to sell trust property for their own private nuisance claim.

In the circumstances, I venture to say that the plaintiffs' undertaking as to damages is wholly inadequate given that the first defendants' current losses are estimated at $250,000 and prejudice to their legal right to use their land.

(16) No doubt that by putting a halt to the continuation of the construction work by an order of this court is something which cannot be taken lightly at all. The plaintiffs will not suffer any greater hardship than at present, if the building is completed. On their own admission, the plaintiffs came to know of the re-zoning decision of the third defendant in 2009. If the plaintiffs are affected by the re-zoning **(FROM RSIDENTIAL TO**

SPECIAL USE – TOURIST VILLA) they could have taken action for judicial review long ago. They did not do anything earlier. They did not take appropriate action in 2009 but waited until the first defendants commence building a commercial building on their above mentioned property in 2020. This is not acting promptly by any standard. An action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort, personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. The plaintiffs live in a place which had been rezoned to special use – tourist villa apartments. The state has designated the area as a tourist zone. It is necessary the plaintiffs should subject themselves to the consequences to the construction of a commercial building which may be carried on their immediate locality, which are actually necessary for trade and commercial and also for the enjoyment of property and for the benefit of the public at large. The plaintiffs' grievance lies with the third defendant who has allowed the first defendants to develop the property by re-zoning. The tort of private nuisance was developed to protect private property or rights of property in relation to the use or enjoyment of land. It is stated in **Clerk & Lindsell on Torts (16th edition, 1989)** para 24-01 that "the essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land". The plaintiffs' interest in the possession and enjoyment of land must be weighed against the corresponding need of the first defendants to be protected against an injury resulting from them having been prevented from exercising their own legal rights to use their own land. In my view, the first defendants could not be adequately compensated under the plaintiffs' undertaking in damages if the uncertainty is resolved in the defendants favour at the trial because only FJ$125,728.00 is in the Fiji jurisdiction over which the court can exercise jurisdiction. The first defendants' loses at present is $250,000 and prejudice to their proprietary right to construct a building on their own land.

The truth is that when a balance is struck between conflicting rights and interests, the scale comes down in favor of the first defendants. In my view, the balance of convenience favours the refusal of the reliefs sought.

[G] Whether damages would be a sufficient remedy to the plaintiffs if the court refuses the injunction sought and the plaintiffs ultimately succeeds at the trial

(17) The courts do not grant an injunction if damages are an adequate remedy. Diplock LJ in '**American Cyanamid**" (supra) said at page 510;

> *"If damages in the measure recoverable at common law 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 plaintiffs claim appeared to be at this stage".*

(18) The plaintiffs in their amended statement of claim, apart from seeking an order to restrain the alleged nuisance, have sought special, general, punitive and exemplary damages.

This shows that the plaintiffs themselves consider damages to be an adequate remedy.

(19) In paragraph (12), (13) and (15) of the amended statement of claim, the plaintiffs plead, inter alia, the following;

> *(12)* ***THAT*** *by the act of construction the first defendant, its agents and employees are wrongfully causing excessive noise and vibrations to effect the plaintiffs said land and improvements thereon and the first defendants, its employees and agents are causing disturbance to the residence of the said land and are interfering with the comfortable and convenient enjoyment of the said land by the plaintiff and its residence.*
>
> *(13)* ***THAT*** *the actions of the first defendant, its agents and servants as complained of hereinabove constitute an interference with the reasonable domestic enjoyment of the plaintiffs property by their residence.*
>
> *(15)* ***THAT*** *in the event the first defendant is allowed to continue with the construction as aforesaid the plaintiffs' interest in the said land will be adversely affected as the first defendant are constructing a structure on their land illegally.*

Then later on their affidavit, in paragraph (17) the plaintiffs' state;

> *(17) That the plaintiff has suffered loss and damage full particulars of which cannot be given yet apart from stating that the plaintiffs have already suffered substantial loss of value of its improvements on the said land by the construction.*

In **Clerk and Lindsell on Torts (19th Edition 2006) at page 1165** it is noted that private nuisance may occur in three different circumstances:

> *"(1) by causing an encroachment on the neighbors land when it closely resembles trespass; (2) by causing physical damage to the neighbors land or building or works or vegetation upon it; or (3) by unduly interfering with the neighbor in the comfortable and convenient enjoyment of his land."*

(20) I take the plaintiffs' evidence to go no further than to be that the plaintiffs **feared** that the Construction of an illegal structure on the first defendants' land would cause a loss of value of improvements on the plaintiffs' land. I intend no disrespect if I say that I find it difficult to visualize such a case in practice. **Professor Newark's classic article on "The Boundaries of Nuisance" (1949) 65 LQR 480 at 482** states that the essence of nuisance was that "it was a tort to land, or to be more accurate, it was a tort directed against the plaintiffs' enjoyment of right over land" . At the heart of this domain of nuisance lies a fundamental question; Is the construction of an illegal structure within the boundaries of

the first defendants' land, a tort to the plaintiffs' land? I pause to observe that there is no evidence of any diminution in market value of the plaintiffs' property.

(21) Indeed, for an action in private nuisance to lie in respect of interference with the plaintiffs 'enjoyment of their land, it will generally arise from something emanating from the first Defendants' land – Such an emanation may take many forms- noise, dirt, fumes, a noxious smell, vibrations, and such like.

(22) It is true, as counsel for the plaintiffs' pointed out, the emanation of water, noise and vibration from the first defendants' land due to construction of a commercial building, is a tort directed against the plaintiffs' enjoyment rights over the land. The annoyance caused by unwanted remarks by the employees of the first defendants is indeed an invasion of plaintiffs' privacy. The nuisance such as noise, vibration and unwanted personal remarks are unpleasant and distracting.

(23) However, turning to the alleged nuisance by vibration and water seepage, there was no evidence as to any actual damage to the plaintiffs' house due to vibration and water seepage. **A prospective damage is not sufficient to found an action in nuisance**. Therefore, until the plaintiffs suffer actual loss in physical sense to their property, the water seepage and vibration represents only the potential to be a nuisance. Next, turning to the alleged nuisance by noise and annoyance where the nuisance consists of interference with the peaceful, convenient and comfortable occupation of land, no actual physical loss or injury to health need be proved. The damage suffered by the plaintiffs in this kind of nuisance consists in the annoyance and discomfort caused to the plaintiffs as occupier of the land.

(24) What then is the relief to which the plaintiffs are entitled? In the case of a nuisance involving interference with the convenient comfortable enjoyment and occupation of the demised land, the Court must place a value on an intangible loss which cannot be accurately assessed by reference to any formula. This, however, does not mean that damages cannot be awarded. Some guidance on the assessment of damages in a nuisance action such as the present can be found in the House of Lords decision in **Hunter and Others-v-Canary Wharf Ltd**[4]. In this kind of nuisance the task of the Court is to determine the loss of amenity value so long as the nuisance lasts……

(25) I accept as counsel for the first defendants submit;

(a) the plaintiffs have not complained of any actual damage to their property, certainly there is nothing on the affidavit material before the court.

(b) the plaintiffs' claim would fall under the third category of private nuisance, that is undue interference with the comfortable and convenient enjoyment of land.

(c) damages under the third category are nominal.

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[4] **[1977] AC 655**

(d) nominal damages can be quantified and paid to the plaintiffs.

(e) the first defendants provided an undertaking at paragraph 58 of the affidavit in opposition that they will only carry out works during normal hours approved by the Sigatoka Town Council within the building approvals.

(f) the first defendants land is unencumbered, see exhibit **C** of the affidavit in support and the first defendants are able to satisfy any award of damages that the plaintiffs may receive .

(26) **The noise, vibration and water seepage created by the construction of a building by the first defendants within the boundaries of their land may give rise to an actionable private nuisance. But there is no evidence of any physical damage to the plaintiffs' property. There is no evidence of any diminution in market value of the plaintiffs' property. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. There is no evidence of plaintiffs' impairment of health due to emanation of noise or vibration by the construction. Therefore, without consequent illness, physical damage to the property and diminution in the market value of the plaintiffs' property, further construction of the building cannot be stopped by an injunction. A sound's loudness is measured in decibels (db). Normal conversation is about 60 db, a lawn mower is about 90 db, and a loud rock concert is about 120db. In general, sounds above 100 db are harmful, depending on how long and how often you are exposed to them. No evidence has been offered by the plaintiffs as to the decibel level of the noise and vibration created by the construction of a building by the first defendants within the boundaries of their land. Without having a clear certainty about the decibel level of the alleged noise and vibration emanating from the first defendants' land, how could I say that it is hazardous to the health of the plaintiffs? How could I ascertain whether a nuisance has actually occurred by noise and vibration in the absence of single document produced by the plaintiffs to show the decibel level of the alleged vibration and noise? I am in a perfect dilemma. Then what is the sense in putting a halt to the continuation of the construction work at the site? The plaintiffs cannot exploit the law of private nuisance in order to stop the further construction of the building. An injunction to stop the further construction of the building to bring the nuisance to an end should only be granted if there is evidence of ; (1) physical damage to the property (2) diminution in market value of the property (3) impairment of health. I see no such evidence in this case and I am not prepared to put a halt to the continuation of the construction work at the site by an interlocutory injunction.**

But there will be certainly be loss of amenity of value so long as the nuisance lasts and for this purpose I will assume in favor of the plaintiffs. It is for the diminution in such utility that the plaintiffs are entitled to damages. Furthermore, the plaintiffs can recover damages in respect of the discomfort or inconvenience caused by the nuisance.

Besides, there is also the issue of transient nature of the nuisance alleged to have come from the first defendants' property. In my view, it would be inappropriate to grant the

relief sought (injunction) in the circumstances of the occasional and transient nature of nuisance.

(27) In **Bowers v Westvaco Corp**[5], family members, including minors living at home were awarded damages for dust and vibration nuisance caused by truck- staging operations on adjacent property. In **Devon Lumber Co Ltd v MacNeill**[6] a majority of the New Brunswick Court of appeal upheld awards of damages for annoyance and discomfort from dust to the infant children of the joint owners of the house.

(28) The effect on the interest in land will provide the measure of damages, if reimbursement for the effects of the nuisance is what is being claimed, irrespective of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of the land. The cost of repairs or other remedial works is of course recoverable, if the plaintiffs have been required to incur that expenditure. If the nuisance has affected the capital or letting value of the land, the diminution in the value of the plaintiffs' interest is another relevant head of damages. When the nuisance has resulted only in loss of amenity, the measure of damages must in principle be the same.

(29) **Accordingly, damages are an adequate remedy, as prayed for by the plaintiffs in their amended statement of claim, and no interlocutory injunction stopping further construction of the building should be issued.**

I go further.

[H] Reasonable User

(30) The plaintiffs claim that because of the nature of the first defendants' construction, it creates noise, vibrations and water seepage. The basis of the plaintiffs' action founded on nuisance is set out at paragraph 12 of the amended statement of claim as follows;

> *12.* ***That*** *by the act of construction the first defendant, its agents and employees are wrongfully causing excessive noise and vibrations to effect the plaintiffs said land and improvements thereon and the first defendants, its employees and agents are causing disturbance to the residence of the said land and are interfering with the comfortable and convenient enjoyment of the said land by the plaintiff and its residence.*

(31) In **Cambridge Water Co. Limited v Eastern Counties Leather plc**[7], Lord Goff of Chieveley after having examined nuisance and the rule in *Ryland v Fletcher* added, at p.70:

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[5] **(1992) 419 SE (2d) 661**
[6] **(1987) 45 DLR (4th) 300**
[7] **[1994] 1 All ER 53**

"……although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so the liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighboring occupiers of land, under which "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action": see Bramford v. Turnley (1862) 3 B & S 62 at 83, {1861 – 73} All ER Rep. 701 at 712 per Bamwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbors' enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it."

(32) The limits to the strict liability under the rule in **Ryland v. Fletcher** is to be found in the Privy Council decision in **Rickards v. Lothian**[8], where Lord Moulton reflecting on the rule said, at p.280:

"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community".

(33) Does the ***Ryland v. Fletcher*** doctrine apply on the facts of this case? It appears to me that the defendants have conclusively shown why this case is different to the usual ***Ryland v. Fletcher*** situation. I feel that the defendants are carrying on a permissible activity to which their land has been zoned. The construction of a tourism villa can generally be termed as the expected or common and ordinary use of the land. In my view, the defendants cannot be deprived of the full enjoyment of land according to the reasonable standard of behaviour that is expected of those. This situation is clearly an exception to the strict liability of under ***Ryland v. Fletcher***. As the High Court of Australia observed in **Hazelwood v. Webber**[9]:

"The principle upon which a prima facie absolute liability appears to be imposed by law is that no man should at the expense of his neighbors introduce upon his own land a potential source of harm which is considered to require continual and effective control or restraint to prevent mischief. If through or relaxation of control damage to his neighbor occurs, although without negligence on his part, he should indemnify his neighbor. But when to obtain effectual use and enjoyment of land is a reasonable manner according to its character and the uses for which it is adapted, occupiers find that the introduction of such potential source of harm is generally necessary; to insist upon the prima facie rule would be to restrict the proper enjoyment of the land or to impose a special responsibility for loss arising from a danger to which by the recognized use of the land every occupier exposed himself and

[8] **{1913} AC 263**
[9] **[1934] 52 CLR 268 AT P. 277**

other occupiers. Accordingly, when use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way".

(34) I feel that, in this case, any potential source of mischief which is likely to arise from the defendants' construction of a building on its own land **"is an accepted incident of some ordinary purpose to which the land is reasonably applied."**

(35) The first defendants are carrying on a permissible activity to which there land has been zoned. The construction of tourism-villa on the first defendants land can be termed as the expected or common and ordinary use of the land which has been zoned. The defendants cannot be deprived of the full enjoyment of land according to the reasonable standard of behaviour that is expected of the construction. These are matters which will ultimately have to be resolved at the trial. It would be premature at this stage for the court to make any conclusion. For the purpose of my task at this interlocutory stage, it is sufficient to say that this transient situation, (nuisance by noise, vibration and water seepage) appears to be an exception to the strict liability under the rule in **Ryland v Fletcher**[10], the leading authority on the liability of owner of a property for the escape of nuisance from his property.

(36) In **Ryland & Or. v. Fletcher**[11], the leading authority on the liability of owner of a property for the escape of nuisance from his property, the headnote to the case states:

"If a person brings or accumulates on his land anything e.g. water, or filth, or noxious fumes – which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage".

(37) There is no technical report submitted to court by the plaintiffs to establish the decibel level of the noise and vibration emanating from the first defendants' construction. Is this alleged noise and vibration beyond permissible level to which the land has been zoned? The process of determining what level of noise and vibration constitutes a nuisance is quite subjective. For instance, the decibel level of noise and the vibration, its length and timing may be taken into consideration in ascertaining whether a nuisance has actually occurred. No evidence of decibel level has been offered? In my view, the first defendants cannot be deprived of the full enjoyment of land according to the reasonable standard of behavior that is expected of those that operate from the land zoned. I am not satisfied that the plaintiffs' case is of sufficient strength to enable me to grant the application for interlocutory injunction. Giving the matter the best attention that I can, I consider that in the exercise of my discretion, I ought not to grant the relief sought, namely, interim injunction against the first defendants putting a halt to the continuation of the

[10] **(1868) ALL E.R.1**
[11] **[1868] All ER 1**

construction work. At this interlocutory stage, it is not necessary to express a final view on the question of '**reasonable user**'.

As was said by Lord Diplock in **American Cynamid v Ethicon 1975 AC at 405** "the grant of an interlocutory injunction is a remedy that is both temporary and discretionary". As to the allegation of water escaping from the first defendants' land on to the plaintiffs' land, the paragraph 39 of the first defendants' affidavit in opposition says that the first defendants have built a retaining wall which has removed any prospect of water escaping onto the plaintiffs land. This is intended to abate nuisance.

(38) As to the plaintiffs' allegation that the first defendants and their agents and workers are causing disturbance to the plaintiffs (which is denied by the first defendants in their affidavit in opposition) there is also evidence before this court (annexure CBN 7 and police complaints made at CBN 8) showing second named plaintiff causing disturbance to the first defendants and their workers. It would be premature at this stage for the court to make any conclusion on any disputes as to facts.

ORDERS

(01) The application for interlocutory injunction is declined.

(02) The costs are to be costs in the cause.

HIGH COURT OF FIJI LAUTOKA

.....29/01/2021

Jude Nanayakkara
[Judge]

High Court – Lautoka
Friday, 29th January, 2021