

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 50 OF 2021.

BETWEEN : **BLUE VIEWS LLC** a limited liability corporation incorporated in USA and registered as a foreign company in Fiji.
PLAINTIFF

AND : **VUNABAKA BAY FIJI LIMITED** a limited liability company incorporated in New Zealand and registered as a foreign company in Fiji.
1ST DEFENDANT

AND : **VUNABAKA BODY CORPORATE (FIJI) LIMITED** a company limited by guarantee and not having share capital.
2ND DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. Tabuadua with Ms. Devi, for the Plaintiff
Mr. Devanesh Sharma, with Mr. Nand for the Defendants

DATE OF HEARING : On 09th November, 2022

WRITTEN SUBMISSIONS: By the Plaintiff on 09th November, 2022.
By the 1st & 2nd Defendants on 09th November, 2022.
Reply Submissions by the Plaintiff on 23rd November, 2022.

DATE OF RULING : On 14th March, 2023

RULING

A. INTRODUCTION:

1. This ruling pertains to the hearing held before me on 09th November, 2022, in relation to the injunctive Orders granted by my predecessor judge on 23rd February, 2021, after hearing the Plaintiff's Ex-parte Summons.
2. The ex-parte interim injunction Orders so granted against the 1st and 2nd Defendants are as follows.

- a. *An interim injunction Order restraining the Defendants, their servants and / or agents from disconnecting the Power, the Water connection and the Gas connection to the residence known as Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2 comprised in Native Lease No.851717, until further order from this Court or final determination of this matter.*
- b. *An interim injunction Order restraining the Defendants, their servants and / or agents from restricting the quite enjoyment of the property at Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2, comprised in Native Lease No.851717 until further order from this Court or final determination of this matter.*
- c. *An interim injunction Order restraining the Defendants, their servants and / or agents from entering the land and premises in Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2 comprised in Native Lease No.851717 until further order from this Court or final determination of this matter.*

3. The case record also reveals that prior to obtaining the above 3 orders; the Counsel for the Plaintiff had on 19th February, 2021, supported an Ex-parte Application and obtained the relief (a) above initially. However, instead of serving it on the Defendants, the Plaintiff by filing a supplementary Affidavit on 23rd February, 2021, had managed to obtain all 3 orders above, still on the Ex-parte basis, which were, admittedly, served on 24th February, 2021.

B. STATEMENT OF CLAIM:

4. Simultaneously, the Plaintiff on 23rd February, 2021 also filed its Writ of Summons and Statement of claim moving for the following substantial / final reliefs;
 - i. *An injunction to compel the Defendants, their servants and / or agents to participate with the plaintiff in the Dispute Determination process outlined in Clause 38 of the Articles of Association of the Second Defendant so that these matters can be expediently resolved for the benefit of all stakeholders.*
 - ii. *Damages.*
 - iii. *A declaration that the Deed, Deed of variation and the Utility Services Agreement of the Defendants are null and void.*

C. EVIDENCE:

5. The record is impregnated with the following Affidavit evidence in support of and against the above mentioned injunctive reliefs.
 - i. Plaintiff's Affidavit in support sworn by Andrew Griffiths on 16th February, 2021 and filed on 19th February, 2021.
 - ii. Plaintiff's Supplementary Affidavit sworn by Andrew Griffiths on 23rd February, 2021 and filed on the same day.

- iii. Defendants' Affidavit in opposition sworn by **Mohini Deo** on 23rd March, 2021 and filed on the same day.
 - iv. Plaintiff's Affidavit in reply sworn by Andrew Griffiths on 15th April, 2021 and filed on 20th April, 2021.
 - v. Plaintiff's supplementary Affidavit sworn by Andrew Griffiths on 30th September, 2022 and filed on the same day (copy) with an accompanying Affidavit. (Original filed on 8th November, 2022).
6. For the purpose of the determination of the injunction Application at hand, I have carefully perused the contents of the above Affidavits, and those of the documents annexed thereto , which *inter-alia*, state/ reveal **THAT**:
1. The Plaintiff and the first Defendant entered into a Sale and Purchase Agreement (herein referred to as the Sub-Lease No. 851717) in respect of the subject Land, being Lot 1 on SO 6756 described as Lot 3 known as Vunabaka (part of) containing an area of 2836m2 comprised in Native Lease No.851717 in the year 2013.
 2. The first Defendant (VBFL) is a limited liability Company incorporated in New Zealand and a foreign entity branch registered in Fiji. VBFL acts as a bare trustee for the Vunabaka Bay Joint Venture (VBJV), where VBFL is the owner/ developer of the development.
 3. The Second Defendant (VBC) is a body corporate entity incorporated to administer the common property and common facilities for the owners of the lots on Vunabaka Bay.
 4. The second Defendant manages the common areas and communal facilities of the development pursuant to its Articles of Association for the benefit of its members, including the plaintiff as one of the lot owners. It also supplies utility services, including power to the lot owners in the Island.
 5. On 2nd May, 2018, a Deed of transfer was to be executed between the Defendants that described the capital cost of purchasing a share of the utility assets and in November 2020 the Defendants in breach of Article 10.9 and without the knowledge of the Plaintiff varied the said Deed by a Deed of Variation.
 6. The Plaintiff was and is a recipient of the utility services and other services provided and managed by the Second Defendant as stated in the 4th paragraph above.
 7. The Second Defendant , after issuing a 30 days' Notice on 20th February, 2020 to the Plaintiff , informing that the Utility Services to its Lot 3 would be disconnected for non-payment of charges, accordingly disconnected the Power Supply twice on 5th and 12th June, 2020.
 8. The Plaintiff, on several occasions had raised its concern over the utility charges and requested the Defendants to resolve it by a dispute resolution mechanism pursuant to

Article 38 of the Article of Association. The Plaintiff alleges that the Defendants have breached the said Article and thereby caused losses and damages.

D. THE LAW , THE PRINCIPLES ON INJUNCTION & DISCUSSION:

7. High Order 29, R1, of the High Court Rules of 1988 (HCR) make provisions for granting of injunction Orders.

Injunction is an equitable remedy granted at the discretion of the court. When exercising the discretion, the courts in many jurisdictions including Fiji follow the guidelines set down by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd [1975] UKHL 1; [1975] 2 W.L.R. 316, [1975] A.C. 396*. They are:

- (i) Whether there is a serious question to be tried at the hearing of the substantive matter;
- (ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and
- (iii) In whose favour the balance of convenience lies, if the injunction is granted or refused.

8. In his judgment Lord Diplock also made the following observations:

"I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases".

Whether there is a Serious Question to be tried?

9. The first issue to be determined is whether there is a serious question to be tried at the trial of the substantive matter.
10. The plaintiff applies for interim injunction Orders, **(1)** to restrain the Defendants, their Servants/ Agents from disconnecting the Power, Water & Gas supply to his residence known as Lot-3 being Lot 1 on SO 6756 known as Vunabaka, **(2)** to restrain them from restricting the quiet enjoyment of the said property by the Plaintiff, and **(3)** to restrain them from entering the said Land and premises. The court had granted these orders on ex-parte basis. These ex-parte orders granted are valid until determination pursuant to the inter-partes hearing.
11. For the time being, what this Court has been called upon to decide is whether the plaintiff is entitled to have the ex-parte interim injunction orders granted as above extended until the final determination of the substantive matter.
12. When granting an injunction or subsequently deciding whether to extend it or not, the Court has to be mindful of the final relief/s prayed for by the party seeking such an injunction or

extension of it. The nature of the final or substantive reliefs sought by the party seeking an injunction always matters, when deciding to grant / extend or refuse it.

13. If no a final relief is prayed for, or such reliefs prayed for do not involve serious question/s to be tried or no prima-facie winnable case is shown by the party seeking injunctive relief, the Court will not grant such reliefs.

14. At this stage, without attempting to resolve the conflict of evidence on facts and question of law, which might call for detailed oral evidence and argument, I intend to consider the pleadings and the affidavit evidence before me to determine whether or not there is a serious question to be tried.

15. In ***Hubbard & Another v Vosper & Another [1972] 2 Q.B. 84*** Lord Denning made the following observations:

“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 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. 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”.

16. Lord Diplock, in *American Cyanamid* (above), said at 407 (H) that:

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence of 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”.

17. The substantive or final relief prayed for by the plaintiff in this case, as per its prayer 1 to the Statement of claim, is, **An injunction to compel the Defendants, their servants and / or agents to participate with the plaintiff in the Dispute Determination process outlined in Clause 38 of the Articles of Association of the Second Defendant so that these matters can be expediently resolved for the benefit of all stakeholders.**

18. By the very prayer 1 itself, the plaintiff tacitly admits that the final resolution to its ongoing dispute with the Defendants, in relation to the supply of Electricity and the charges to be levied on it, is through the Dispute Resolution Process before a mutually agreed Expert , as provided by Clause 38 of the Article of Association (AoA).

19. Admittedly, the dispute has not so far been referred to an Expert for the resolution of it in terms of the said clause in the AoA. No consensus so far has been arrived in appointing an Expert, owing to the continued refusal by the Plaintiff to pay and settle the arrears of bill for the Power consumed by the Plaintiff, through the Supply connected to its Lot-3.

20. The submissions made and the contents of the AoA clearly show that if the Plaintiff duly pays and settles all the arrears on account of power it consumed, the Defendants are readily available to take part at the Dispute Resolution process, by having an Expert nominated in terms of the AoA.
21. This shows that the Plaintiff so far has not exhausted the inbuilt Mechanism, as provided by the AoA, to resolve the dispute, prior to resorting to the Court. The Plaintiff moves the Court to compel the Defendants to go for the Dispute Resolution process as its final relief. The Court cannot compel a party to go for dispute resolution. It is the very Agreement that should guide the Plaintiff.
22. The AoA is very clear as to the rights and duties of the parties. Still the Plaintiff has room to have the dispute at hand resolved through the mechanism enshrined in the AOA. In view of this, a pertinent question arises as to whether a cause of action could have arisen for the Plaintiff to come before the court on the very issue complained of.
23. Parties are not at variance on the factual position that they have to resort to the Dispute Resolution Mechanism to resolve the current issue at hand. The impediment is the refusal by the plaintiff to settle the arrears of Utility Bills. It is a common ground that the Power supply to the Island is not from the National Grid. The 2nd Defendant must be, undoubtedly, incurring substantial expenses in generation and distribution of Power.
24. Learned Counsel for the Plaintiff was heard to say that the Defendants can recover the arrears of utility bills by resorting to summary procedure. I beg to disagree for obvious reasons. This is something like forcing the 2nd Defendant to “fall from frying pan to fire”.
25. There is no evidence to show that the Plaintiff was accorded different treatment as far as the unit price for the consumption of Power or in any other matters are concerned. The main dispute is the arrears of bill for the Power supply, which if resolved duly by following the prescribed mechanism, all the other issues are also bound to get resolved before the Expert. This factual position has been conceded by the Counsel for the Plaintiff in her oral submission.
26. In view of the above, it is clear that there is no serious question to be tried at the trial with regard to the purported substantial relief 1 in the prayer to the SOC. If the Plaintiff duly pays the arrears for the supply of power, however without prejudice to his right to agitate with regard to the propriety of the charges for the Electricity, before the Expert at the dispute resolution process, the whole issues will find an automatic solution.
27. I find that the Court has no role to play as far as the final reliefs claimed hereof are concerned. Unless there is a serious question to be tried by the Court in relation to the substantial relief prayed for, no necessity arises at all for the Ex-parte injunction to be in force any further.
28. If the above is the position with regard to the, purported substantial relief, which seeks to compel ***the Defendants to go for Dispute Resolution***, this Court will not have any other role to play at the main trial. The Plaintiff cannot be allowed to make use of this Court only to have an injunction issued in its favor, while its substantial relief lies elsewhere.

29. The Plaintiff in paragraph 9 of its Statement of Claim concedes that the disputes referred to in paragraph 5, 6 and 7 of the S.O.C, also should be determined by the Expert in Dispute determination process pursuant to Article 38 of the AOA. Then, this Court has no role to play at a trial as far as the 3rd, purported, substantial relief is also concerned. Accordingly, the question of deciding on any damages, as prayed for in the 2nd paragraph of the prayer to the S.O.C, also will not arise.
30. After perusal of the Affidavit evidence adduced by both the parties and hearing the arguments advanced at the hearing, I am convinced that there is no serious question to be tried in relation to the substantial reliefs prayed for in the prayer to the Statement of claim.

Inadequacy of damages

31. Though, in view of the above, the discussion on damages is not warranted, for the sake of completeness, I shall now embark on the second test whether damages would be an adequate remedy to the plaintiff in the circumstances of the case.
32. Lord Diplock in American Cyanamid Co v Ethicon Ltd, above states that:

“The Court should go on to consider... 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 the 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 appeared to be at that stage” (at 408-C).

33. No injunction should normally be granted if the damages would be an adequate remedy. Nowhere in its pleadings, has the Plaintiff averred that it would suffer **irreparable** damages. I find that the damages would be an adequate remedy to the plaintiff, if it is to arise due the disconnection of the utility services in the absence of an injunctive order. I also find that the defendants are in a financial position to pay such damages, if ordered.
34. The actual dispute between the parties, is in relation with the alleged non-payment or reduced payment of charges for Power supply provided by the 2nd Defendant to the plaintiff’s property and disconnection of services by the Defendants.
35. The Director of the Plaintiff Company, being a pioneer in the development activities of the Island concerned, should know better how the affairs are conducted and what needs to be done at an instance of this nature. He cannot seek damages out of a situation that cropped up essentially owing to his own failure to pay the relevant charges for the Power supply. If he has any concern on the propriety of charges levied for power supply , it can very well be addressed before the Expert at the dispute resolution process , which is to kickoff provided he settles the arrears of bills.

36. Even if this action proceeds for trial, an award of damages at the end, in my opinion, would adequately compensate the plaintiff, in the event it succeeds at the trial.

Balance of convenience

37. It is where there is doubt as to the adequacy of the respective remedies available to either party or to both, the question of balance of convenience arises (see American Cyanamid case (at 408E).
38. I have already decided that damages would be an adequate remedy to the plaintiff in the circumstances of the case. However, I decide to go further into this third test to satisfy my conscience.
39. Allowing the Plaintiff not to pay or partially pay for the Power it consumes , by having an injunction order of this nature in place, will undoubtedly set a bad precedent for the other lot owners or to the potential defaulters to enjoy the facility with no charges or at the rate they decide. This will endanger the existence and operation of the 2nd Defendant as a service provider.
40. Under these circumstances, the balance of convenience does not favour the extension of the interim injunctions granted Ex-parte on 23rd February, 2021.

Any Other Considerations:

41. The contents of the 2nd supplementary Affidavit by the Plaintiff (copy filed on 30th Sep,2022 and the original filed on 8th November,2022) will not , in my view, assist the Plaintiff in sustaining the injunction orders currently in operation.
42. The alleged incident of Criminal Trespass by an employee of the Defendant on the 18th July, 2021 is a separate incident, which is currently dealt with at the Nadi Magistrate's Court. This cannot be taken into account when deciding the fate of the Ex-parte injunction obtained on 23rd February, 2021. The due process at the Magistrate's Court will decide on it. However, no contempt charges were moved by the Plaintiff, if it was a violation of the Injunctive Orders in operation.
43. The other matter adverted to by the Plaintiff in the 2nd Supplementary Affidavit is with regard to the alleged boundary dispute. This seems to be an after-thought. There are no averments in this regard in the Statement of claim or in the Affidavits filed initially. No substantive reliefs prayed for in this regard. The Plaintiff has not so far moved for an amendment to the Statement of Claim in order to embody the matters complained of subsequently.
44. The above matters averred in the 2nd Supplementary Affidavit, should not be allowed to be used to gain mileage for the Plaintiff in this interlocutory proceedings. The 2nd and 3rd Ex-parte injunctive Orders have no base to stand, as the substantive reliefs in relation to those

injunctive orders, are also still to be obtained through the dispute resolution, as the plaintiff alluded in its statement of claim.

E. CONCLUSION:

45. For the reasons given above, I am not inclined to extend any further the Ex-parte injunction Orders 1, 2 and 3 granted on 23rd of February, 2021 in favor of the Plaintiff. In any matter, there may be many questions to be tried at the trial. A party, who expects the court to exercise its discretionary power in its favour, must establish that there is a serious question to be tried, damages are inadequate and prospects are there for victory at the end of the day. The plaintiff has failed in all tests.
46. Considering the circumstances discussed above, this Court stands convinced that ordering of a reasonable amount of costs in favor of the Defendants is warranted, on account of this interlocutory proceedings.

F. FINAL ORDERS:

- a. The ex-parte injunctive Orders 1, 2 and 3 granted on 23rd February, 2021 in favor of the Plaintiff are hereby dissolved.
- b. The Plaintiff's Application, seeking interim injunction orders, is hereby dismissed.
- c. The Plaintiff shall pay the Defendants a sum of \$2,500.00, being the summarily assessed costs of these interlocutory proceedings.
- d. The matter shall take normal cause, in the event the Plaintiff still wishes to continue with this action.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 14th day of March, 2023.

SOLICITORS:

For the Plaintiff: **Lowing Lawyers**
For the Defendants: **R. Patel Lawyers**