

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 373 OF 2023**

**BETWEEN** : **CORAL SURF RESORT PTE LIMITED** trading as  
**WARWICK FIJI RESORT & SPA**  
**Plaintiff**

**AND** : **DENARAU RESORT MANAGEMENT PTE**  
**LIMITED** trading as **RADISSON BLU RESORT (FIJI)**  
**DENARAU ISLAND**  
**First Defendant**

**CHARLES HOMSY**  
**Second Defendant**

**Appearances** : **Mr S.A. Koya for the Plaintiff/Respondent**  
**Mr K Chang for the Defendant/Applicant**

**Hearing** : **3 May 2024**

**Judgment** : **24 June 2024**

**JUDGMENT**

**(Summons for further & better particulars pursuant to O.3, r 4 & O.18, r.2)**

- [1] This is an interlocutory application by the First and Second Defendants seeking further and better particulars from the Plaintiff as well as an enlargement of time to file their defence.
- [2] The application is opposed. The Plaintiff argues that its pleadings are adequate and that the defendants are improperly seeking evidence, not facts. The Plaintiff also raises a preliminary issue regarding the admissibility of the affidavits filed in support of the defendants' summons.

## Background

- [3] The Plaintiff and First Defendant operate resorts, being the Warwick Fiji Resort & Spa and Radisson Blu Resort (Fiji) Denarau Island, respectively. They each employ a large number of staff in a variety of roles from cleaning, kitchen, reception, gardening, activity staff, and so on. Tourism is one of Fiji's biggest industries. There are a considerable number of tourist resorts in Fiji, and most are situated in western Viti Levu. No doubt there is significant competition among resort operators for experienced staff.
- [4] The Plaintiff's claim, as contained in its Amended Statement of Claim, is that the First Defendant has been poaching its staff.
- [5] According to the Plaintiff's pleadings, the Second Defendant, Mr Charles Homsey, was employed with the Plaintiff in 2017. The Second Defendant resigned from this employment in July 2018 and took up employment with the First Defendant.
- [6] The Plaintiff pleads that the Second Defendant and other employees and agents of the First Defendant have since been engaged in ongoing efforts to poach the Plaintiff's staff. The Plaintiff contends that this amounts to a tortious interference with the employment contracts of its employees by inducing, procuring and/or encouraging these employees to breach their employment contracts and engage in employment with the First Defendant.
- [7] The allegations are that there have been 17 to 20 employees that have been poached. The activities alleged are that the First Defendant's agents and employees mingled/fraternised on the Plaintiff's premises with the Plaintiff's staff, whilst inducing such staff with procurements and offers of higher salaries to join the First Defendant. The Plaintiff alleges that these are not usual procurements such as normal job offers, advertisements and so on but a strategic and targeted approach to poach the Plaintiff's staff. The Plaintiff identifies one former employee, 'Mr Abbas', as being one of many responsible for this.
- [8] The Plaintiff also pleads that many of its employees who have been induced have left at short notice, breaching their employment contract and providing insufficient notice and causing the Plaintiff to provide a lower quality product/service for its own customers. The Plaintiff does not identify the employees who have been

induced/procured nor specify the terms of the employee's contract that have allegedly been breached. The timeframe in question during which the defendants' conduct is in question is from July 2018 to the present, a six-year period. No specific dates for any of the alleged conduct is supplied in the Amended Statement of Claim.

[9] In terms of the economic loss suffered by the Plaintiff, it pleads that in light of the defendants' conduct, the Plaintiff has had to increase the salaries and provide more benefits to its staff to match the First Defendant. Further, the Plaintiff says that the First Defendant's conduct has caused an insubordinate attitude, a lowering of morale and a dropping of standards.

[10] By way of relief, the Plaintiff seeks injunctions restraining the defendants from continuing to tortuously interfere with its employees, an injunction restraining the defendants from improperly interacting and persuading the Plaintiff's employees to resign and join Radisson Blu as well as general damages, punitive damages and costs.

#### **History of these proceedings**

[11] The proceedings commenced with the filing of a Writ of Summons and Statement of Claim on 19 December 2023. The Statement of Claim contained five paragraphs only. In response, the defendants filed a summons seeking to strikeout the Plaintiff's claim. The matter was resolved at the hearing on 14 February 2024 with the Plaintiff agreeing to file a more detailed Statement of Claim.

[12] An Amended Statement of Claim was filed on 28 February 2024.

[13] Following the filing of the Amended Statement of Claim there was correspondence between counsel which began with a letter from the defendants' solicitor dated 8 March 2024, specifying further particulars that the defendants required in order to file their defence. The Plaintiff's solicitor responded on 12 March 2024, declining to provide the further information, contending that the facts pleaded sufficed to make out the elements of the cause of action of tortious interference, that the defendants had stepped into the territory of evidence, and that identifying the employees would give rise to a risk that the employees may need to be joined as defendants to this proceeding.

[14] On 13 March 2024, the defendants filed the present summons with a supporting affidavit from Ms Raumanu Georgina Pranjivan dated 13 March 2024. An Amended Summons was filed by the defendants on 28 March, seeking an enlargement of time to file their defence with a supplementary affidavit from Ms Pranjivan dated 27 March 2024.

[15] The Plaintiff has filed an affidavit in opposition from Mr Goktan, Kavak, General Manager of the Plaintiff, dated 9 April 2024. An affidavit in reply was filed for Ms Pranjivan.

### **Decision**

[16] There are three issues for the Court to consider:

- i. The Plaintiff raises a preliminary issue over the admissibility of the affidavits filed for Ms Pranjivan.
- ii. Whether the Plaintiff's pleadings are deficient and require further particulars? If so, what particulars are required?
- iii. Whether the defendants should be granted an enlargement of time to file their Statement of Defence?

### **Admissibility of Ms Pranjivan's affidavits**

[17] The defendants have filed three affidavits for Ms Pranjivan. The Plaintiff argues that these affidavits are not admissible. The reasons advanced are two-fold; firstly, counsel who are employed with the law firm that is acting for a party are not permitted to provide affidavits in the proceeding for their client. Secondly, if solicitors are permitted to do so then only counsel in carriage can do so and Ms Pranjivan does not depose that she is counsel in carriage.

[18] The Plaintiff relies on the High Court decision of *Bulileka Hire Services Ltd v Housing Authority* [2016] FJHC 322 (25 April 2016). Responsibly, Counsel also brought to my attention another decision which arrives at a different conclusion, namely the decision by then Master Azhar<sup>1</sup> in *Singh v Lautoka General Transport Co Ltd* [2020] FJHC

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<sup>1</sup> Now Justice Azhar.

391 (5 June 2020). Both cases appear to have focused on O.41, r.5 and 8 of the High Court Rules 1988. Order 41 prescribes the form and content of affidavits and their proper execution. The two rules read:

*5 (1) ...an affidavit may contain only such facts as the deponent is able of his or her own knowledge to prove.*

*(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*

...

*8 No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.*

[19] The Master discussed the *Bulileka* (supra) decision as follows at 28:

*...The Court in the above decision [Bulileka] struck out the affidavit sworn by the solicitor in support of an application for leave to appeal and stay pending appeal of his client. The court in that case relied on the Order 41 rule 9 (sic) and observed that, if an affidavit sworn before the barrister and solicitor of the party is not to be used, an affidavit of the solicitor himself has no force or avail in law...*

[20] The Master noted that the High Court relied on dicta from the Court of Appeal decision in *Pacific Agencies (Fiji) Ltd v Spurling* [2008] FJCA 49 (22 August 2008). The Court of Appeal case was discussed by the Master as follows at 29 to 31:

*29....the Fiji Court of Appeal in **Pacific Agencies (Fiji) Ltd v Spurling** (supra) and held in paragraph 18 that, there is nothing in said judgment which suggests that the solicitor who represents a party in Court has the right to depose an affidavit on his behalf. However, Hickie JA delivering the judgment of the Court of Appeal in that case was of the view that the affidavit could have been sworn by the solicitor who knew the issues. He said at paragraph 6:*

*There are a number of matters deposed to in the Affidavit which should have been sworn to by the Solicitor with the conduct of the matter. For example, how can a non-lawyer, depose as to:*

*(a) what the Solicitors on the Court record did or did not do on 16 July 2008 (paragraph 4);*

*(b) what “has been well settled law and common practice in Fiji” (paragraph 7) or the “usual rule and practice” (paragraph 7); or*

*(c) “that the Defendant has valid and arguable grounds of appeal which raise important questions of law and have reasonable prospects of success” (paragraph 8)?*

30. *The Supreme Court, in the same case (**Pacific Agencies (Fiji) Ltd v Spurling** [2008] F.JSC 27; CBV0007.2008S decided on 17 October 2008) had some concerns on the view of Hickie JA in relation to the sole knowledge of solicitors of the issues in that case and held paragraphs 31 and 32 that:*

*[31] Hickie JA was critical of Ms Narayan’s affidavit for having deposed to matters solely within the knowledge of her solicitor. We do not share such views.*

*[32] We were informed that there is a practice within Fiji of objection being taken if the lawyer who swears an affidavit appears as advocate in the case. While we express no view as to when such objection may or may not be appropriate*

31. *Whilst the Court of Appeal held that, the affidavit in that case should have been sworn by the solicitor who had sole knowledge of the matter, the Supreme Court did not comment on solicitors*

*swearing an affidavit on behalf of the clients. What is important is that, neither the Court of Appeal, nor the Supreme Court did hold that, a solicitor cannot swear an affidavit on behalf of his or her client.*

- [21] The Master then discussed the old English decision of *Lagos v. Grunwaldt* (1910) 1 K.B 41, noting at 32:

*...in **Lagos v. Grunwaldt** (supra) the affidavit supporting the application for summary judgement under Order 14 was sworn by the member of the law firm that represented the plaintiff. The English Court of Appeal rejected the said affidavit on the basis that, the deponent could not have positively sworn to the facts contained in that affidavit and not on the basis that it was sworn by the associate of plaintiff's solicitors. It appears for sure that, the superior courts both in Fiji and United Kingdom did not reject the affidavits solely on the basis they were sworn by the solicitors on behalf of their clients, because there is no special rule requiring rejection of such affidavits...*

- [22] The Master proceeded to offer his view on the propriety of counsel swearing affidavits for their client's cases, at 32 and 33:

32. *...Finally, the affidavits of the solicitors in respect of interlocutory matters may be the best evidence available. It may also be economical and timely to have solicitors or their associates swear an affidavit in support of interlocutory applications. If any such affidavit is filed it cannot be rejected as long as the said affidavit complies with the requirements under Order 45 (sic) rule 5 of the High Court Rules.*

33. *However, it is always best to discourage this practice of solicitors swearing affidavit on behalf their clients, for it carries the inherent risks such as, inadvertently putting the solicitor's credibility in issue, waiver of privilege and the solicitor being subject to cross examination etc. For these reasons, I prefer reasoning of Fiji Court of Appeal and Supreme Court in **Pacific Agencies (Fiji) Ltd v Spurling** (supra) and position of English*

*Court of Appeal in relation to an affidavit sworn by the solicitors in **Lagos v. Grunwaldt** (supra) over the decision of **Bulileka Case** cited by the counsel for the first defendant and first named second defendant. Therefore, I decide an affidavit sworn by a solicitor on behalf of his or her client should not be rejected solely on the basis it was sworn by such solicitor on behalf of his or her client. The court should consider whether any such affidavit complies with the Order 42 rule 5 or not before deciding either to receive in evidence or reject it.*

- [23] I respectfully concur with the learned Master's statements at paragraph 32. The rules do not expressly prohibit solicitors from providing affidavits in matters in which the law firm with which they are employed are acting. The rules are clear. As long as the facts deposed by the solicitor are within that solicitor's knowledge then the affidavit is admissible.<sup>2</sup> However, a deponent cannot have their affidavit sworn by a solicitor (or agent) of the firm that is acting for the deponent.<sup>3</sup> The two provisions go no further than that.
- [24] In the present case, while the interlocutory application is disputed it can hardly be said that Ms Pranjivan's evidence is contentious. The primary purpose of her initial affidavit in support of the summons is to annex the correspondence between the solicitors pertaining to the request for further particulars. The letter from the defendant's solicitors seeking further particulars is a requirement under O.18, r.11(6). Ms Pranjivan also sets out the relevant history of the proceedings with respect to the pleadings. She states in her affidavit dated 13 March 2024 that these matters are *'within my knowledge and/or derived from information to which I have access'*. She elaborates on this in her third affidavit dated 23 April 2024 where she states at paragraph 5 that *'I am familiar with this matter given the nature of my employment and position that I hold with Howards'*. Indeed, any employee with authorization to access files for the clients of the law firm/solicitor will be able to depose to matters of this nature.
- [25] I am satisfied that O.41 does not prohibit Ms Pranjivan from deposing to the matters pertaining to the correspondence and the pleadings. The affidavits are admissible on the basis that as an employee of Howards with access to the litigation file for the

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<sup>2</sup> Order 41, r.5.

<sup>3</sup> Order 41, r.8.



defendants Ms Pranjivan is able to depose to the fact that the correspondence was sent between the solicitors as annexed to her initial affidavit.

### **Application for further and better particulars**

[26] Order 18 deals with pleadings. Rules 6 and 11 provide that every pleading must contain facts and not evidence. The facts pleaded must set out a summary of the party's claim or defence. The facts necessary to establish the cause of action or defence must be contained in the pleadings.

[27] The principles are well established. The following passage in *Kurop v Adrenalin Watersports (Fiji) PVT Ltd* [2016] FJHC 21 at (9), citing from the Supreme Court Practice [1999], suffices to set out the key principles applicable for present purposes:

*General – The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as possible so as to minimize costs (a view approved by Edmund-Daviez L.J. in **Astroviani Compania Naviera SA v. Linard** [1972] 2 Q.B. 611; [1972] 2 All ER 647). The function of particulars is accordingly;*

- (1) *To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley L.J. in **Duke v Wisden** 918970 77 L.T. 67 at 68, per Buckley L.J. in **Young & Co.** [1924] 1 K.B. 675 at 679;*
- (2) *To prevent the other side from being taken by surprise at the trial (per Cotton L.J. in **Speding v Fitzpatrick** (1888) 38 Ch. D 410 AT 413; **Thomson v Birkley** (1882) 31 W.R. 230;*
- (3) *To enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per cotton L.J. *ibid*; per Jessel m.r. in **Thorp v Holdsworth** 918760 3 Ch. D 637 AT 639; **Elkington v. London Association for the Protection of Trade***

(1911) 27 T.L.R. 329 at 330);

- (4) *To limit the generality of the pleadings (per Thesiger L.J. **Saunders v Jones** (1877) 7 Ch. D 435) or of the claim or evidence (**Milbank v Milbank** [1900] 1 Ch. 376 at p.385);*
- (5) *To limit and define issues to be tried, and as to which discovery is required (**Yorkshire Provident Life Assurance Co v Gilbert** [1895] 2 Q.B. 148, per Vaughan Williams L.J. in **Milbank v Milbank** [1900] 1 Ch. 376 at 385);*
- (6) *To tie the hands of the property so that he cannot without leave go into any matters not included (per Brett L.J. in **Phillips v Phillips** (1878) 4 Q.B.D. 127 at 133; **Wooley v Broad** [1892] 2 O.B. 317)*

*The purpose of pleadings is not to play a game at the expense of the litigant but to enable the opposing party to know the case against him. There is a tendency to forget this basic purpose and to seek particulars which are not necessary when in truth each party knows the others case. Whenever either party is imputing fraud, negligence, or misconduct to his opponent, the facts must be stated with special particularity and care. Thus, in an action of wrongful dismissal, a plea justifying the dismissal on the ground that the servant was incompetent or dishonest must state the charge specifically and in detail; so must a plea justifying the publication of defamatory words on the grounds that they are true; so must all charges of bad workmanship, want of skills, negligence, and contributory negligence. The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place" (per Lord Penzance in **Mariner v Bishop of Bath and Wells** [1893] p.145 and see the remarks of Thesiger L.J. in **Saunders v Jones** (1877) 7 Ch. D. 435 at 452.*

[28] The Plaintiff relies on the following passage from *Digicel (Fiji) Ltd v Dickson International Trading Company Ltd* [2009] FJHC 278 at [27], as identifying the elements that establish the cause of action of tortious interference inducing breach of contract:

- i. *The wrongdoer knew or acquired knowledge of the contract in question and its essential, although not necessarily, its precise terms;*
- ii. *He so acted or 'interfered' whether by persuasion, inducement or procurement or other means so as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party;*
- iii. *The breach of contract was directly attributable to such act or interference; and*
- iv. *Damage was occasioned or was likely to be occasioned to such other party.*

[29] The defendants argue that the pleadings are deficient in that they do not properly specify the following:

- i. The identity of the particular employees that are the subject of the claim.
- ii. The terms of the contract that have allegedly been breached.
- iii. The identity of the defendant's employees or agents that have allegedly induced the breaches and how the breaches were induced.
- iv. The knowledge that the defendants are alleged to have of the contractual provisions that are alleged to have been breached.
- v. When the alleged breaches are said to have occurred.

[30] I am satisfied that the Amended Statement of Claim does not adequately set out the allegations against the defendants. In my view, better and further particulars are required in respect to the Plaintiff's employees who are said to have been induced to leave their employment, the dates or periods over which these inducements occurred and the clauses in the employment contract that are said to have been breached. Contrary, to the Plaintiff's argument, these are facts and not evidence. They are, to my mind, fundamental to the elements that make up the pleaded cause of action. Moreover, they are necessary in order for the defendants to know the case against them, to prevent

them from being taken by surprise at trial, to permit them to know what is to be discovered and indeed inspected, and to reduce the unnecessary burden and cost to the defendants that is presently likely to occur in the absence of the better particulars.

[31] The Plaintiff argues that identifying the employees who have allegedly breached their employment contract risks the employees seeking to be joined in the proceeding. That may or may not be the case – for my part, I would think that any determination and findings in this proceeding are confined to this proceeding as between the parties in this proceeding. Notwithstanding, even if such a risk exists, namely that the employees may seek to be joined, this must be weighed against the defendants right to properly know the case against them and the latter, in my view, ought to prevail.

[32] That said, in my view much of the information sought by the defendants in their solicitor’s letter of 8 March 2024 goes too far.<sup>4</sup> The reasons being:

- i. Some of the information sought can be inferred from the existing pleadings.<sup>5</sup>
- ii. Some of the information sought is not necessary to be pleaded,<sup>6</sup>
- iii. Many of the paragraphs in the solicitor’s letter, seeking information, are repetitious in that they seek the same information sought in earlier paragraphs,<sup>7</sup> and
- iv. Some matters go to evidence and are more properly dealt with at discovery or trial.<sup>8</sup>

[33] Accordingly, and for the aforementioned reasons, I am satisfied that the following additional information is required from the Plaintiff in order for the defendants to properly know the case against them:

- i. The names of the Plaintiff’s employees that the defendants have tried to induce and the 17 to 20 employees that the defendants are alleged to have induced to leave their employment with the Plaintiff and join the First Defendant.

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<sup>4</sup> The solicitor’s letter is annexure ‘A’ to Ms Pranjivan’s affidavit dated 13 March 2024.

<sup>5</sup> For example, paragraph 5(a),(d),(i) & (k).

<sup>6</sup> For example, paragraphs 5(h),(o),(p),(q),(r) & paragraph 7(a)-(f).

<sup>7</sup> For example, paragraphs 6(a),(c),(d) & (e).

<sup>8</sup> For example, paragraphs 7(g)-(j).


- ii. The names of the defendants' servants, agents and employees that have allegedly tried to induce the Plaintiff's employees.
- iii. The dates that the defendants' servants, agents or employees are alleged to have visited/utilized the Warwick Resort to make the inducements. If the Plaintiff is unable to specify the particular date(s) then it should specify the period over which these visits occurred.
- iv. The specific terms in the Plaintiff's employees' contract that the defendants are alleged to have procured the employees to breach.

### **Orders**

[34] The following orders are made:

- i. The Plaintiff is to file and serve a Second Amended Statement of Claim containing the particulars specified at paragraph 33 above by 15 July 2024.
- ii. The First and Second Defendants are to file their Statement of Defence by 5 August 2024.
- iii. The defendants have been successful and are entitled to costs summarily assessed in the amount of \$2,000 payable by the Plaintiff within 14 days.



  
D. K. L. Tuiqereqere  
JUDGE

### **Solicitors:**

Sherani & Company for the Plaintiff

Howards Lawyers for the Defendants