

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

**HBE 05 of 2024**

**BETWEEN** : **SANJAY KUMAR** of Vuda, Lautoka, Company Director and Businessman.  
**PLAINTIFF**

**AND** : **PRAMOD KUMAR** of Namaka, Nadi Company Director and Businessman.  
**1<sup>ST</sup> DEFENDANT**

**AND** : **SHEILENDRA KUMAR** of Votualevu, Nadi and both Company Directors and Businessmen.  
**2<sup>ND</sup> DEFENDANT**

Appearances: Mr. Singh with Ms. Swamy A. for the Applicant  
Mr. Naivalu M. with Mr. Narayan for the first Respondent  
Ms. Dutt S. for the second Respondent  
Mr. Narayan with Ms. Kumar for the third Respondent

Date of Hearing: 05 March 2025

Date of Ruling: 19 March 2025

**R U L I N G**

**BACKGROUND**

1. Mr. **Sanjay** Kumar (Applicant), Mr. **Pramod** Kumar (1<sup>st</sup> Respondent) and Mr. **Sheilendra** Kumar (2<sup>nd</sup> Respondent) are brothers. They are directors and shareholders of two companies namely Fairdeal Earthmoving Contractors Pte Limited (“**FEMPCL**”) and Wailoaloa Seascape Hotel Pte Limited (“**WSHPL**”).
2. In early 2024, Sanjay filed an Originating Summons under sections 176 and 177 of the Companies Act 2015.

3. Sanjay alleges that Pramod and Sheilendra have, over a long period of time, banded together to assume a position of power in the decision-making structure of the two companies. They use their authority to manipulate the companies' affairs and make business decisions which benefit them disproportionately. Sanjay has sworn affidavits by which he tries to paint a picture that his rights as a shareholder are being trampled over and marginalized by Pramod and Sheilendra.
4. Pramod in particular, allegedly uses FEMPCL assets for his own personal benefit or for the benefit of a certain other company in which he had a beneficial interest. Sanjay has no interest whatsoever in this other company. That company in question is Laneway Construction Pte Limited ("LCPL"). Pramod was director of LCPL until 11 July 2024. This was a day after certain allegations of conflict of interest were raised by Sanjay's counsel in Court on 10 July 2024.
5. Against that general background, Sanjay had applied to Court to seek certain interlocutory injunctive orders. He adduced evidence which tended to show that Pramod and Sheilendra, had, indeed, taken steps to dispose of some assets of FEMPCL and WSHPL behind his back. The Court then granted some *ex-parte* Orders on **12 March 2024** to restrain Pramod and Sheilendra from dealing with or disposing of or encumbering FEMPCL and WSHPL assets and to allow Pramod unhindered access to the companies' books.
6. On 29 July 2024, the Court granted an *ex-parte* Order to join LCPL as a party and also two other Orders. The first of these two other Orders restrains Pramod from using or dealing with FEMPCL's resources, material, machinery or labour. The second restrains LCPL or its servants or agents from dealing with or disposing (etc) any of its assets within the jurisdiction. These were later varied by consent *inter-partes* on 05 August 2024. The Orders were sealed on 09 October 2024.

### COMMENTS

7. On 29 October 2024, Messrs. Patel & Sharma was granted leave to issue committal proceedings. The particular Order which concerns the committal proceedings is reproduced in full below:

THAT the 1st Defendant is restrained from using and/or dealing with any resource, material, machinery and/or labour of FEMCPL for his personal use and/or towards the development of his personal property, any property and any project related to Laneway Construction Pte Limited except any arm's length dealing until further Orders of this Court.

8. The committal proceedings is founded on the allegation that Pramod had acted in breach of the above Order in the following ways:

- (i) he took or caused to be taken from FEMCPL's yard at least 43.5 cubic meter of concrete (and crushed metal)
- (ii) the concrete was loaded onto FEMCPL's delivery trucks and was then transported to, and offloaded at, a yard situated at Lowcost in Votualevu in Nadi.
- (iii) the said yard is owned by Laneway Construction Pte Limited ("LCPL")
- (iv) these "doings" by Pramod all happened:
  - (a) without any Local Purchase Order by LCPL.
  - (b) without any agreement or prior agreement as to the price of the concrete.
  - (c) without any arrangement for delivery by FEMCPL.
  - (d) without any prior agreement and/or arrangement between FEMCPL and LCPL. There is no arrangement for payment being made.
  - (e) without any control on the manufacture of the concrete or the quantity being manufactured or produced.
- (v) the concrete in question was taken for the use of LCPL without any payment being made to FEMCPL by LCPL.

9. The committal proceedings is marked for hearing tomorrow (20 March 2025).

#### **APPLICATION TO CROSS-EXAMINE PLAINTIFF**

10. Before me now are two Summons filed by the respondents seeking an order that the Applicant be directed to make himself available for cross-examination at the hearing of the committal proceedings. I will not go into detail on the affidavits filed by the parties. Suffice it to say that the allegations are refuted. The application for cross-examination is opposed.

11. Order 38 Rule 2 (3) of the High Court Rules 1988 provides as follows:

*In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.*

## SUBMISSIONS

### *Respondents' Argument*

12. Mr. Narayan's argument in support of the application may be summarized as follows:
- (i) the Court has a discretion as to whether or not order the attendance of a deponent for cross-examination in any matter begun by originating summons, originating motion or petition.
  - (ii) there is no bright line rule which forbids the court from making such an order in a committal proceeding such as the present one provided that each case must turn on its own facts.
  - (iii) provided that, even where the court makes such an order, the deponent is still not compellable to attend court for cross-examination. However, where a deponent fails to attend court, the court may draw (adverse) inferences accordingly. Furthermore, the affidavit in question shall not be used as evidence without leave – which leave the court may withhold.
  - (v) the parties have filed many affidavits in these proceedings. The affidavits raise serious issues of fact.
  - (vi) the main issues of fact are:
    - (a) the allegation that Pramod forcefully took concrete-mix and crushed metal from FEMCPL and had FEMPCL truck deliver this to an LCPL job site in Votualevu in Nadi.
    - (b) that Pramod assaulted Sanjay when Sanjay tried to stop the bridge operator. While there is a video recording in place, the video does not show that it was Sanjay who approached Pramod in the first place and who was operating the camera.
    - (c) that Pramod did not follow proper procedure (no local purchase order raised, no delivery docket issued, no invoices raised)
  - (iii) the above issues arise from allegations raised by Sanjay which go towards his cause for the committal proceedings. These are refuted by Pramod.
  - (iv) the committal proceedings are criminal in nature. They are not interlocutory proceedings. The court is called upon to resolve the factual disputes, finally. In order to determine, finally, whether or not Pramod had acted in contempt of the court in breaching the orders in question, it is crucial that the court allows cross-examination to test the veracity of the allegations. If the court is minded to grant order in terms, the court may make directions to limit cross-examination so that it does not extend to the substantive issues.

## *Applicants' Response*

13. Mr. Singh's argument may be summarized as follows:
- (i) yes! There are issues of fact raised by the affidavits filed. And, yes! Every case must turn on its own facts.
  - (ii) but, in committal proceedings, the onus is on the applicant to show that there was a willful neglect or willful disobedience of the order in question.
  - (iii) while, admittedly, the court has a general discretion under Order 38 Rule 2 (3) to order cross-examination, the courts have generally shied away from ordering a deponent to be cross-examined in a committal proceeding. The "genius of the common law" militates against the exercise of the discretion to allow cross-examination easily in a committal or a contempt case. The likelihood of cross-examination spilling out of control is crucial.
  - (iv) the applicants in this case, have not specified what they wish to cross-examine on. All they say is that "all the disputed evidence may be resolved by cross-examination". Only at the hearing of their application, did they hand up over the bar-table a list of issues that they wish to cross-examine Sanjay on.
  - (v) there is established authority in the Court of Appeal in Fiji that neither a contemnor nor an alleged of contempt is compellable a witness to be subject to cross-examination in a contempt proceeding (**Rosy Reddy v Yanktesh Permal Reddy & Others** ABU 77/2020, 20 August 2021; **Naidu v The Attorney-General of Fiji**, Civil Appeal No. ABU0070 & ABU 71 of 2022).

## **DISCUSSION**

14. Both counsel agree that whilst this is a case of civil contempt, the proceedings are *quasi-criminal* in nature. In **Comet Products UK Ltd v Hawtex Plastics Ltd & Anor** [1971] 1 All ER 1141 at 1143 to 1144, Lord Denning MR said:

'This case raises questions of some importance. Counsel for the plaintiffs submitted that in proceedings of this kind the defendant can be compelled to give evidence even against himself. Counsel pointed out that this is a case of civil contempt and not criminal. The difference is well known. A criminal contempt is one which takes place in the face of the court, or which prejudices a fair trial and so forth. A civil contempt is different. A typical case is disobedience to an order made by the court in a civil action. I cannot accept counsel's submission. Although this is a civil contempt, it partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding. I see that Cross J in **Yianni v Yianni**, so decided; and furthermore we ourselves in this court, in **Re Bramblevale Ltd**, said that it must be proved with the same degree of satisfaction as in a criminal charge. It follows that the accused is not bound to give evidence unless he chooses to do so. In this connection I quote what Bowen LJ said': -

‘It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, ‘no one is bound to incriminate himself’

This was not always the law in the case of civil contempt. In the days of Sir William Blackstone, 200 years ago, civil contempt was an exception to the general principle. In those days a plaintiff was entitled to deliver interrogatories to the defendant, which the defendant was bound to answer on oath. In his Commentaries (18th Edn, 1829, Bk4, page 287) Sir William Blackstone said that:-

‘this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance’;

and he went on to say that ‘by long and immemorial usage,[it] has now become the law of the land’. I am prepared to accept that such a rule did exist in the days of Sir William Blackstone. But I do not think it exists any longer today. The genius of the common law has prevailed. I hold that a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him provide his guilt. I reject the submission that the defendant is a compellable witness in the contempt proceedings against him.’

(emphasis added)

15. Indeed, the case law suggest that cross-examination may be ordered if it can be limited to the particular circumstances of the contempt alleged (as per Lord Denning MR. in **Comet** (supra) at 1145 paras a to b). However, where the cross-examination desired is much wider than that, then the court ought to exercise its discretion against it.
16. In this case, I keep in mind that the substantive matter between the parties relates to an alleged minority shareholder oppression. By their very nature, the alleged breach of the injunctive orders in question, if substantiated, would tend to support the substantive case of oppression. I also bear in mind that the following appear to be common ground between the parties:
  - (i) that Pramod did take the crushed metal and concrete mix from FEMPCL, using FEMPCL delivery truck.  
that Pramod, at the time, was (and still is) a director/shareholder of FEMPCL.
  - (ii) that the crushed metal/concrete mix was delivered to a job-site at Votualevu.
  - (iii) that the job-site in question does not belong to FEMPCL.
  - (iv) that the job-site either belongs to LCPL or Pramod personally.
  - (v) that Pramod, was a director of LCPL until fairly recently in 2024 – well after the substantive proceedings in this case were filed by Sanjay.

17. Having said that, it is trite that a company director owes a fiduciary duty to act in the best interest of the company and to not profit personally in his capacity as a director and/or to not allow a conflict between his duty as such and his own self-interest.
18. The potential consequences of an alleged breach of these duties, is that the company director may be ordered to compensate the company for all consequential losses and/or be required to return misappropriated company assets or profits gained as a result of their conflict of interest.
19. Arguably, flowing from that, is a duty of disclosure<sup>ii</sup>.
20. While Mr. Singh readily concedes that the general onus is on Sanjay to establish that there was a willful neglect or willful disobedience of the order in question, it would appear that there is also some onus, to say the least, on Pramod to prove that he had not prejudiced the company by the transactions in question or that he had not profited personally from it. This, of course is a question of fact which is reserved for the substantive hearing (the winding up matter).
21. Against that backdrop, it would appear that the only issue that calls for resolution in this case is whether or not the deliveries in question have been paid for. To resolve this question, it is hardly necessary to cross-examine the plaintiff.
22. The alleged assault on Sanjay by Pramod has no direct bearing on the committal proceedings in this case. Sanjay would have been best advised though to lodge a complaint to the police.

## **CONCLUSION**

23. In the final, I dismiss the application. Costs to the plaintiff (respondent in this application) which I summarily assess at \$2,000 (two thousand dollars only). The three Respondents are to bear these costs equally between them.



Anare Tuilevuka  
**JUDGE**  
**19 March 2025**

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<sup>i</sup> in **Redfern v. Redfern** [1891] P 139 at 147, [1886-90] All ER Rep 524 at 528

<sup>ii</sup> See for example **Commonwealth Bank of Australia v Fernandez** [2010] FCA 1487; (2010) 81 ACSR 262.