

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

Civil Action No. HBC 50 of 2021

**BETWEEN:**                **SEA PILOTS (FIJI) LIMITED** a limited liability company whose registered office is located at 24 Ratu Sukuna Road, Suva, in the Republic of Fiji.

**PLAINTIFF**

**AND:**                    **MALCOLM ALEXANDER PECKHAM** Field 40 Road, Lautoka, Ship Captain.

**DEFENDANT**

**BEFORE**                **Hon. Justice Vishwa Datt Sharma**

**COUNSEL:**            **Ms. Jackson V.** for the Plaintiff  
                              **Ms. Tikoisuva N** for the Defendant

**DATE OF DECISION:** 19<sup>th</sup> October, 2023

**DECISION**

*[Injunction pursuant to Order 29 Rule 1 and 2 of the High Court Rules 1988]*

## **Introduction**

- 1) The plaintiff filed an inter parte notice of Motion on 17<sup>th</sup> February 2021 together with a Statement of claim and an Affidavit in Support deposed by James Henry Vollmer and sought for the following orders:-
  - [1] That the Defendant do forthwith deliver up to all the company property in his possession which include, the Plaintiff's:
    - a) Pilot Boat Service Manual;
    - b) Company Cheque Books containing Cheque Numbers 6200, 6936 - 7000 and 8802 - 8787, which relate to the Plaintiff's ANZ Cheque Account Number 8312434; and
    - c) Company Vehicle being a Toyota Land Cruiser Registration No. CPILOT.
  - [2] The Defendant do forthwith deliver up to the Plaintiff all receipts and invoices relating to the 143 separate cheque payments paid out of the Plaintiff's ANZ Cheque Account between January 2018 to October 2018 totaling the sum of \$601,935.13 (six Hundred and one Thousand Nine Hundred and Thirty Five Dollars and Thirteen Cents).
  - [3] Costs of this application be costs in the cause; and
  - [4] Any further Orders this Honourable Court deems just, fit and expedient.
- 2) The Plaintiff relied on the Affidavit in Support deposed by James Henry Vollmer.

## **Background Facts**

- 3) From 02<sup>nd</sup> August 2005 to 12<sup>th</sup> November 2018, the Defendant was a Director of the Plaintiff Company.
- 4) The Defendant resigned as a Director on 12<sup>th</sup> November 2018.
- 5) On 20<sup>th</sup> December 2018, the Form A11 (Change to Company details) was lodged at the Registrar of Companies.
- 6) At the date of the Defendant's resignation, he had in his possession the following items that belonged to the plaintiff:

- (a) The Plaintiff's Cheque Books containing Cheque Numbers 6200, 6936 - 7000 and 8802 - 8787, which relate to the Plaintiff's ANZ Cheque Account Number 8312434
  - (b) The Plaintiff's Pilot Boat Service Manual;
  - (c) The Plaintiff Toyota Land Cruiser Registration No. CPILOT
  - (d) Invoices and receipts relating to the 143 separate cheque payments paid out of the Plaintiff's ANZ Cheque Account between January 2018 to October 2018 totaling the sum of \$601,935.13 (six Hundred and one Thousand Nine Hundred and Thirty Five Dollars and Thirteen Cents).
- 7) The Defendant is holding onto the company property in his possession to this date.
- 8) On 05<sup>th</sup> October 2018, the Directors of the Plaintiff, the Defendants and the Defendant's solicitors met to discuss the outstanding issues.
- 9) The Directors of the Plaintiff requested that the Defendant release the company property into the Plaintiff's possession but the Defendant refuses to comply with the Plaintiff's request.
- 10) The Defendant continued to neglect to comply with the Plaintiff's request.

#### Determination

- 11) The Causes of Action in the current actions are:
- (a) Wrongful detention
  - (b) Conversion of company cheques
  - (c) Breach of Fiduciary Duties as a Director
- 12) The Plaintiff seeks a mandatory Injunction as per the case of **'Redland Bricks Ltd v Morris (Supra)**.
- 13) The issues for this Court to determine are:
- (1) Whether the Defendant forthwith deliver up to the Plaintiff all the company property in his possession which include, the Plaintiff's:
    - (a) Pilot Boat Service Manual;
    - (b) Company Cheque Books containing Cheque Numbers 6200, 6936 - 7000 and 8802 - 8787, which relate to the Plaintiff's ANZ Cheque Account Number 8312434; and
    - (c) Company Vehicle being a Toyota Land Cruiser Registration No. CPILOT.
  - (2) The Defendant do forthwith deliver up to the Plaintiff all receipts and invoices relating to the 143 separate cheque payments paid out of the

Plaintiff's ANZ Cheque Account between January 2018 to October 2018 totaling the sum of \$601,935.13 (six Hundred and one Thousand Nine Hundred and Thirty Five Dollars and Thirteen Cents).

(3) Costs of this application be costs in the cause.

- 14) The Plaintiff has submitted to the Court earlier on 21<sup>st</sup> February 2022 that the bulk of the mandatory injunction orders sought by the Plaintiff in its Inter parte Notice of Motion filed on 17<sup>th</sup> February 2021 have been taken care of by the Consent orders made on 21<sup>st</sup> February 2022. Hence, it Leave Court to determine-
- (i) 'whether a mandatory order that the Defendant handover the possession of the Pilot Boat Service Manual be granted; and
  - (ii) the Company Vehicle registration no. CPILOT to the Plaintiff?'
- 15) The Plaintiff filed its Writ Action claiming three (3) Causes of Actions. However, since the Pilot Boat Manuals and the Toyota Land Cruzor Truck Registration No. CPILOT relate only to the Plaintiff's First Cause of Action against the Defendant, the Plaintiff only needs to deliberate and make submissions of the Cause showing "**wrongful detention of Goods**".
- 16) It is not disputed that the Defendant was a company Director of the Plaintiff and that he resigned on 12<sup>th</sup> November 2018.
- 17) However, the Defendant disputes that the Plaintiff's company property is still in his possession to the current despite his resignation and he refuses to deliver the same to the Plaintiff.
- 18) The reason for the Defendant's refusal to deliver the Plaintiff's Company property according to the Defendant in his statement of defence filed is that:
- "The Directors of the Plaintiff Company agreed in their meeting of 05<sup>th</sup> October 2018 for the Defendant to keep the vehicle 'CPILOT' which was to be transferred to the Defendant in recognition of the Defendant's years of service to the company. The conditions of Defendant's resignation was agreed between all the Directors then and therefore the Plaintiff no longer has any entitlements to the vehicle registration no 'CPILOT'.
- 19) The Plaintiff submitted that there is a financial interest noted on the Plaintiff's vehicle registration no. CPILOT in favour of Credit Corporation. The Plaintiff added that no doubt losing possession of a company asset that has a third party interest registered on it would be breach of the Contract between the Plaintiff and Credit Corporation; especially if the Defendant were to have an accident and render the Plaintiff's security to credit corporation worth less.
- 20) As per Lord Diplock in American Cyanamid [1975] UKHL 1; [1975] 1 All ER 504, 510(d) HL:-

*"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on 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. These are matters to be dealt with at the trial."*

- 21) The guidelines laid down by Lord Diplock in **American Cyanamid Co. v Ethicon Ltd** [1995] AC 396 are still regarded as the leading source of the law of injunction where it was held that the following guidelines can be taken into consideration when granting or refusing an interim injunction:

- (a) A serious question to be tried at the hearing of the substantive matter.
- (b) Whether the damages is an adequate remedy.
- (c) In whose favour the balance of convenience lie if the injunction is granted or refused.

- 22) In the case of **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523 at 534, Kerr L.J. made the following observations:

*"It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straightjacket....The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial."*

- 23) In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 84 Lord Denning 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 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."*

### **Serious Questions**

- 24) The Plaintiff must satisfy the Court that there is a serious question to be tried and that the balance of convenience favours the grant of the injunction: **Klissers v Harvest**

Bakeries [1985] 2 NZLR 140 (CA) At p.142 Cooke J delivering the judgment of the Court said [20]:

*"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way - as the Chief Justice did here - it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."*

- 25) Serious question is not a step to be brushed over lightly. In Air Pacific Ltd v. Air Fiji Ltd [2006] FJCA 63 the Court of Appeal said at [24]:-

*"The two stages in American Cyanamid are not to be regarded as an inflexible process, and in the end the question is where overall justice lies: Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 110, 128 (NZCA). However, as the High Court of New Zealand has said, the establishment of a serious issue is not a step to be brushed over lightly: "It is not sufficient for a plaintiff just to say there is a tenable cause of action from a legal point of view, and a conflict of evidence on the facts": Ansell v NZ Insurance Finance Ltd Wellington A434/83, judgment 30 November 1983, Eichelbaum J. In the present case the Judge dealt with the facts relating to this issue in a single sentence and, with respect, may not have appreciated that despite the considerable quantity of material, on analysis the evidence gave little if any support for the assertions made by the plaintiff in its statement of claim and affidavits. We conclude that on the existence of an agreement, there was insufficient material to allow the Judge to find there was a serious issue."*

- 26) The Plaintiff has submitted that it has satisfied Court with the First limb test under 'Redland Bricks Ltd v Morris (supra in that that the Plaintiff is the registered owner of the vehicle 'CPILOT' and therefore there cannot be any rational basis for denying the Plaintiff the right to possess and use an asset that the Plaintiff owns.

#### Would Damages be sufficient remedy?

- 27) The Plaintiff submitted that the Defendant has wrongfully interfered with the Plaintiff's rights as an owner of a property and continues to do so and therefore the Plaintiff is entitled to an injunction.

- 28) As a general rule, the question of whether damages are an adequate remedy must be considered upon an application for an interlocutory injunction as has been filed in the current application.
- 29) The balance of convenience is only to be resorted to if damages are not an adequate remedy for the Plaintiff (**Bank of Baroda v Akhila Nand Chaudary**, unreported, FCA 50 of 1986).
- 30) Lord Diplock said in **American Cyanamid** [1975] UKHL 1; [1975] 1 All ER 504, 510(D) HL said that once he is satisfied that there is a serious question to be tried:

*"the Court should go on to 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. If damages.....would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage" [American Cyanamid p.408 B-C]"*

- 31) The Plaintiff's contention is that if the Injunction is refused the Plaintiff will suffer irreparable damage and that damages will not be an adequate compensation. On the other hand, the Defendant's contention is that damages are an adequate remedy for the Plaintiff.
- 32) The Substantive matter is still impending hearing and determination by this Court.

#### **Balance of Convenience?**

- 33) The Plaintiff submitted that having paid for the vehicle, plus interest to Credit Corporation and then been denied its use in the company operations cannot possibly be adequately be compensated by way of damages. The Plaintiff added that the Defendant is 74 years old and not in position to pay any damages.

#### **Serious Question to be tried?**

- 34) There is prima facie no serious question to be tried since the meeting of the Directors with Defendant of 05<sup>th</sup> October 2018 for the Defendant to keep the vehicle registration no. 'CPILOT' was resolved to be transferred to the Defendant accordingly.

#### **Undertaking as to Damages**

- 35) The Plaintiff has provided this Court at paragraphs 45 to 50 of the Plaintiff's affidavit in support filed on 17<sup>th</sup> February 2021 the status of the Plaintiff's financial position as at 31<sup>st</sup> December 2020.



**Conclusion**

- 36) For the aforesaid rational, I find that the Status Quo of the matter to be maintained until the hearing and determination of the impending Issues within the Substantive action.
- 37) Therefore, I have no alternative but to refuse the Plaintiff's application seeking for the Interim and mandatory Injunctive Orders and dismiss the application accordingly.

**Costs.**

- 38) It is only fair that the Plaintiff pays the Defendant a sum of \$1,000 as summarily assessed costs since the matter proceeded to full hearing for determination and parties filing submissions and arguing the matter orally for determination.

**Orders**

- A. The Plaintiff's Inter-Parte Notice of Motion filed on 17<sup>th</sup> February 2021 seeking for Injunction and Mandatory Orders are hereby dismissed.
- B. The Plaintiff to pay the Defendant a sum of \$1,000 as summarily assessed costs within 14 days timeframe.

Dated at Suva this 19<sup>th</sup> day of October, 2023.



  
.....  
**Vishwa Datt Sharma**  
**JUDGE**

CC: JACKSON BALE LAWYERS, SUVA  
TOGANIVALU LEGAL, SUVA