

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 148 of 2009L

BETWEEN : **GLENORE LIMITED** a duly incorporated company having its registered office situated at c/- HLB Crosbie & Associates, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi, Fiji trading as **GARDEN ISLAND RESORT**

Plaintiff

AND : **GLOBAL PREMIUM SERVICES LIMITED** a duly incorporated company having its registered office situated at 3 Vesi Crescent, Lautoka, Fiji

Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. S Krishna

Solicitors: Mitchell Keil Lawyers for the Plaintiff

Date of Hearing: 21 August 2009

Date of Judgment: 21 August 2009

INTRODUCTION

[1] This is an ex-parte application for and injunction restraining the Defendant from presenting a winding up petition in this Court in respect of a debt which is allegedly owed by the Plaintiff to the Defendant. The Plaintiff disputes the debt.

[2] The matter was heard on **21 August 2009** and after hearing Counsel for the Plaintiff Applicant I ordered that an injunction issue.

[3] These are the reasons for my judgment.

REASONS FOR JUDGMENT

[4] The Plaintiff filed on **21 August 2009** a Writ of Summons with endorsed claim, ex-parte motion for interim injunction, affidavit in support sworn by a clerk employed by the Plaintiff's solicitors. It has been said before by the Judges of the High Court and the Court of Appeal that such a practice is not acceptable. However, I am prepared to accept this affidavit because the Plaintiff has given the clerk a written authorisation for the clerk to swear the affidavit on its behalf due to the urgency of this application. Noting that the Plaintiff operates a hotel on one of the outlying islands it is understandable.

THE FACTS

[5] This is a dispute between the parties for payment for architectural services rendered by the Defendant to the Plaintiff for the latter's hotel.

[6] By notice dated **21 July 2009** the Defendant by its lawyers issued a statutory demand under **section 220** of the **Companies Act** for the payment of moneys allegedly owing by the Plaintiff for architectural services. The notice warned that if the amount claimed was not paid within 3 weeks from the date of receipt of the notice then the said solicitors would present a petition to this Court to have the Plaintiff company wound up. The notice was followed by a letter from the said solicitors dated 17 August 2009 again with the warning that unless the Plaintiff agreed to the Defendant's proposal for settlement of monies owing the solicitors were instructed to proceed with the winding up application.

[7] The affidavit in support had annexed to it several emails¹ and letters² between the parties themselves and their lawyers³ which clearly show that there is a serious dispute as to the amount that is allegedly owed.

[8] At the time this application came before me the 3 weeks time limit had well expired.

[9] The Plaintiff says in the affidavit that its resort is renowned in Fiji and presentation of a winding up petition and an eventual advertisement will bring about immense damage to the resort's commercial reputation.⁴

THE LAW

[10] The application is made pursuant to **Order 29 rule 1(2)** of the **High Court Rules 1988**.

[11] This is not a new rule as some Counsel have suggested. It has been the law since 1991. The amendment in 1991⁵ provides:

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

[12] Recently, I held that the two elements of "urgency" and "mischief" must be satisfied and consideration of the likelihood of "irreparable or serious mischief" resulting is to be looked at from both the applicant's and the respondent's points of view: **[Petherick v Aussie Houses International Ltd \[2009\] FJHC 158; HBC129.2009L \(31 July 2009\); Sharma v Raj \[2009\] FJHC 136; HBM019.2009 \(26 June 2009\)](#)**

¹ Annex MU12

² Annex MU3.

³ Annex MU11

⁴ Para 33

⁵ Legal Notice 61/91 dated 5 November 1991

[13] The Applicant must also show that he can bring himself within the **American Cyanamid**⁶ principles, i.e. that there are serious issues to be tried, damages are not an adequate remedy and the balance of convenience lies in his favour: **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2004] FJCA 59; ABU0011.2004S & ABU0011A.2004S (26 November 2004).**

CONSIDERATION OF THE APPLICATION

[14] I am satisfied that the alleged debt is seriously disputed. There are serious issues to be tried.

[15] I also satisfied that the question of damages does not arise here. The Defendant is threatening to proceed by winding up proceedings which I am of the opinion is an abuse of process. The proper process is by way of Writ of Summons. The Defendant is not precluded by the grant of an injunction from recovering its debt by way of Writ of Summons.

[16] The likelihood of damage to the Plaintiff by an advertisement in the newspapers that it would be wound up if a debt, which the Plaintiff says it disputes, cannot be ignored.

[17] I am satisfied that the requirements of **O 29 r 1(2)** and the **American Cyanamid** principles have been met so the grant of an interim injunction restraining the Defendant from proceeding by way of winding up proceedings is justified.

[18] Further, the use of a **s 220 Companies Act** statutory demand where the debt is seriously disputed is an abuse of process. The provision should not be used as a means of blackmailing the debtor into payment when the debt is disputed.

[19] The matter is to go before the Master who shall set the timetable for filing of further affidavits and submissions should the Defendant wish to be heard on the interim injunction continuing, otherwise the matter is to take its normal course.

⁶ (1975) 1 All E R 396

ORDERS

[20] I therefore make the following **Orders**:

- 1] An injunction to restrain the Defendant, whether by itself or by its Directors, Officers, servants or agents or otherwise howsoever from presenting a winding up petition in this or any other High Court in Fiji against the Plaintiff;**
- 2] The Injunction is to remain in force until further order of the Court;**
- 3] The Plaintiff is to serve the Defendant all Court documents including this Order within 21 days;**
- 4] This matter is adjourned to the Master for mention on 30/9/09 at 9.00am;**
- 5] The costs of and incidental to this application be in the cause.**

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Sosefo Inoke
Judge