

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 156 of 2009L

BETWEEN : **MEL KAYLANI INVESTMENT LIMITED** having its registered office at Suite 1, 21 Sukuna Road, Nadi Main Street, Fiji and trading as **TROPICAL MESSAGE & BEAUTY/EN VOGUE HAIR SALON** and **MELINDA WAKEHAM** of Suite 2/3 Sukuna Road, Nadi Town, Nadi, Fiji, Businesswoman

Plaintiffs

AND : **WYNDHAM VACATION RESORTS ASIA PACIFIC (DENARAU ISLAND) LIMITED** an Australian Corporation and having its office at 130 Bundall Road, Bundall, Queensland, Australia

Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

**Counsel Appearing: Mr. K. Maraiwai for the Plaintiffs
Mr. F. Hannif for the Defendant**

**Solicitors: Messrs Iqbal Khan & Associates for the
Plaintiffs
Munro Leys for the Defendant**

**Date of Hearing: 29 September 2009
Date of Judgment: 2 October 2009**

INTRODUCTION

[1] The background to this case is set out in my interlocutory judgment delivered on **31 August 2009**.

[2] In that judgment I gave my reasons as to why I refused to hear the Plaintiff's application for interim injunction ex-parte and ordered that the

application proceed inter-parte and the parties file affidavit material in support of their respective cases and submissions. This is my judgment after the inter-parte hearing.

THE APPLICATION

[3] The Plaintiff (Ms Wakeham) applied by motion filed on 28 August 2009 for an interim injunction to restrain the Defendant (Resort) from evicting her until final determination of the substantive action. The application was supported by two affidavits sworn by Ms Wakeham filed on 28 August 2009 and 3 September 2009, respectively. The General Manager of the Resort swore an affidavit on behalf of his employer in reply to Ms Wakeham's affidavit of 28 August 2009 which was filed on 17 September 2009.

CONSIDERATION OF THE APPLICATION

[4] I reproduce my reasons that I gave in my judgment of **31 August 2009** for refusing to hear the application ex-parte because the same reasons apply to this inter-parte hearing.

[5] The application must meet the requirements of **Order 29 rule 1(2)** of the **High Court Rules 1988** and the **American Cyanamid**¹ 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); Glenore Ltd v Global Premium Services Ltd [2009] FJHC 174; HBC148.2009L (21 August 2009).**

[6] Having not been satisfied at (that) stage that this is not a case where damages are not an adequate remedy and there being no undertaking as to

¹ (1975) 1 All E R 396

damages given, I took the view that the matter should proceed inter-partes and ordered accordingly.

[7] That preliminary view that this is essentially a claim for damages for breach of contract so damages are an adequate remedy has not changed and therefore this application fails on the same ground. I need not consider whether Ms Wakeham's undertaking as to damages, which she has put before me in her second affidavit, is adequate.

[8] The affidavit in support of the Resort's case sets out a history of accommodation of Ms Wakeham's presence at the Resort's spa and wedding centres. The initial contract with Ms Wakeham expired in 2006 and since then Ms Wakeham's presence at the Resort was on a mutual arrangement. In February 2009 Ms Wakeham was told that the Resort was calling for tenders for the operation of the spa and wedding facility. She was one of four that submitted tenders. Her tender was unsuccessful and she was advised on 4 May 2009 to wrap up her business and vacate the Resort by 4 June 2009. She engaged a consultant to negotiate on her behalf and the result of those negotiations was that she was allowed to remain until 18 June 2009. Further representations by Ms Wakeham's consultant resulted in the Resort extending her stay till 31 August 2009. On 31 July Ms Wakeham received a further letter from the Resort confirming that she was to vacate the Resort premises by 31 August 2009. Instead of leaving she filed a Writ of Summons against the Resort on 28 August 2009 and this application for interim injunction to stop the Resort from evicting her.

[9] Ms Wakeham's Counsel asked that if I were to refuse his client's application she would need two to 3 months to move. I think that is too long. The Resort has given her a month at a time to wrap up her business and vacate so I would take that as the appropriate time.

COSTS

[10] Ms Wakeham has lost in this application. This application has been brought on the advice of her lawyers and I do not think she should be penalised twice in terms of fees in having to pay the Resort's legal fees as well as her own. The Resort can absorb its own costs so I make no order as to costs.

ORDERS

[11] The Orders are therefore as follows:

- 1) The Plaintiff's application by motion filed on 28 August 2009 is dismissed.**

- 2) The Plaintiff is to vacate the Defendant's Resort within 1 month.**

- 3) No order as to costs.**

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Sosefo Inoke
Judge

