

PENLAN HOLDINGS (SAMOA) LTD v JOHNSON (MICHAEL)

Supreme Court Apia
Dillon J
19 August 1992

PRACTICE AND PROCEDURE: Interim injunction - vehicle not to be sold or disposed of by Defendant until action settled - full disclosure on ex parte application - undertaking as to damages - R 67 Supreme Court (Civil Procedure Rules) 1980 on Directions - timetabling of disputes - S39 Judicature Ordinance 1961.

HELD: As the written agreement stipulated vehicle or \$13,000, the interest of the Plaintiff was monetary so there was no question of irreparable damage arising if the interim injunction was not granted.

M G Philipp for Plaintiff
R Drake for Defendant

This is a Motion by the Plaintiff for an interim injunction against the Defendant to have an Isuzu motor vehicle Registration No. 33 owned by the Defendant not sold or disposed of by the Defendant until the main action between the parties has been heard and dealt with and for the said vehicle to be placed under the control of the Justice Department until then.

The Motion is dated the 11th August 1992 and was made ex parte. On the same day the Court ordered that the Motion be served with accompanying affidavits on the Defendant and be called in Court 2p.m. Friday 14.8.92. It was then adjourned to 17.8.92 for hearing at 11a.m. The matter came before me at 3p.m. on Monday 17.8.92 when Counsel for the Plaintiff and Counsel for the Defendant were both heard. Decision was reserved on the Motion until Wednesday 19.8.92 at 2p.m.

The Statement of Claim filed on 11th August 1992 alleges that the claim arises out of a labour only building contract to be carried out by the Plaintiff for the Defendant. The written contract was entered into on 7th July 1992 and was for a 30' x 14' extension to the Defendant's residence. The price was \$16,500 on a labour only basis to be paid \$3,500 on 8th July and the balance of \$13,000 would be paid on 1.8.92 by the Defendant transferring the Isuzu pick-up Registration No. 33 to the

Plaintiff (or its directors) if the Defendant had not sold the vehicle to someone else by 1st August 1992. If the vehicle was sold before 1.8.92 the Defendant would pay the Plaintiff \$13,000 in cash on or before 1.8.92.

On 26th July 1992 when the Plaintiff says the contract was about 2 days from completion the Defendant purported to terminate the contract and prevented the Plaintiff from completing the contract work. Further the Defendant, though not able to sell the Isuzu vehicle before the 1st August 1992 has failed to transfer its ownership to the Plaintiff as provided for in the contract.

The Plaintiff, in its Statement of Claim seeks -

- (a) an order allowing it to complete the contract work
- (b) an order directing the Defendant to transfer the Isuzu vehicle
- (c) costs and
- (d) further or other relief.

The Affidavit in support of the Motion is sworn on 31st July by Lance Woodworth a director of the Plaintiff Company. This confirms the allegations made in the Statement of Claim but failed to exhibit a letter dated 29th July 1992 from the Defendant in which the Defendant complained of the Plaintiff failing to follow instructions and the extremely poor standard of workmanship resulting in a substantial amount of correctional work being required. The import of this letter from the Defendant was glossed over by the Plaintiff in its affidavit in support (para.14) as being "For the first time the Defendant gave reasons for his wish to terminate the contract..."

In paragraph 15 of the affidavit in support the Plaintiff deposed that the Defendant, a U.S. citizen and ex Peace Corps member had indicated that he would be leaving soon for the U.S.A. where he had been offered a job.

In paragraph 16 of the affidavit in support the Plaintiff deposed that the Defendant had indicated he would not hand over the Isuzu vehicle and the Plaintiff expressed concern that the Defendant might try to dispose of the Isuzu vehicle contrary to the contractual arrangements.

Finally in paragraph 18 of the affidavit in support the Plaintiff feared that the Defendant might try to damage the Isuzu vehicle.

The Defendant filed an affidavit in reply sworn on 17th August 1992 exhibiting the Defendant's letter of 29th July 1992 and accordingly the contents of such letter are now before the Court.

In paragraph 7 of the affidavit in reply the Defendant relates how he received a stop notice from the Public Works Department 2 or 3 days after terminating the Plaintiff's contract because there was no building permit for the work. This move was apparently engineered by the wife of Lance Woodworth, the deponent of the affidavit in support.

In paragraph 10 of the affidavit in reply the Defendant has struck out the words "a motor vehicle" in his disclosure of assets.

There is a further affidavit by Lance Woodworth sworn on the 17th August 1992. This deals with the real issues between the parties as to materials supplied and quality of workmanship and does not need to be further considered at this stage and in respect of the motion for interim injunction.

From the bar I was informed by Defence Counsel that the Defendant is to return to the United States and that the Isuzu vehicle has been transferred by the Defendant to a friend and agent in case he could find a buyer. I was not informed when the Defendant intends to return to the U.S.A. and I was not advised the name of the friend and agent now holding the Isuzu vehicle. From the bar I was advised that the Defendant is advertising his house for rent at \$1,000 er month.

Considerable argument was directed to me concerning the need for the fullest disclosure on an ex parte application for interim injunction. I agree. But when the matter then comes before me on notice, failure to make such full disclosure is significant only as to the "clean hands" of the applicant in seeking an equitable remedy. I now have the contents of the Defendant's letter of 29th July to the Plaintiff exhibited to the Defendant's affidavit in reply.

Further argument was directed to me concerning the Plaintiff's undertaking as to damages in the event that the Defendant sustains any damage by reason of the making of an interim injunction. The undertaking filed is completed by Lance Woodworth and his wife Penelope Woodworth, directors of the Plaintiff Company and is given on behalf of themselves and on behalf of the Plaintiff Company. It is not completed by the Plaintiff Company. There is neither disclosure of any assets or liabilities of the two directors nor of the financial position of the Company. From the bar I was informed that the Company was first registered in March 1992. I am not satisfied as to the worth of the undertaking filed and that is an essential element in the Plaintiff's motion.

In any event the Plaintiff's claim is based on the written agreement which stipulated the Isuzu vehicle or \$13,000. The interest of the Plaintiff is therefore purely monetary so that no question of irreparable damage arises here if the interim injunction is not granted.

That might be sufficient for me to dispose of this motion, but I am troubled by what has transpired here.

I have detailed all the twists and turns by both the Plaintiff and the Defendant to show that this is very much the pot calling the kettle black. Neither side emerges with dignity and honour.

Further I am concerned with the form of the building contract which is on letterhead for Penlan Holdings (Samoa) Ltd but then refers throughout to the contractor, Mr Lance Woodworth, to carry out the work and to receive payment. I believe that the contractor should be listed in the intituling as 2nd Plaintiff to ensure that this matter at trial is dealt with on its true merits. If sought by the Plaintiff's counsel I shall make an order joining Lance Woodworth as 2nd Plaintiff, an amended Statement of Claim to be filed and served by Friday 21st August 1992. I suspect that at this stage the Plaintiff no longer seeks an order directing the Defendant to allow the Plaintiff to complete the works.

There is no specific provision other than R.67 Directions, in the Supreme Court (Civil Procedure Rules) 1980 for timetabling steps in an action such as this. At this stage it is clear what the dispute is about, a labour only contract where the Defendant complains about the quality of the work and the contractor retorts that the materials supplied by the Defendant were inferior and of not sufficient quantity. That, to my mind, should be capable of being dealt with by this Court in fairly short order, and should be dealt with without delay and before the Defendant leaves the jurisdiction.

S39 of the Judicature Ordinance 1961 provides that:

"Subject to the provisions of this Ordinance ... and the Rules of Court, the practice and procedure of the Supreme Court in the exercise of its civil ... jurisdiction shall be such as the Court thinks in each case to be most consistent with natural justice and convenience."

I infer from the written contract between the parties, signed on 7th July 1992 and due for final payment on the 1st August 1992 that the work was expected to be completed within the 24 days between such dates. This is consistent with the Plaintiff's claim that the work was 99% complete when work was stopped by the Defendant on the 26th July 1992. The remedying of any defective

work, the costing of any further remedial work, and the carrying out of costing of work to complete the job should now be available to the Defendant, 24 days after the work was stopped on 26th July 1992.

Pursuant to R.67 and S.39 I make an order for Statement of Defence and/or Counter-Claim to be filed and served by Defendant by Wednesday 26th August 1992 and any Reply or Statement of Defence to Counter-Claim to be filed and served by Plaintiff by Friday 28th August 1992. The matter is set down for trial on Monday 31st August 1992 at whatever time counsel wish to proceed after 9.30a.m. There will be leave to the parties to apply further to alter the order for directions. Costs in this application to be costs in the cause.