IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 46 OF 1990
(Civil Action No. 144 of 1990)

Between :

COBWEBB CO. PTY. LIMITED — Appellant

v.

RATU KAVEKINI NAKELIA Turaga ni Yavusa Naleiwavuwavu and Turaga ni Mataqali Navakalolo suing on behalf of himself and all other persons constituting the Yavusa Naleiwavuwavu with its constituent Mataqali Navakalolo, Natabuderogo, Eloto and Talenaika — First Respondent

and

RATU JOSAIA QORO suing on behalf of himself and all other persons constituting the Yavusa Nasara with its three constituent Mataqali namely Nalagi, Drakoro and Navaka — Second Respondent

Mr. P. Knight for the Appellant
Mr. S. J. Stanton Q.C. for the two Respondents

Date of Hearing : 31st October, 1990
Delivery of Judgment : 8th November, 1990

JUDGMENT OF THE COURT

There was some confusion in this appeal due to Mr. Knight's Notice of Appeal listing all six defendants in the action as Appellants and describing his own client as "the fourth Appellant". Only the fourth defendant has in fact appealed.

The appeal is against the order of Mr. Justice Saunders granting the Respondents an interim injunction in the following form :

> " *IT IS THIS DAY ORDERED that each Defendant be restrained until further Order from dealing in any way with the Native Customary Fishing Right owned by the Vanua of Sabeto in that area of 130.5 acres approximately, described in Approval Notice Diagram File No. 60/150 dated January 1990 a copy of which is Annexure PK2 to the Affidavit of Peter Knight sworn on 1st August 1990 with Costs in the cause."*

There are five grounds of appeal but we only find it necessary to consider the third and fifth grounds :

> " *3. That the learned Judge improperly exercised his discretion in making the order he did in that he did not consider or did not properly consider the matters to be taken into account in dealing with an application for an interim injunction.*
>
> *5. That the learned Judge erred in law in not enquiring as to whether the Plaintiffs were in a financial position to honour their undertaking as to damages before granting the injunction. "*

A brief recital of the relevant facts will suffice. The Respondents representing the Yavusa mentioned in the description of the Respondents in the heading to this judgment instituted action on behalf of themselves and all persons in the two Yavusa and constituent matagalis against the appellant and five other defendants,

including the Director of Lands and the Attorney General. In their Statement of Claim they seek a very large number of declarations and orders in connection with the Vulani Islands which were the subject of the issue of a Crown Grant No. 1077 and public auction of the land on 2nd May 1885 more than a hundred years ago. So far as the Appellant is concerned they seek (inter alia) the following relief :

> *"(w) An Order that the fourth Defendant its servants and agents be restrained pending the determination of these proceedings and thereafter permanently from interfering in any way with the Plaintiff's Qoliqoli collectively referred to as comprising the Vanua of Sabeto. "*

The Appellant is registered as lessee of 125 acres at the mouth of the Sabeto River known as **"Vulani Island"** under Crown Lease Book 37 Folio 55. The transfer of Vulani Islands to the Appellant was with the consent of the Minister for Lands and Mineral Resources and the Director of Lands.

On the 23rd January 1990 the Director of Lands issued to the Appellant an approval notice to the issue of a foreshore lease relating to an area of Crown foreshore land of approximately 52.8 hectares.

It is in respect of this 52.8 hectares or 130.5 acres referred to by the learned judge that the Appellant is restrained from interferring with the Native Customary Fishing Rights owned by the Vanua of Sabeto.

It is relevant to state that the first defendant in the High Court action is the Tui Sabeto and as pleaded by the Respondent is the Paramount Chief for the Vanua of Sabeto. Mr. Stanton admits that the customary fishing rights of the Vanua are vested in the Tui Sabeto as trustee.

We are not called upon to determine whether Mr. Stanton's admission is correct or not, but it is noted that the Respondents themselves pleaded that the first defendant, the Tui Sabeto had agreed to accept the sum of $145,000 as compensation assessed by an independent arbitrator for the loss of the Vanua's customary fishing rights. Their pleadings indicate that they are very dissatisfied with the Tui Sabeto's handling of the compensation issue and in particular as regard the sum he allocated to himself.

The leading case dealing with interlocutary injunctions is the House of Lords case AMERICAN CYANAMID CO. V. ETHICON LTD. (1975) A.C. 396.

It was held :

> " *Held, allowing the appeal, (1) that in all cases, including patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo.* "

Mr. Knight argued that following the American Cyanamid Case it is now established that courts as a general rule have regard only to the following criteria :

1. is there a serious issue to be tried?
2. are damages an adequate remedy?
3. where does "the balance of convenience lie"?
4. are there any special factors?

Mr. Knight further contended that the learned judge did not consider criteria 2 and 3.

It would appear that the learned judge did not consider the second and third criteria at all. This is apparent from his Ruling which is as under :

"

Ruling

From the Bar table this morning, Mr. Sharma challenged the right of the two named Plaintiffs to represent the Yavusa Nalewavuwavu and the Yavusa Nasara, appearing on instructions given to him by members of those Yavusa who did not wish to proceed with this action.

O. 15 r 14(1) of the High Court Rules reads:

"Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

The question of whether the proceedings may continue with the present plaintiffs as representatives or otherwise will have to be determined. In the meantime, the Court, exercising its discretion and upon reading all the pleadings and affidavits before it, is of the opinion that if the plaintiffs can proceed in their personal capacities, they have a good arguable claim, that there are serious questions of law to be tried particularly concerning the legal nature of a customary fishing right and the legal method of its disposal, and that more harm will be done by refusing than granting an injunction.

Accordingly the Court makes the following order :

Upon the plaintiffs giving the usual undertaking as to damages to be inserted in the order, each defendant will be restrained until further order from dealing in any way with the Native Customary Fishing Right owned by the Vanua of Sabeto in that area of 130.5 acres approximately, described in Approval Notice Diagram File No. 60/150 dated January 1990 a copy of which is annexure PK2 to the affidavit of Peter Knight sworn on 1st August, 1990.

Costs to be costs in the cause.

(Sgd.) M.J.C. Saunders
JUDGE

8th August, 1990. "

The prime consideration is whether the applicant would be adequately compensated by an award of damages if he succeeded in his claim.

Lord Diplock at pp 407 and 408 in the American Cyanamid Case set out the principle to be considered.

He stated :

" *..... the governing principle is that the court should first 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 in the measure recoverable at common law would be 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. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so*

> *between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.*
>
> *It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. "*

We do not find it necessary to express any opinion as to the fourth criteria. Mr. Knight contends there are no special factors. However when we come to consider the second and third criteria the scales come down very heavily in favour of the Appellant.

As to whether damages is an adequate remedy the Vanua have received $145,000 conpensation assessed by an independent tribunal for loss of fishing rights.

Mr. Stanton raised a number of objections to that assessment. He states, in any event, that damages can not be quantified, ergo damages are not an adequate remedy.

We do not accept that argument. A capital sum invested for the Vanua would provide income for unborn Fijian members of the Vanua. The suggestion that the $145,000 has not been properly dealt with by the Tui Sabeto is no concern of the Appellant or of this court in this action at this stage, if at all.

We are in no doubt that the instant case is a proper case

for refusing to grant an interim injunction on the sole ground that damages in our view is an adequate remedy.

However, although we do not need to consider the question of the balance of convenience we are also of the view that in considering where the balance of convenience lies we would still hold in favour of the Appellent. The Appellant has already expended $1,850,000 on the site. It is committed under the terms of the approved foreshore lease to expend $70,000,000 within 5 years of commencement of the lease, a further seventy million within the next 10 years and a further sixty five million dollars within the next 15 years. The total comes to (two hundred and five million dollars.

The injunction has brought to a halt all operations on the land. The abovementioned facts have only to be stated to demonstrate the inconvenience the Appellant has suffered and will continue to suffer if it is restrained from exercising the rights granted to it by the Director of Lands on behalf of the Republic of Fiji.

The learned judge does not appear to have considered whether the undertaking given by the Respondents was of any value. Mr. Stanton admitted the Respondent in their personal capacities had no financial ability to meet any damages that might be awarded against them but that Vanua had other assets of inestimable wealth.

That is so, but it is a wealth that is protected by the law. Land for example can not be sold or seized by a creditor. So far as a non Fijian judgment creditor is concerned that wealth is protected and can not be touched.

We are in no doubt that the learned judge failed to

adequately consider the criteria to be considered and that that failure was a failure to properly exercise his discretion.

We allow the appeal and dissolve the interim injunction granted by the learned judge.

While only the fourth defendant has appealed the learned judge's failure to properly exercise his discretion must be held to vitiate his order and result in setting aside the whole order to the benefit of all defendants in the action.

The Appellant is to have the costs of this appeal and of the application before the learned judge.

(Sir Ronald Kermode)
Justice of Appeal

(Sir Moti Tikaram)
Justice of Appeal

(M.D. Jesuratnam)
Justice of Appeal