IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 31 OF 1993
(High Court Civil Action No. 210 of 1993)

BETWEEN

GIRDHAR LAL RANIGA — APPELLANT

-and-

MERCHANT BANK OF FIJI — RESPONDENT

AND

CIVIL APPEAL NO. 38 OF 1993
(High Court Civil Action No. 210 of 1993)

BETWEEN

MERCHANT BANK OF FIJI — APPELLANT

-and-

GIRDHAR LAL RANIGA — RESPONDENT

Mr B.C. Patel for the Appellant in Appeal No. 31
and the Respondent in Appeal No. 38
Mr R.A. Smith for the Respondent in Appeal No. 31
and the Appellant in Appeal No. 38

Date and Place of Hearing : 5th August, 1994, Suva
Date of Delivery of Judgment : 11th August, 1994

JUDGMENT OF THE COURT

These are two appeals heard together. For convenience we refer to the parties as Mr Raniga and the Bank.

Mr Raniga and another were trading under the name of Grace Bros. as motor dealers. On 1 August 1990 they entered into a written non-recourse agreement with the Bank. That agreement provided that the Bank would purchase vehicles from Grace Bros. and then sell them on a hire purchase basis to buyers already procured by Grace Bros. A number of such transactions were carried out but there was default by the buyers and on 3 May 1993 the Bank commenced an action against Mr Raniga and his partner seeking to recover $150,000 by way of damages. The Bank alleged that it had purchased the vehicles in question in reliance on certain representations made by Grace Bros., but that those representations had been false and were made fraudulently.

The Bank then applied to the High Court ex parte for a Mareva injunction to restrain Mr Raniga from removing any assets from Fiji, an order for discovery in respect of all assets within or without the jurisdiction, and a writ ne exeat civitate to prevent Mr Raniga from leaving the country unless security was given for the amount claimed. It should be mentioned that the other defendant had already left Fiji and so is not concerned in these interlocutory matters.

On 3 May 1993 Ashton-Lewis J. made the orders sought in terms of the summons.

Following service on Mr Raniga he filed a Statement of Defence to the claim and also an application to discharge the orders made by Ashton-Lewis J. Mr Raniga, in his Statement of

Defence and by affidavit, denied the Bank's allegations and said that the Bank had been aware of and had agreed to the way in which the transactions had been carried out.

The application to discharge the orders was heard by Fatiaki J. and on 29 July 1993 he gave Judgment declining to vary or discharge the Mareva injunction, but varying the order as to discovery by limiting it to assets in New Zealand. He also discharged the order for a writ ne exeat civitate, and substituted an order restraining Mr Raniga from leaving Fiji until there had been compliance with the order as to discovery. The orders made by Fatiaki J. were as follows:

> "1. The first defendant GIRDHAR LAL RANIGA do within 21 days of the date hereof file in Court and provide to the plaintiff an affidavit disclosing with particularity, the nature, value and location in New Zealand of all real and personal assets (including bank accounts) held in his own name or jointly with any other person or nominee or otherwise howsoever on his behalf; provided that the plaintiff shall, other than for the purposes of this action, not make use of any information so disclosed pursuant to this order without the prior consent of the defendant or leave of the Court;
>
> 2. The first-named Defendant GIRDHAR LAL RANIGA be restrained from removing from the jurisdiction or otherwise dissipating, charging disposing of or dealing with any of his assets within the jurisdiction save and unless there should remain within the jurisdiction free and unencumbered assets belonging to the Defendant to a total value of not less than $150,000.00 and that he shall deliver into the custody of the Sheriff until there should so remain within the jurisdiction free and unencumbered assets belonging to him to a total value of not less than $150,000.00, his passport and all passenger tickets held by him;

3. **Until such time as the said GIRDHAR LAL RANIGA shall fully comply with order (1) above or until further order in the meantime he is hereby restrained from leaving Fiji and that he do forthwith deliver into the custody of this Court his passport and all travel tickets held by him."**

From this Judgment both parties have appealed. Mr Raniga's Notice of Appeal is based on the contention that wrong principles were applied by the Judge in deciding that there should be a Mareva injunction and an order for discovery, and that the restraint on Mr Raniga leaving Fiji was unreasonable, harsh and unlawful. The Bank's appeal was confined to the contention that the Order for discovery should not have been limited to assets in New Zealand but should have remained in the comprehensive terms of Ashton-Lewis J's order. At the hearing this appeal was withdrawn and was therefore dismissed.

We deal with the remaining matters for determination in turn.

1. The Mareva Injunction

(a) A good arguable case

In his Notice of Appeal Mr Raniga submitted that the Judge erred in law by not discharging the injunction in that:

"(a) he was wrong to apply the American Cyanamid principles to the question of whether the Respondent had shown a "good arguable case" for mareva injunction.

(b) there was no evidence of the risk of dissipation or removal from jurisdiction of any assets by the appellant so as to warrant a mareva injunction and the learned Judge failed to appreciate that the Respondent had the onus on this issue which it failed to discharge."

It is true that the Judge, while recognising that what had to be decided was whether the Bank had "a good arguable case", approached that question by reminding himself of the observation of Lord Diplock in American Cyanamid v Ethicon (1975) 1 All E.R 504. That case was not the case of a Mareva injunction but of an ordinary injunction. It established the principle that what had to be shown was that there was "a serious question to be tried". Successive cases have made it clear that there is a difference (albeit a subtle one) between a "good arguable case" and a "serious question", and it would have been better if Fatiaki J had made no reference to American Cyanamid.

The difficulty in defining that difference is shown by the observation of Parker L.J. in Derby Weldon (No.1) (1990) 1 Ch. 48 at p.64:-

> "In my view the difference between an application for an ordinary injunction and a mareva injunction lies only in this, that in the former case the plaintiff need only establish that there is a serious question to be tried, whereas in the latter the test is said to be whether the plaintiff shows a good arguable case. The difference ..... is incapable of definition ....."

Notwithstanding this we accept that a good arguable case requires a higher standard of proof than for a serious question. We can do no better than adopt the remarks of Staughton L.J. in

Haiti v Duvalier (1989) All E.R. 456 at p.458:

> **"It is enough that on the affidavit evidence, there is a case to answer on a good arguable case, such as would justify the use of interim protective measures in an English domestic case."**

We think our proper course is to consider afresh the evidence which was before Fatiaki J. in order to be able to say for ourselves whether there was a good arguable case.

The affidavit filed on behalf of the Bank had annexed to it the Non-recourse Agreement. This was, of course, in writing and it must be regarded as the basis of the relationship between the parties. The affidavit then contained allegations that in respect of eight separate transactions there had been a departure from the written agreement and that the Bank had been induced to buy the vehicles and sell them on to the ultimate buyers by representations as to the price and value of the vehicles, made by Grace Bros, which were false and fraudulent. It was alleged further that Grace Bros. had falsely represented that each buyer had traded in a vehicle for which he had received the sum paid to the Bank as a deposit. The detailed allegation appears as para. 5 of the affidavit, namely :

> **"All of the Buyers defaulted under their hire purchase agreements and during the process of repossession it was discovered that none of them had "traded in" anything at all and that the money each had paid the Plaintiff by way of deposit had been given to them by the Defendants who had simply increased the sale price of each car by that amount and got it back from the Plaintiff when the Plaintiff paid them (the dealer-Defendants) a price inflated by the value of the non-existent trade-in. Apart from anything else, the**

**scheme had the effect of tricking the Plaintiff into unwittingly financing 100% of the real price being paid by the Buyers, but as well as that, it is now clear that because the Buyers did not have to put up any money of their own they were quite indiscriminate about price and even the real price they agreed to pay was much more than a market value."**

In response to these allegations Mr Raniga denied any false representations and said that the Bank was aware of all the facts surrounding each allegation, and indeed had itself devised and instigated the manner in which the transactions would be carried out.

There was accordingly, on the material before the Judge, a sharp conflict of fact which could only have been resolved by oral evidence. Moreover, the defence raised by Mr Raniga depended upon it being shown that the written Agreement between the parties did not reflect the true nature of their dealings. It was also contended that the Agreement was subject to certain implied terms.

The allegations made by the Bank were serious ones and, on the face of it, were capable of being supported by the written Agreement. We are satisfied that there was a good arguable case which required an answer.

(b) <u>The Risk of Dissipation</u>

It was argued next that the Bank was required to give some grounds for believing that there was a real risk (and not simply a risk) of the assets being removed or dissipated before the

judgment was satisfied. The authorities consistently use the expression "real risk" and we accept that this was what had to be shown. It was also the test which the Judge recognised he should apply.

Fatiaki J. then acknowledged that he had some difficulty on this aspect of the matter. What he said (p.189 of the Record) was:

> "I accept that a bare assertion that the defendant is a foreigner or is travelling overseas is an insufficient basis to raise a `real risk' that he will dissipate or remove his assets but equally defendant who has permanent residency status in another country and who is selling off assets with a view to eventually migrating overseas presents a more than fanciful risk that assets or the proceeds thereof may be removed beyond the normal territorial jurisdiction of the Court."

Fatiaki J. then noted the observation of Mustill J. in Third Chandris Corp. v Unimarine S.A. (1979) 1 All E.R. 972 at p.977 that all the plaintiff can be expected to show is that "a danger exists".

It was argued for Mr Raniga that he had not transferred any assets out of Fiji since January 1992, which was before the present action was commenced, and that he has now disclosed all his assets remaining in Fiji and shown that all those assets are fully secured to the Westpac Bank, with the result that there is no real risk of any assets being transferred or dissipated.

There were, however, circumstances which the Judge was

entitled to consider as presenting a danger that any judgment against Mr Raniga could not be satisfied. The nature of the allegations made against him raise questions of possible fraud, and it is noted that one of the grounds of appeal as to the order for discovery of assets in New Zealand is that **"such order if complied with is also likely to incriminate the Appellant."** The Judge attached some significance also to the fact that several letters written by the Bank to Mr Raniga alleging non-compliance with the Non-Recourse Agreement went unanswered.

We consider there was adequate reason for the Judge to conclude that there was a real risk of transfer or dissipation of assets, particularly as Mr Raniga conceded that his intention was to take up permanent residence in New Zealand and for that purpose to sell such assets as remained in Fiji.

A further submission made in respect of this grpund of appeal was that the Bank had failed in its duty of disclosure in that it had not, before applying to the Court, made enquiries as to Mr Raniga's assets by searching the available registers at the Companies Office, the Land Transfer Office and the Bill of Sales Register.

However, not all assets of value are of a kind that will be revealed by the search of registers. Indeed,in presenting an argument that disclosure by Mr Raniga of his assets in New Zealand might incriminate him in respect of offences against the laws of Fiji, Mr Patel made the point that such assets could

include movable property of significant value. We are not convinced that, in the circumstances of this case, the Bank had any obligation to search registers in New Zealand before applying to the High Court.

The appeal in respect of paragraph 2 of the order made by Fatiaki J. must therefore be dismissed.

2. Discovery of Assets in New Zealand

An order for discovery of assets is ancillary to a Mareva injunction and needs to be considered in the light of the circumstances justifying the making of the injunction.

The assets in Fiji already disclosed by Mr Raniga would not, in themselves, appear to have any significant value and the question of the source from which a judgment could be met assumes at once a wider significance. Mr Raniga had acknowledged that he has assets which he has transferred to New Zealand. A judgment obtained in Fiji would be capable of enforcement in New Zealand and so the identification of assets in that country would appear to be of immediate relevance. Mr Raniga's reluctance to disclose them, and his fear of incrimination, lend weight to the need for such disclosure.

Some doubts have been expressed as to whether a discovery order, being ancillary to the injunction, should be extended beyond the territorial scope of the injunction. While this may

not be a normal course it seems plain that there can be circumstances in which a wider order is justified. The present is just such a case. There is real doubt as to whether there are assets in Fiji of sufficient value to satisfy a judgment, but there are clearly assets in New Zealand. In such circumstances it seems obvious that an order extending to New Zealand was properly made. We are not prepared to interfere with that order.

3 The Restraining Order

Mr Raniga is prevented from leaving Fiji, and his passport and airline ticket were required to be deposited in Court. It is argued on his behalf that this was unreasonable, harsh and unlawful.

Accepting, as we have already held, that there ought to be disclosure of assets in New Zealand, we consider it follows that Mr Raniga should not be allowed to leave the country until he has complied with that requirement. The order restrains him only until he complies with the order. He can leave the country as soon as he likes so long as he first makes disclosure. The remedy is in his own hands. We can see nothing unreasonable or harsh in that, nor any basis of unlawfulness; by reason of the provisions of Section 15 (3)(h) of the Constitution of Fiji, the order does not infringe the general provisions of that section.

For the reasons given Mr Raniga's appeal must be dismissed.

Mr Raniga must pay the Bank's costs, but reduced by 10% because of the Bank's own appeal which was withdrawn.

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(Sir Peter Quilliam)
Judge of Appeal

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(Mr Justice Ian R. Thompson)
Judge of Appeal

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(Mr Justice Peter Hillyer)
Judge of Appeal