IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0063 OF 2007S
(High Court Civil Action No. HBC 225/07L)

BETWEEN:	HONEYMOON ISLAND (FIJI) LIMTED	*First Appellant*
AND:	OCEANIC SCHOONER COMPANY (FIJI) LIMITED	*Second Appellant*
AND:	WILLIAM GOCK	*Third Appellant*
AND:	PAUL MYERS	*Fourth Appellant*
AND:	FOLLIES INTERNATIONAL LIMITED	*Respondent*

Coram: Devendra Pathik, JA
Randall Powell, JA
Andrew Bruce, JA

Hearing: Tuesday, 1st July 2008, Suva

Counsel: C B Young for the Appellants
H Nagin for the Respondent

Date of Judgment: Friday, 4th July 2008, Suva

JUDGMENT OF THE COURT

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[1] By Agreement for Lease dated 7 June 2007 between the respondent ("Follies International") and the Native Land Trust Board ("NLTB") Follies International was given exclusive possession of Mocui Island ("the Island") and was required to commence construction of a tourism resort thereon by 1 January 2009.

[2] The appellants ("the Honeymoon Parties") including the first appellant ("Honeymoon Island") had hitherto conducted tours to the Island, landing on the Island for picnics. They claimed to be entitled to do so pursuant to an agreement headed Lease dated 9 March 1993 between Honeymoon Island and the NLTB. Pursuant to this agreement Honeymoon Island was required to pay the NLTB $12,000 annual rent half-yearly in advance.

[3] This agreement also provided that the agreement would cease to have effect if Honeymoon Island failed within 6 months to prepare a survey of the land to be leased.

[4] In July 2007 Follies International and the Honeymoon Parties sought interlocutory injunctions to keep each other from venturing onto the Island. The applications were heard on 20 August 2007 and, on 31 August 2007, Phillips J delivered judgment in which she restrained the Honeymoon Parties from landing on the Island. It is from that interlocutory decision that the Honeymoon Parties seek to appeal, seeking orders that the injunction refused them ("the 1st Injunction") be granted and that injunction granted to Follies International ("the 2nd Injunction") be dissolved.

[5] The trial judge found that both applications satisfied the "threshold" test of establishing a serious question to be tried. However in considering the balance of convenience the trial judge had concerns about the ability of the Honeymoon Parties to meet their undertaking as to damages, holding that the paucity of information proferred about their financial position meant that there was a real danger that *"any damages which would undoubtedly accrue to the plaintiff if the injunction sought against it were granted"* would be irrecoverable.

[6] In this regard the trial judge referred to evidence that the rent payments of $12,000 pa payable to the NLTB by Honeymoon Island were not paid as and when they fell

due. In contrast Follies International had provided satisfactory evidence that it would be able to meet its undertaking as to damages.

[7] The trial judge went further and found that the Honeymoon Parties were precluded by the doctrine of clean hands from seeking injunctive relief because they had failed to disclose that they had (a) made rent payments late, (b) not carried out a survey of the land to be leased and (c) used the Island for the past 18 years, which use prior to 2003 the judge considered illegal.

[8] On 18 September 2007 the trial judge dismissed an application for a stay of her orders pending the determination of this appeal, finding, inter alia, that there was still no credible evidence before her of the Honeymoon Parties financial ability to meet any losses which may accrue to Follies International.

[9] There are five (5) grounds of appeal, namely that:

1. There was no credible evidence that Follies International would suffer any damage, so accordingly it was an error to find that the Honeymoon Parties undertaking as to damages was insufficient
2. It was wrong to rely on late payment of rent to raise doubts about the Honeymoon Parties undertakings as to damages
3. There was no duty on the Honeymoon Parties to disclose the "clean hands" matters
4. There had been a denial of natural justice, the trial judge arriving at her decision based on reasonings not put to the Honeymoon Parties at the hearing
5. It was an error to restrain the Honeymoon Parties when there was no credible evidence that Follies International would suffer irreparable damage if the injunctive order it sought was not granted.

Grounds 1, 2 & 4 – the 1st Injunction – Damages, Late Payment of Rent, Natural Justice

[10] The appellants can only succeed if they can demonstrate that the trial judge has made an error in the exercise of her discretion or that a substantial wrong has occurred: ***House v The King*** [1936] 55 CLR 499

[11] The grant or refusal of an interlocutory injunction is a discretionary matter and Courts of Appeal are generally reluctant to interfere with the exercise of the discretion by the trial judge. The trial judge's decision to grant or refuse the injunction must be *"so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it"*: ***Garden Cottage Foods Ltd v Milk Marketing Board*** [1983] 2 All ER 770 at pg 772 per Lord Diplock.

[12] The grant of interlocutory injunctive relief is discretionary. The Court must be satisfied that there is a serious question to be tried, in other words whether the applicant has any real prospect of succeeding in its claim for a permanent injunction at the trial. If the Court is satisfied that there is a serious question to be tried the Court must then consider whether the balance of convenience lies in favour of granting or refusing to grant the interlocutory relief sought: ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396.

[13] As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. *"If damages..... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted"*: ***American Cyanamid*** (supra) at 408.

[14] In relation to the Honeymoon Parties application for an injunction the trial judge found that there was a serious question to be tried. However in our view she was also entitled to find, for the reasons that she gave, that the Honeymoon Parties financial position on the evidence before the Court was insufficient to secure their undertakings as to damages.

[15] The appellants' further complaint that there was no evidence as to the damages that Follies International might suffer if the injunction was granted, is not made out. The Honeymoon Parties sought to exclude Follies International from the whole of the Island and the trial judge was entitled to conclude that this would jeopardise its obligations to lodge development plans with the NLTB by 1 July 2008 and to commence construction of the resort by I January 2009 and to infer that the resultant loss could be substantial, and well in excess of the assets disclosed by the Honeymoon Parties.

[16] Applicants for interim injunctions who offer an undertaking as to damages must also proffer sufficient evidence of their financial position. *"The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy"*: ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd*** [2004] ABU 0011 at p12.

[17] The opposing party is able to test or challenge any such financial information and it was appropriate for the trial judge to take into account the late payment of rent due to the NLTB in concluding that the Honeymoon Parties might not be able to secure their undertakings as to damages.

[18] The Honeymooners also complain that the trial judge did not alert them to the fact that she considered the evidence as to their financial position insufficient to support their undertakings as to damages. However in every case involving an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that it

can meet its undertaking as to damages whether or not the Court specifically directs the applicant's attention to the matter or not.

[19] Grounds 1, 2 and 4 of the Appeal are rejected.

Ground 3 – Clean Hands

[20] The maxim that "those who seek equitable relief must come before the Court with clean hands" is often misapplied. As Scrutton LJ noted *"the depravity, the dirt in question on the hand, (must have) an immediate and necessary relation to the equity sued for."*: ***Moody v Cox*** [1917] 2 Ch D 71 at 87.

[21] Applicants for interlocutory relief have a duty to disclose to the Court all relevant matters, especially matters adverse to their interests. It may be that the first two of three non-disclosed matters relied upon by the trial judge and referred to in paragraph 7 above ought to have been volunteered by the Honeymoon Parties. However they were matters relevant to whether or not there was a serious question to be tried, they were not determinative of that question and minds might reasonably differ on the necessity to disclose them, particularly when those opposing the application were legally represented. The third matter seems, with respect, to be irrelevant, containing as it does highly speculative factual and legal conclusions and not having an immediate and necessary relation to the equity sued for.

[22] Ground 3 is made out, however the "clean hands" observations were, in our opinion, strictly obiter, the trial judge having already determined the balance of convenience against the Honeymoon Parties. We are compelled to this conclusion because once the trial judge found that the financial position of the Honeymoon Parties was insufficient to secure their undertakings as to damages, she was obliged to refuse the Honeymoon Parties an injunction, clean hands or not.

Ground 5 – 2nd Injunction: No Credible Evidence that Follies International would suffer any damage

[23] As noted in paragraph 15 above the evidence was that if construction of the resort was delayed beyond January 2009 then losses were likely to be substantial, and if the Honeymoon Parties injunction had been granted then there was a real likelihood that construction would have been so delayed. However it does not follow that unless Follies International were granted the injunction they sought, preventing the Honeymoon Parties and their tourist picnickers from landing on the Island, that construction of the resort would be delayed. There is no reference in the judgment to any such evidence and there was no such evidence before the trial judge.

[24] The trial judge sets out at paragraph 15 of the judgment what she describes as the *"threshold test"* from ***American Cyanamid*** (supra), and at paragraph 16 holds that *"Both applications satisfy the threshold test of establishing a serious question to be tried"*. The judgment then deals with the financial position and unclean hands of the Honeymooners before concluding, at paragraph 26:

> *"For the reasons stated aforesaid, the (Honeymoon Parties') application must fail. (Follies International) has satisfied the threshold requirements for the relief sought and in whose favour the injunctive relief is granted."*

[25] It was submitted by counsel for the respondent that the reference to "threshold requirements" included the requirement of establishing irreparable damages, but that seems unlikely given that the earlier references to "threshold" refer only to the serious question to be tried element. In any event there was no evidence before the trial judge as to any loss that Follies International might suffer if the Honeymoon Parties continued to visit the Island prior to the final hearing, and of course it follows that there was no consideration as to whether damages for such loss would be an adequate remedy.

[26] Accordingly Ground 5 of the appeal succeeds and the injunction restraining the Honeymooners must be dissolved.

[27] The appeal having succeeded only in part there will be no order as to costs with the intention being that all party bear its own costs of the appeal.

[28] The orders of the Court are:

1. Appeal allowed in part
2. Order 4 of the trial judge entered 5 September 2007 is vacated

Pathik, JA

FIJI COURT OF APPEAL

Powell, JA

Bruce, JA

Solicitors:

Young and Associates, Lautoka for the Appellants
Sherani and Company, Suva for the Respondent