IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU0015 OF 2024
[Suva High Court No: HPP 085 of 2022]

BETWEEN : **BAADAL PRASAD SHARMA**

Appellant

AND :
1. **AARADHYA KASHVI SHARMA**
2. **VINESHNI MANI DASS**
3. **ALPANA DARSHIKA KUMAR**
4. **THE REGISTRAR OF TITLES**
5. **THE ATTORNEY-GENERAL OF FIJI**

Respondents

Coram : **Prematilaka, RJA**
Qetaki, JA
Clark, JA

Counsel : **Appellant In- Person**
Ms. G Henao, and Ms. L Tavaiqia, for 1st, 2nd and 3rd Respondents
Mr. V Ram, for 4th and 5th Respondents

Date of Hearing : **6th November, 2024**

Date of Judgment : **28th November, 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read on draft the judgment of Qetaki, JA and agree with the conclusions and orders.

Qetaki, JA

Background and Preliminary Matters/Issues

[2] This is an appeal pursuant to section 12 (2) (f) (ii) of the Court of Appeal Act against the Judgment of the High Court of Suva, made Ex-Parte on the 29th of July 2022, and the extension of such orders on 13th February 2024. The initial Injunctive Orders state as follows:

> 1. *The defendants whether by themselves, their servants, agents, members or otherwise howsoever be restrained from accepting, administering, dealing, distributing and handling any properties whether real or personal belonging to the Estate of Akash Shanil Sharma;*
>
> 2. *The First and Second Defendants whether by themselves, their servants, agents, members, or otherwise howsoever be restrained from receiving any settlement sum, from the Office of Attorney General to be paid in Civil Action No.HBC 43 of 2021;*
>
> 3. *The Defendants whether by themselves, their servants, agents, members or otherwise however be restrained from dealing with Itaukei Lease No. 33047, property belonging to the Estate of Akash Shanil Sharma until further orders of the Honorable Court..."*

[3] In the Notice of Appeal filed on 19th February 2024, the Appellant seeks to Set Aside the above Ex-Parte Injunction Order; and for a further Order that the costs of the Appeal and hearing in the Court of Appeal be paid by the Respondents/Original Plaintiffs, and for such further orders as the Court of Appeal deems just.

[4] With reference to the Ex-Parte Summons ("*Summons*"), it was supported by two Affidavits in Support, one sworn by Vineshni Mani Dass the Second Plaintiff/Second

Respondent, and the other sworn by Alpna Darshika Kumar, the Third Plaintiff/Third Respondent. They claim that they are beneficiaries of the Estate of Akash Shanil Sharma, which is being administered by Baadal Prasad Sharma the Second Defendant/Appellant, after the latter's father had for some reason relinquished his role as the previous Administrator of the Estate. The Second Plaintiff is also claiming, as best friend and mother of the First Plaintiff (An Infant), that the child is a beneficiary of the Estate of the deceased, being the daughter of the deceased as father, and the Second Plaintiff as mother, through a de-facto relationship which commenced in 2014. The child's Birth Certificate bears the name of the deceased. There are other issues raised in the two Affidavits, which will be discussed in the course of this judgment.

[5] The Summons was heard on 29th July 2021 in Chambers before the High Court Judge (pages 208 to 212 of the copy record), where the Legal Aid Commission represented the Plaintiffs. Ms. Mishra, a counsel for the Plaintiffs made submissions before the judge based on the Summons and the Affidavits in Support. After hearing the submissions for the Plaintiffs and having sought clarifications on a number of issues, including the status of HBC Action No. 43 of 2021, the learned judge granted the Orders as prayed. I reproduce below the record of the proceedings when the application for injunction was granted.

> "*Ms. Mishra: My Lord would the court want us to take through the court the background?*
>
> *Judge: No, its ok, I have read the file. In fact, I am aware of this matter. Any matters which come before me I am always aware was happening there.*
>
> *Ms. Mishra: Yes, My Lord.*
>
> *Judge: ……. Very well, In fact I have perused the application, the entire application and in that I have actually seen the Writ action which has been filed and endorsed by the Chief Registrar. Together with that the affidavits deposed herein and the background of this case and I am satisfied with the application of the applicants filed herein together with those affidavits which I have mentioned accordingly and I grant*

the Interim Injunctive Orders as sought in the ex-parte summons accordingly."- page 210 of Record. (Underlining is for emphasis)

[6] The Injunction Order was signed on the same day, the 29th of July 2022, and the matter was then adjourned to the 3rd of August 2021 at 9:30am, to allow for service of the relevant court documents to the Respondents, and for mention.

[7] The substantive Writ of Summons with a Statement of Claim was also filed on 29 July 2022, and the Statement of Defence and Counterclaim was filed approximately 9 months later on 28 April 2023; a Reply to Statement of Defence and Defence to Counterclaim was filed on 12 May 2023.

[8] Two Interlocutory applications were filed by the Appellant after the Notice of Appeal to this Court was filed on 19 February 2024.They were brought to the attention and view of the Court during the course of the hearing. These interlocutory proceedings and their outcome were not disclosed in the written submissions of the Appellant and the Respondents. Although the applications were for stay of proceedings, the issues raised in those proceedings are relevant to this appeal.

[9] On 23rd February 2024, four days after the notice of appeal to this court was filed, the Appellant /Second Defendant in his capacity as the Administrator of the deceased's estate, lodged an Application for Stay of Proceeding in the High Court, as follows:

"i) That execution and all further proceedings to enforce and or in relation to the judgment of the High Court given at Suva on the 13 February 2024 at paragraph 23 including orders granted on EX-Parte basis on 29th July 2022 and proceedings on this matter BE STAYED pending determination of the Appeal by the Second Defendants to the Court of Appeal filed on 19th February, 2024.

ii) That the costs of the application be costs in the cause; and

iii) Such further order as the Court sees fit and expedient."

[10] The Summons was before Sharma J, who after consideration of the affidavits filed by the parties, made his Decision on 9th July 2024 dismissing the application. The learned judge's Decision at paragraphs 17 to 24, are worthy of note as they raise issues which are relevant also to an application for the grant of an interim injunction, in the circumstances of this case. There is a common thread in the issues and considerations of factors to be considered in the application for a stay of proceedings and an application for an injunction. The learned judge stated:

> *"17. The pertinent question to be asked herein is that if a stay is refused and the 2nd Defendants Appeal succeeds, and the judgment is enforced in the meantime, what are the risk of the Plaintiff/Respondents being able to recover what has been paid to second Defendant/Appellant in terms of the Settlement judgment sum granted in Civil Case HBC 43 of 2021?*
>
> *18. If the stay is granted and the Appeal fails, there are risk that the 2nd Defendant/ Appellant will be unable to enforce the substantive judgment for settlement sum delivered in Civil Action No. HBC 43 of 2021.*
>
> *19. It will be noted from the orders of this Court of 29th July 2022 and further extended on 13th February 2024, that the orders the 1st and 2nd Defendants by their servants, agents, members or otherwise however be restrained from receiving any settlement sum from the office of the Attorney General to be paid in Civil Action No. 43 of 2021, there was a reason and purpose why this Court made the above-mentioned orders which is now being appealed to.*
>
> *20. Once the substantive matter in the Civil Action N0. 85 of 2022 is determined, the settlement sum in Civil Action No.43 of 2021 will be paid out accordingly.*
>
> *21. As of now, the current orders that the 2nd Defendant /Appellant wishes to Appeal against seeking for 'Stay pending Appeal 'does not prejudice either the 2nd Defendant/Appellant nor the Respondents in the appeal matter.*
>
> *22. This Court made the orders to safeguard the settlement sum ordered in High Court No. HBC 43 of 2021 and let the status quo to remain since neither parties to the proceedings are currently benefitting from the Deceased's estate, until the final determination of the current substantive matter.*
>
> *23. As it is now, the 2nd Defendant/ Appellant is acting within his locus and powers in his capacity as the administrator of the Deceased's estate, it has not been established as of yet until hearing and determination of the substantive matter as to who have the beneficial interest and entitlement of*

the judgment sum of money ordered upon settlement by the Court in High Court Civil Action No. 43 of 2021.

24. For the aforesaid rationale, I do not see any merit in the 2nd Defendants/Appellants application that would prompt me to accede to his application seeking for stay of execution and of proceedings pending 'Appeal' at the Court of Appeal."

[11] That is not the end of the matter as far as the stay application is concerned. The Appellant/ Second Defendant on 12 August 2024 filed in the Court of Appeal Registry Ex-Parte Summons for Stay of the judgment of the High Court of 13 February 2024 and as well as an injunction granted originally on 29 July 2022. The Court ordered that the application be made Inter-Partes, and the parties were ordered on 29th August 2024 to file submissions. The hearing of the application was before the Hon. Justice Filimone Jitoko, President of the Court of Appeal (as he then was), held on 19th September 2024. In an Ex-Tempore Ruling, issued on 2nd October 2024, His Lordship granted the Appellant's/Second Defendant's application for stay. It appears that paragraph [4] captures the basis of the said ruling, it states:

*"[4] The Appellant's application to this Court for stay after it being first refused by the High Court, is in accordance with section 20(1)(a) of the Court of Appeal Rule and after having considered the principles set out in the leading authority of **Natural Waters of Viti v Crystal Clear Mineral Water (Fiji) Ltd**(2005) FJCA 13; ABU0011.2004S, and especially the important questions of law involved and the public interest in the outcome, this Court will have no hesitation in granting stay of the execution of the High Court judgment pending the hearing and final determination of the appeal. However, the stay is also in respect of the interlocutory Orders made by the High Court in conjunction with the proceedings."*

[12] His Lordship made pertinent comments and observations in his Ruling which are also relevant to this appeal. In paragraphs [12] to [16], His Lordship states:

"[12] It is quite clear, as submitted by the Appellant, that there are serious issues of law raised in the Orders touching on the legality of the restraint against the State and the principle of indefeasibility of title to land under our Torrens system. Also of importance is the issue of jurisdiction and legality of one High Court, invoking

its discretionary powers to restraint and prohibit the execution of the orders made by another High Court.

[13] Probate action HPP 85 of 2022, from which the orders restraining the Appellant from executing the orders in HBC 43 of 2021 was issued, claims that the 1st to 3rd Plaintiffs therein, are legitimate beneficiaries to the estate of Akash Sharma, and the matter remains pending in the High Court. The consent order before Amaratunga J on 8 July 2022 agreed that, upon the Appellant/Plaintiff withdrawing the action against the Permanent Secretary for Health and the Attorney-General, the settlement sum of $328,425.12 are to be paid to the Appellant/Plaintiff.

[14] The Court notes that the Appellant appeared as Plaintiff in HBC 43 of 2021, in his capacity as the Administrator of the Estate of Akash Sharma and therefore the settlement sum belongs to the Estate of Akash Sharma, which the Appellant is to hold in trust until the identity of all the beneficiaries are proven, including those plaintiffs in HP 85 of 2022.

[15] Given the nature and identity of the settlement sum, I order that the sum be paid to the interest bearing account of the Chief Registrar of the High Court, until the Courts orders otherwise."

[16] In the final, the Court make the following orders:

(1) The Application to Stay the interlocutory Orders of 29 July 2022 and 13 February 2024 are granted, subject to the Order that the settlement sum of $328,427.12 be paid by the Attorney-General into the interest bearing account of the Chief Registrar, until the Court otherwise order.

(2) That given the urgency of the matter, all the parties are to facilitate the early appeal hearing in the substantive action.

(3) Each party to bear its own costs.'

Discussion

High Court (per Sharma, J)

[13] The learned judge explained that the High Court decision dated 13 February 2024 relates to two summonses,

(a) Firstly the summons to vary the Interim injunction Order, filed by the Legal Aid Commission on behalf of the Plaintiff, and

(b) Secondly, Summons to Set Aside the Interim injunction Orders made on 29th July 2022 filed by the Appellant as Administrator in the Estate of Akash Shanil Sharma, deceased.

In support of the first Summons, an affidavit was filed by Alpana Darshika Kumar, 3rd Respondent/ Original Third Plaintiff. The Appellant had filed an affidavit in support with respect to the second Summons under consideration.

[14] The learned judge stated that:

(i) In HPP No. 43 of 2021, the sum of $328,427.12 being payment in respect of a Medical Negligence claim is to be paid to the Plaintiff Baadal Prasad Sharma by the Defendants, in his capacity as the Administrator of the Estate of Akash Shanil Sharma, with other orders enumerated therein.

(ii) That the Ex - Parte orders made on 29th July 2022 acted as an estoppel, and could not let the parties deal and process the payments as set out in the settlement/agreement reached in that action.

(iii) That from the substantive applications and interlocutory applications and summons filed by the parties, it has been revealed that there are other interests who purport to have a claim to the Estate of the deceased, including an infant child (Aaradhya Kashvi Sharma) and Alpana Darshika Kumar (legal wife), and Vineshni Mani Dass, the defacto wife of the deceased. This raises issues on whether these interests were disclosed by the Administrator of the deceased's Estate in Civil Action HPP No.43 of 2021.

[15] In paragraphs (21) to (23) the learned judge states:

"(21) After giving a due consideration of all above, it is only fair at this stage of the proceedings, that until I hear and determine the Substantive Writ Action No. HPP 85 of 2022, the (2) two Summons which are interlocutory in nature filed by the Legal Aid Commission and First and Second Defendants Baadal

Prasad Sharma cannot be acceded to the variation of the orders nor the pending interim injunctive Orders can be set aside until the finalization of the substantive matter accordingly.

(22) The (2) summons filed by the Legal Aid Commission and the First and Second Defendants is hereby dismissed in its entirety without disturbing the pending Interim Injunctive Orders already made on 29th July 2022 by this Honorable Court.

(23) The Interim Injunctive Orders are extended until the final hearing and disposition of the substantive matter in HPP Action No. 85 of 2022."

Orders:

(i)) The Summons filed by Legal Aid Commission on 25th August 2022 in its entirety is accordingly dismissed.

(ii) The Summons filed by second defendant Baadal Prasad Sharma on 30th September 2022 is also accordingly dismissed in its entirety.

(iii) ……..

(iv) The parties to complete the cause of action in terms of the High Court rules 1988 to allow the substantive matter to be ready for Hearing/Trial accordingly.

(v) A Hearing/Trial date to be assigned after delivery of this decision on Tuesday 13the February 2024."

Grounds of Appeal

1. *That the learned judge erred in law when he failed to consider whether there was a "serious issue to be tried", a fundamental judicial inquiry in determining the appropriateness of interlocutory injunctions.*

2. *That the learned judge erred in law and fact when he failed to consider whether an award of damages would be an adequate remedy, a critical assessment in the context of granting interlocutory injunctions.*

3. *That the learned judge erred in law and fact by failing to conduct an assessment of the balance of convenience, notably overlooking the imminent risk of irreparable harm to the appellant, particularly through the endangerment of Itaukei Lease No. 33047 to Mortgagee Sale, due to the injunctions granted as aforesaid.*

4. *That the learned judge erred in law and fact by granting Ex – Parte injunction orders on 29the July 2022 and subsequently extending them on 13 February 2024, without properly considering the impact on the enforcement of an earlier and precedent taking Consent Order issued in HBC 43 of 2021 by Hon.Justice Amaratunga.*

5. *That the learned judge erred in law and fact by granting an Ex – Parte injunction order on 29 July 2022 and subsequently extending them on 13 February 2024 against the Attorney General of Fiji in regard to 8th July 2022 orders of Justice Amaratunga Court order in HBC 43 of 2021.*

6. *That the learned judge erred in law and in fact by making determinations on contested facts in the judgment, as specifically highlighted in paragraphs 16, 17 and 19 of the judgment.*

7. *That the learned judge erred in law and fact by not considering the respondents/original plaintiffs' non- disclosure of a critical court order made in HBC 43 of 2021 by Honorable Justice Amaratunga in that 29 July 2022 Ex – Parte injunction application, hence orders were granted Ex – Parte on 29 July 2022 and subsequently extended on 13 February 2024.*

8. *That the learned judge erred in law and fact by not considering any of the appellant's written submissions, filed on 16 August 2023; oral submissions and the contents of the affidavit in opposition, filed on 7 September 2023.*

Case for the Appellant

[16] Ground 1: The Appellant submits the learned judge failed to consider whether there was a serious issue to be tried. He submits that in cases of injunction, particularly those granted Ex-parte, the original Plaintiff/Respondents bear the burden of showing that the injunction should continue, and this was not the case as there was no Affidavit in Reply to the Affidavit in Opposition filed by him. He submits that since the claim in the Affidavit in Opposition remains undisputed, *"it is evident that without locus, there is no serious issue to be tried",* as held in **Jai Prakash Narayan v Savita Chandra**, Civil Appeal No.37 0f 1985. The Appellant submits that his locus as a duly appointed Administrator of the Estate of Akash cannot be challenged.

[17] The Appellant submits that the learned judge's failures aforesaid have the effect of undermining the principles of justice and due process, depriving the Appellant of a fair assessment under the circumstances. The Appellant relies on the principles enunciated in **American Cyanamid Co. v Ethicon Ltd** [1975] UKHL 1; [1975] AC 396, as adopted in **Digicel (Fiji) Ltd v Fiji Rugby Union** [2016] FJSC 40; CBV0004.2015 (26 August 2016), and submits the principles so established were overlooked. The Appellant submits that the High Court should have considered the Respondents affidavit in support, the Appellant's affidavit in opposition, and the legal submissions of the parties, as well as the established legal principles. The Appellant's argument is that the respondents did not have locus in the matter (meaning there was no real issue to be tried). That this position is supported by various evidences (none was specified) in the affidavit of the opposition and legal provision of the Succession, Probate and Administration Act 1970 (no specific section is mentioned). The Respondents did not file a response to the affidavit in opposition.

[18] Grounds 2 : The Appellant submits that the learned judge erred in law when he failed to consider whether an award in damages would be an adequate remedy, and failed to consider the fact that the Respondents/Original Plaintiffs did not offer any undertaking as to damages, which constitutes a significant legal error, as it overlooks an essential element of the test for injunctive relief, which requires a court to evaluate if a monetary compensation could sufficiently compensate the aggrieved party. Failure to conduct the damages assessment undermines the equitable balance the Court must maintain in preliminary relief decisions potentially disregarding a less intrusive, yet equally effective remedy. This submission is made notwithstanding that it has been argued by Appellant (Ground 1) that there are no serious issue to be tried: see **Mala v Koronivaci,** which states that when an injunction has been granted Ex-parte, the Respondents/Original Plaintiff bears the onus of satisfying the Court that the injunction ought to continue.

[19] Ground 3: The Appellant submits that the learned judge erred in law and fact by failing to conduct an assessment of the balance of convenience, especially whether there is imminent risk of irreparable harm to the Appellant's leasehold interest being at risk of

disposal under a Mortgagee Sale. The Appellant submits that the learned judge omitted reference to arguments in written submissions filed in Court and the oral arguments of the Appellant. The Appellant relies on **Digicel (Fiji) Ltd v Fiji Rugby Union** (supra) at paragraph 125. He submits that Itaukei Lease No. 33047 is no longer an asset of the Estate, which was transferred to the Appellant by the beneficiaries of the Estate. That the transfer to the beneficiaries were pursuant to the Deed of renunciation executed by the Third Respondent when the Appellant was not the Administrator of the Estate. The Respondent submits that the judgment dated 13 February 2024 does not even make reference to Itaukei Lease No. 33047.

[20] Ground 4: The Appellant submits that learned judge failed to acknowledge that the parties in HBC 43 of 2021 had entered into Consent Orders before Hon. Justice Amaratunga. The learned judge had incorrectly referred to Consent orders as a *"Resolution and a Deed of Settlement and Mutual Release/Terms of Settlement",* in paragraphs 10 and 12 of judgment. Such mischaracterization and the extension of Ex – Parte orders contravene established principles on the finality and authority of High Court orders, undermining judicial respect to another High Court judge's authority: see **Akhtar v Sadiq** [2013] FJCA 142; ABU08.2010 (12 April 2013)**.** The Appellant submits that the Court of Appeal's jurisdiction is inherently limited to the original jurisdiction of the High Court in this action, as established under section 99 (3) of the Constitution and section 12 of the Court of Appeal Act 1949. The orders issued in Civil Action HBC 43 of 2021 cannot be varied by any Court other than the one that originally made it, or alternatively by a court exercising appellate jurisdiction originating from HBC 43 of 2021 itself.

[21] Ground 5: The Appellant submits that the learned judge erred in law and fact by granting an Ex – Party order on 29 July 2022, extended on 13 February 2024 against the Attorney General, injuncting the Attorney General of Fiji from making a payment of $328,427.12 to the appellant, due within 21 days by Justice Amaratunga as ordered on 8 July 2022 in HBC 43 of 2021.This is a contravention of section 15 of the State Proceedings Act 1951. The Appellant relies on the following authorities: **State v Public Service Commission**

ex parte Lagiloa [1994] FJ Law Rp. 33; [1994] 40 FLR 237 (10 November 1994), and **Uluivuda v Qarase [[2008]** FJCA 116; ABU0078.2008 (20 November 2008).

[22] Ground 6: The Appellant submits that the learned judge erred in law and in fact by making a determination on contested facts in the judgment, as highlighted in paragraphs 16, 17 and 19 of the judgment. That during interlocutory sage, issues of conflict of evidence, or determinations on contested facts, should not be resolved, but to await the final determination of the substantive issues: **Professional West Realty (Fiji) Ltd v Professionals Ltd** [2010] FJCA 50, which is authority for the proposition that interlocutory stages should not resolve conflicts of evidence. The learned judge prematurely stated in paragraphs 16, 17 and 19 that the respondents/original Plaintiffs were beneficiaries in the said Estate without logical explanation or any reasoning.

[23] Ground 7: That the Respondents/ Original Plaintiffs should be denied equitable relief as they did not disclose material information prior to the grant of the Ex – Parte injunction application, and orders were given by Justice Amaratunga - see **Alam v Queensland Insurance (Fiji) Ltd** [2017] FJCA 60. The case underscores that injunctions may be granted or refused based on the applicant's conduct prior to seeking the court's protection, highlighting the essential elements for full and frank disclosure in applications for injunctive relief.

[24] Ground 8: The Appellant was deprived of his constitutional right to a fair hearing under section 15(2) of the Constitution, and the learned judge failed to consider and evaluate the Appellant's written submissions: **Chand v State** [2018] FJCA 145. That the claim is barred under the doctrine of latches: **James v Scudamore** [2023] EWHC 996 (Ch.), Mc Elroy v Mc Elroy (Re Estate of Ray James Mc Elroy) 2023EWHC 109 (Ch.). The Respondent/Plaintiff failed to endorse the injunction relief sought in the injunction application: **Colebourne v Colebourne** (1876) 1 Ch.D.690. He claims costs: **Professional West Realty (Fiji) v Facciola [2012] FJCA 93; ABU0017.2011 (30 November 2012).** It is the Appellant's prayer that this Court rectifies the errors identified

by setting aside the High Court's decision and awarding costs on a high scale in favour of the Appellant.

Analysis

Legal Basis for Grant of Interim Injunction

[25] An injunction is an equitable remedy granted at the discretion of the court. The power which the court possesses to grant an injunction should be cautiously exercised only on clear and satisfactory grounds. An application for an injunction is according to some an appeal to an extraordinary power of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise: **Hubbard & Another v Vosper & Another** [1972] 2QB 84 and **American Cyanamid Co v Ethicon Ltd** (supra) where Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as leading source of the law on interim injunctions. They are:

(1) Whether there is a serious question to be tried at the hearing of the substantive matter;

(2) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and

(3) In whose favour the balance of convenience lies if the injunction is granted or refused.

These principles have been adopted and applied in our courts: **Pacific Timber Development Limited v Consolidated Agriculture Fiji Ltd,** and **Digicel (Fiji) Ltd v Fiji Rugby Union,** (supra) are examples and there are numerous other cases.

[26] Order 29 of the High Court Rules 1988 regulates Applications for Injunctions. Order 29 Rule (1) states:

1. (1) An application for the grant of an injunction may be made by any party before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be. (Underlining is for emphasis)

[27] Order 29 Rule 2 states:

2. (1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by order authorise any person to enter upon any land or building in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into the Court or otherwise secured.

(4) An order made under this rule may be made on such terms, if any as the Court thinks just.

(5) An application for an order under this rule must be made by summons or by notice under Order 25, rule 7.

(6) Unless the Court otherwise directs, an application by a defendant for such an order may not be made before he acknowledges service of the writ or originating summons by which the cause or matter has begun. (Underlining is for emphasis).

[28] Section 100(3) of the Constitution confers on the High Court an unlimited original jurisdiction necessary for the administration of justice in Fiji.

Consideration of Grounds of Appeal

[29] Ground 1: Is there a serious question to be tried at the hearing of the substantive matter? It has long been established that before granting an injunction the court must be satisfied that there is a serious issue of law or fact to be decided at the trial, and the claim is not just a frivolous or vexatious claim: **American Cyanamid Co.** (supra) The appellant's principal contention here is, not that there is, or there isn't, a serious question to be tried, but rather on the failure by the learned judge to carry out an independent inquiry on whether there is a serious question of law to be tried, and its consequence. In not considering this requirement the learned trial judge, it is argued, deprived the appellant of a fair assessment of his submissions and evidence, that the 1st, 2nd and 3rd respondents have no locus standi in challenging the administration of the deceased's Estate.

[30] The Respondents asserted in their written submissions and in submissions at the hearing that there are significant issue that need to be tried. These issues were raised in the Ex-Parte Summons, the Affidavits in Support and in the Substantive Summons. The 1st, 2nd and 3rd Respondents submit that although the learned judge had not specifically said so in his judgment, there are serious questions of law and fact to be tried including,

(a) The status of the 1st Respondent whose Birth Certificate bears the name of the deceased as the father of the child,;

(b) The 2nd Respondent who is claiming as the defector partner/ wife of the deceased who is the mother to the First Respondent, and

(c) The 3rd Respondent, the legal wife of the deceased. On the evidence, it is uncontroverted that the child Aaradhya Kashvi Sharma an infant, is registered in the Births Registry with the name of the deceased as the father.

[31] It would appear from the record that there are additional issues to be determined, including:

(d) Whether the appellant has locus to apply for the grant of Letter of Administration;

(di) The question of the legitimacy of the appellant's claims as beneficiary of the deceased's estate, and

(dii) The transfer of ownership of Itaukei Lease 33047 first to the deceased's parents and then to the appellant who now owns the lease.

These issues necessitate a thorough examination at a proper trial. The appellant's submission that the respondents did not respond to the appellant's Affidavit In Opposition, is noted, however, that does not mean that the Court has to accept the appellant's affidavit in its totality as factual and truthful. That, and the denial of a number of serious allegations made by the 2nd and 3rd Respondents in their respective affidavits, reinforces the point that, there are serious issues to be tried. Paragraph 8 of the Supplementary Submission of the 1st, 2nd and 3rd Respondents filed on 14 November 2024, by the Legal Aid Commission, appear to have adequately and precisely sum - up the position, as follows:

> *"The learned High Court correctly exercised its discretion in considering the serious triable issues raised by the Appellant's Affidavit in Opposition; such as who are the rightful beneficiaries of the Estate and who is the rightful administrator of the Estate. These issues are even more serious in the light of pleaded fraudulent administration of the Estate and the transfer of Estate assets (including the information of a possible mortgagee sale of the Itaukei Lease that is one of the subject properties in the substantive action). Hence the High Court correctly exercised its discretion to grant an interim injunction in the spirit of preserving the Estate property until final determination of the substantive Estate matter. Doing so was necessary for the administration of justice in the special circumstances of this case.*"

This ground has no merit and is dismissed.

[32] Ground 2: Whether the 1st, 2nd and 3rd Respondents will suffer irreparable harm if the injunction is denied? That is whether the said Respondents could be adequately compensated by an award of damages as a result of the Appellant continuing to administer the Estate of the deceased, collect the negotiated settlement sum, deal with the leasehold, and distribute the assets of the Estate to the beneficiaries, which excludes the 1st, 2nd and 3rd Respondents, as the Appellant has already determined that they do not qualify as beneficiaries under the Succession, Probate and Administration Act.

[33] Lord Diplock, in **American Cyanamid Co**, on damages and undertaking for damages, stated:

> *"…….the governing principle is that the court should first consider whether if the Plaintiff were to succeed at 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 defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, nor interlocutory injunction should normally be granted, however strong the Plaintiffs claim appeared 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 Plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of 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."*

Lord Diplock went on to say that it was where there is a doubt about the adequacy of either of the parties' remedies than what is called the *"balance of convenience"* arises. His Lordship recognised that it would be unwise to attempt to list the various matters which may need to be considered in deciding where the balance of convenience lies, let alone to suggest the relative weight to be attached to them.

[34] The purpose of an undertaking is to provide the defendant/ appellant with security against losses as recognized in **Wakaya Limited v Kenneth Chambers and Marsha Nusbaum** [2012] FJSC 9, CBV0008.2011 (9 May 2012), a case where the essential requirements of obtaining an undertaking was overlooked by the High Court, before granting an injunction in the case (a situation similar to this case), the Supreme Court stated:

> *"36. ……Adverting to this omission Marshall, JA in the Court of Appeal stated "In my view common law and equity have developed to the point that the cross undertaking is to be implied in quia timet applications. That will not stop judges from requiring the undertaking from the plaintiffs so that they are advised of the adverse risks involved in making a quia*

timet application. But this risk is now so well known, as the question of damages has to necessarily await the conclusion of the trial in the High Court. If in the High Court the Petitioner fails, then in addition to any other relief, it will be obliged to make an order for damages against the Petitioner for the loss, if any, that was sustained as a result of the grant of an injunction.by the High Court……""

[35] In **Gounder v Padayachi** [2022] FJCA 16; ABU 109.2016, ABU122.2016, ABU, 2017 (4 March 2022), this Court (per Jameel, JA), commenting on the requirement for the undertaking in damages, stated:

> *"[104] My understanding of the ratio of the Supreme Court's judgment in **Wakaya** (supra) in regard to obtaining an undertaking in damages from the Plaintiff, is to put him on notice should it turn out at the conclusion of the trial that he was not entitled to a quia timet application, he bears the risk of the defendant being entitled to damages, however, that too would be only after the latter has established such right, at the conclusion of the trial. The preponderance of authority is however that, obtaining this undertaking is a matter of discretion of the trial judge……"* (Underlining is for emphasis)

The ground was dismissed on that basis and based also on the unique and peculiar facts of the case.

[36] The 1st, 2nd and 3rd Respondents conceded that no undertaking had been given, however, that fact on its own, does not affect the underlying merits of the case or the serious issues identified that warrant judicial consideration. The *"failure to proffer sufficient evidence of their financial position"* is not in the end determinative of whether or not an injunction should be granted or maintained: **Druma v Nakete** [2008] FJHC 94; HBC214.2007 (14 April 2008). In this case, although no substantive undertaking for damages was given by the Plaintiff, the court took into consideration the circumstances in its entirety and granted the injunction. At paragraph 8.2 of the judgment, the learned judge stated:

"I am persuaded that it is appropriate in the present case to look at the question of damages and that of balance of convenience as interlinked."

I find that in the circumstances of this case, and having regard to:

(i) the Affidavits of the 2nd and 3rd Respondents, and the subsequent evidence deposed by the Appellants in the Affidavit in Opposition, and

(ii) the legal authorities cited above,

There are serious issues to be tried. And, given the objective of the application for the grant of injunction, which is to preserve and secure the assets of the estate of the deceased pending the disposal of the substantive claims, damages is not, under the circumstances adequate remedy for the 1st, 2nd and 3rd Respondents/Plaintiffs. On the other hand, the Appellant's position, is that he will not be able to distribute the monies which was the subject of the Consent Order in Civil Action No. 43 of 2021; and the leasehold is protected from Mortgagee Sale. As Administrator of the Estate of the deceased, it is in the interest of the estate and the beneficiaries and potential or disputed beneficiary status, that the serious questions of law be conclusively determined. Damages, in my view will adequately compensate the Appellant/ First Defendant, having regard to the circumstances of the respective parties' interests. On the balance of convenience, a point that is canvassed below, without the grant of an injunction, if the Respondents/Plaintiffs are successful (win the case), and the estate has been fully administered by the Administrator/Appellant, the Plaintiffs will have suffered irreparable loss. This Ground has no merit and is dismissed.

[37] Ground 3: In whose favour the balance of convenience lie if the injunction is granted or refused? The Appellant submits that, the learned trial judge failed to conduct an assessment on the balance of convenience, thus overlooking the imminent risk of irreparable harm to the appellant. It would appear that the Appellant's submissions on this ground is limited to his interests in the leasehold which is now owned by the Administrator (and Appellant) in his personal capacity, although that fact and issue of how the ownership is acquired, is being challenged. Lord Diplock, in **American Cyanamid v Ethicon Ltd** had observed that "*where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo".* Presumably, if the status quo is temporarily maintained, the effect on the parties of an injunction would depend on what enterprise(s) they were engaged in at the material time of the grant of the injunction. What would be the effect of the preservation of the status quo by injunction on them? To what extent can the court consider the relative strength of the parties' cases in deciding where the balance of convenience lies?

Lord Diplock stated:

> *Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or on the Plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."*

[38] In assessing the balance of convenience, without the grant of an injunction, or with its removal, if the Respondents win their action, and the Estate has been fully administered by the Appellant, the 1st, 2nd and 3rd Respondents will have suffered irreparable loss. In contrast, with the injunction in place, even if the Appellant ultimately wins, he would suffer no irreparable harm, as the settlement funds are held in an interest-bearing account managed by the Chief Registrar, and the lease will not be subject to Mortgagee Sale being protected by the injunction. It should further be emphasised that the injunction does not prevent the appellant from making payments towards his loan with the Housing Authority, as the loan is taken from the Authority in the appellant's personal capacity. I find the 1st, 2nd and 3rd Respondents case convincing, having regard to all the circumstances of this case, including the conduct of the Appellant as deposed in the Affidavits in Support of the 2nd and 3rd Respondents. On the balance of convenience, on my assessment, it is the 1st, 2nd and 3rd Respondents who will stand to suffer irreparable loss, in the event the injunction is removed, and they are successful in the end of the trial, after the Appellant has fully administered the deceased's estate. This ground has no merit and is dismissed.

[39] Ground 4: The Appellant submits that the learned judge had failed to consider the impact of the grant of Ex – Parte injunction orders on 29th July 2022 and subsequently extending them on 13th February 2024, without properly considering the impact on enforcement of an earlier precedential Consent Orders issued in HBC 43 of 2021.Injunction in circumstances, as in this case, where the injunction order would in effect have an impact in the enforcement of an earlier Consent Order in HBC N0. 43 of 2021: **Akhtar v Sadiq** [2013] FJCA 142; ABU08.2010 (12 April 2013).The Appellant submits that the jurisdiction of the Court of Appeal is inherently limited to the original jurisdiction of the High Court , as established under section 99(3) of the Constitution and section 12 of the Court of Appeal Act 1949.I believe that this issue is being overtaken by the Ex-Tempore Ruling dated 2nd October 2024, as ordered by His Lordship Jitoko, P. , as discussed in paragraphs [11] and [12] above. The Ground is dismissed.

[40] Ground 5: The learned judge erred by granting an injunction against the Attorney General and extending the same, in breach of the State Proceedings Act. The Appellant submits that the learned judge erred in law and fact by granting an Ex Parte Order on 29th July 2022, extended on 13 February 2024, against the Attorney General of Fiji from making a payment of $328,427.12 to the appellant due within 21 days in HBC 43 of 2021.That it contravenes section 15 of the State Proceedings Act. It was open to the parties who negotiated the Consent Order to consider and include an Order that the negotiated sum be paid into Court and not retained in the Office of the Attorney General, it being a Party, and since the funds are for the Estate of the deceased, and to be included in the assets of the Estate, to which all the beneficiaries of the Estate would have a claim.

[41] The Court is aware that the settlement sum is now deposited in an interest bearing account held by the Office of the Chief Registrar. The Appellant did not express any view on the relocation of the funds, if the Appellant had any grievance on the said Order, it was not raised at the hearing. The Orders made by his Lordship Justice Jitoko P., with regard to the relocation of the funds has resolved the issues raised in this ground. His Lordships reasoning and observations as stated in paragraphs [11] and [12] are adopted by this Court

and the parties need now to focus their attention on facilitating the finalisation of pleadings, if not already the case, and to agree on fixing an early hearing date for the hearing and disposal of the substantive Summons. The Ground is dismissed.

[42] Ground 6: The Appellant submits that the learned judge erred by making determinations on contested facts in the judgment as specifically highlighted in paragraphs 17, 18 and 19 of the judgment. It is not disputed that during the interlocutory stages, issues of conflict of evidence determination on contested facts should not be resolved, but to await the final determination of the substantive issues: **Professional West Realty (Fiji) Ltd v Professionals Ltd** [2010] FJCA 50, which is authority for the proposition that conflicts of evidence should not be resolved at the interlocutory stage. It appears that the Appellant has misinterpreted or misconstrued the contents of paragraphs (16), (17) and (19) of the judgment dated 13th February 2024, as:

(A) In paragraph (16), the learned judge was commenting on the information that has come to his knowledge after he had taken a much closer perusal of the substantive matters (applications), the interlocutory applications, Summons and the affidavits that were filed in the matter before him. The fact that the deceased had an infant child, his legal wife who he married on 12th July 2016 and his de-facto wife.

(B) In paragraph 17, the learned judge raised the issue whether, the Appellant as Administrator of the deceased Estate, in HBC No.43 of 2021 and the First and Second Defendant in HPP85 of 2022, had informed the Honourable judge presiding in Civil Action No.43 of 2021, that the First Plaintiff, Second Plaintiff and third Plaintiff had beneficial interest in the deceased's Estate.

(C) In paragraph (19) the learned judge was commenting on the need to have a trial/ hearing date so that a final determination could be made with respect to the Consent Order pursuant to Civil Action HBC No. 43 of 2021.That whether such final determination would decide on whether the First and Second

Defendants (Sashi Prasad and Baadal Prasad Sharma) are the only persons entitled to receive the entire settlement sum and/or whether other beneficiaries including the First, Second and Third Plaintiffs are also entitled to a share of the settlement sum of $328,427.12?

[43] It is quite clear from the above, that the learned judge, did not make any final determination on any conflicting or disputed facts. To the contrary, the learned judge was raising issues of interest to the court in its role, to ensure that justice is done, and that is best addressed by holding a trial/hearing that may address all outstanding and conflicting facts and issues. Paragraph (21) of the judgment supports the view that any final determination will be made after the substantive hearing:

> *"(21) After giving a due consideration of all above, it is only fair at this stage of the proceedings, that until I hear and determine the Substantive Writ Action in Action No. HPP 85 of 2022, the two Summons which are interlocutory in nature filed by the Legal Aid Commission and the First and Second Defendants, Baadal Prasad Sharma cannot be acceded to the variation of the orders nor the interim injunctive orders can be set aside until the finalization of the substantive matter accordingly."* (Underlining is for emphasis)

This ground has no merit and is dismissed.

[44] Ground 7: The Appellant contends that the learned judge did not consider the Respondents'/Plaintiffs' non-disclosure of critical court order made in HBC 43 of 2021. The non-disclosure of a critical Court order in Civil Action No. HBC 43 of 2021 by Amaratunga, J, on 8th July 2022 and High Court Orders in HBC 43 of 2021. That the Respondents should be denied equitable relief as they did not disclose material information prior to the grant of Ex – Parte injunction application: **Alam v Queensland Insurance (Fiji) Ltd** [2017] FJCA 60.

[45] The Plaintiffs (1st, 2nd and 3rd Respondents) were not parties to Civil Action No. 43 of 2021. The 1st,2nd and 3rd Respondents, being discarded as beneficiaries of the deceased Estate by the Appellant, and not being a party to Civil Action 43 of 2021, appeared to

have made sufficient disclosures under the circumstances. It will be noted that paragraph 2 of the Ex – Parte Summons referred to the "*Settlement Sum*" in Civil Action No. HBC 43 of 2021; paragraphs 44 to 47 of the affidavit in support of Vineshni Mani Dass, the defacto wife of the deceased, had made disclosures, to which the appellant offered no reply in his Affidavit in Opposition. He also avoided making specific replies to paragraphs 36, 38, 39 and 40 by a general denial, of the affidavit in support of Alpna Darshika Kumar, the legal wife of the deceased. The ground has no merit. It is dismissed.

[46] Ground 8: The Appellant's claim that none of his written submissions, and affidavits in opposition had been considered by the learned judge is untrue and misleading. In the judgment delivered on 13 January 2024, the learned judge had considered the written submissions of both parties. The Respondents and the Appellants were treated equally in that judgment as their respective applications: (i) The Respondents, for the variation of the injunction Orders, (ii) and the Appellant's, for the setting aside the injunction were both dismissed entirely by the learned judge. The Appellant had not pointed to any Rules of the High Court or cases to support his contention. On the totality of the judgment and Orders made in this case, the Appellant's/First Defendant's submission and Affidavit in Opposition have been considered and reflected in the outcome of the applications. It would appear that the Appellant and the Respondents have equal access to the Court, and received equal treatment from the Court, which in the final, makes a determination on the issues to be resolved on the merits of each case, in accordance with the law.

Conclusion

[47] This appeal is dismissed. It is evident from the consideration of the matters before the Court that there are serious questions of law and fact to be tried at the hearing of the substantive action/matter. I urge the parties to seriously consider, giving utmost urgency to the matter, and facilitate the early hearing in the substantive action.

Clark, JA

[48] I have read the draft judgment of Hon Qetaki JA and, for the reasons he gives, agree with the outcome and orders proposed.

Orders of Court:

1. *Appeal is dismissed.*
2. *Injunction Orders Affirmed*
3. *All parties are to facilitate the hearing and disposal of the substantive action within four months from 29th November 2024.*
4. *Appellant to pay costs summarily assessed at $3,000.00 to 1st, 2nd and 3rd Respondents, and to be paid within 21 days of this judgment.*

The Hon. Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

The Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL