

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 121 OF 2018

BETWEEN : **MAHENDRA DEO** Lot 27 Fairway Palms, Denarau Island, Nadi,
Fiji, Engineer/Director/Businessman.

PLAINTIFF

AND : **SHAREEN LATA HANS aka SHAREEN LATA DEO** of Lot 17, The
Links, Denarau, Nadi, Businesswoman.

DEFENDANT

Appearances : Mr A. K. Narayan (Jr) for the plaintiff/applicant
Mr S.K. Ram for the defendant/respondent

Date of Hearing : 11 October 2018

Date of Ruling : 21 November 2018

R U L I N G

[On interim injunction]

Introduction

[01] Before me is an application for interlocutory injunction filed by the plaintiff/applicant (*'the applicant'*) against the defendant/respondent (*'the respondent'*).

[02] By a summons supported by the affidavit of the applicant (Mahendra Deo) sworn on 12 July 2018 (*'the application'*) made under Order 29 of the High Court Rules 1988, as amended (*'HCR'*), the applicant seeks the following orders:

[1] *For a Declaration that the purported transfer dated 5th February, 2018 was fraudulent and/or void;*

- [2] *An injunction restraining the Defendant from uttering in any manner or form, the fraudulent transfer to any third parties, entities, contractors, suppliers, employees, clients, departments and/or statutory bodies including the Registrar of Companies;*
- [3] *As may be necessary, any acts, transactions and/or action taken with the use of the purported transfer including any registrations with any relevant statutory bodies or otherwise be set aside;*
- [4] *Damages;*
- [5] *Costs on a full solicitor/client indemnity basis.*
- [03] The defendant/respondent (*'the respondent'*) opposes the application. She has filed an affidavit in response to the application (and in support of an application to strike out the plaintiff's substantive action) sworn on 17 August 2018. The applicant has filed the affidavit in reply on 4 October 2018.
- [04] It is to be noted that the respondent has filed a combined affidavit for both in response to the application and in support of her application to strike out the applicant's substantive claim. Paras 23 through 35 of the respondent's affidavit are relevant to the application for interlocutory injunction. The summons to strike the substantive claim filed by the respondent is pending before the Master awaiting determination.
- [05] At the hearing, I heard the oral submissions put forward by the parties. In addition, both parties have filed their respective written submissions.

The Background

- [06] Mahendra Deo, the plaintiff/applicant (*'the applicant'*) brought an action against Shareen Lata Hans aka Shareen Lata Deo, the defendant/respondent (*'the respondent'*) praying for among other things a declaration that the purported transfer of shares dated 5 February 2018, was fraudulent and/or void. The applicant alleges that on 5 February 2018, the respondent intentionally or recklessly and, dishonestly and fraudulently transferred a further 48 shares of the applicant in Pacific West Builders Limited (*'PWBL'*) to herself (respondent). It is said she did so by virtue of the deed and the power of attorney. The applicant's claim arises out of the shareholding in PWBL.

- [07] At the time of incorporation of PWBL on 26 June 2006, the plaintiff held a total of 99 shares. One (Ms) Urmila Devi held the remaining one share.
- [08] When PWBL was incorporated, the parties were in wedlock. Their marriage is now dissolved by an order of the Magistrate's Court made on 18 September 2017.
- [09] By virtue of a Deed dated 20 August 2009 (*'the Deed'*), the applicant among other things covenanted that he would hold 48 shares in PWBL on trust for the respondent. At the same time the applicant appointed the respondent to be his true and lawful attorney in respect of the 48 shares he would hold on trust for the respondent by way of power of attorney No. 50614, which was registered on 26 August 2009 (*'PoA'*). The PoA reads:
- "... Shareen Lata Deo ... to be my true and lawful attorney in respect of my shares in the private limited company known as PACIFIC WEST BUILDERS LIMITED for me and in my name, place and on my behalf to act as 48 fully paid shareholder and to take any action as may be reasonably necessary to perform of the duties of a shareholder of the said company..."*
- [10] Sometime in October 2015, the applicant formally transferred the 48 shares held on trust together with one ordinary share Ms Urmila Devi held to the respondent, thus equalising the shareholding of PWBL.
- [11] The shares, according to the applicant, held on trust was transferred and effected to the respondent without recourse to the PoA. As a result, the terms of the Deed, the authority and the PoA were satisfied, accepted and acknowledged by the respondent, and given that both parties were of the understanding that the Deed had come to an end after the formal transfer and the applicant overlooked to revoke the PoA.
- [12] Disputes arose between the parties over the affairs of PWBL. As a result, on 31 August 2017 the respondent filed an action (HBC 186 of 2017) against the applicant seeking amongst other things orders for the conduct of the affairs of PWBL and to disqualify the applicant as a director of PWBL.

- [13] The disputes got aggravated, which had led the applicant to the filing of a Winding-up application (Winding-up Action No. 11 of 2017) to have PWBL wound up on the ground of deadlock between the 2 shareholders, the applicant and the respondent.
- [14] The applicant states that while the Winding-up application is still pending before the Master, the respondent for the very first time now claims that she is holding 98 shares in PWBL, being the 50% formally transferred to her with the 48% shares still held on trust for her by the applicant, and that since the PoA was never revoked by the applicant after the formal share transfer, the respondent has transferred a further 48 shares to herself. The applicant alleges that the transfer of the further 48 shares by the respondent to herself by virtue of the Deed and the PoA had been done so intentionally or recklessly and, dishonestly and fraudulently. The writ of summons issued by the applicant has been served on the respondent. In the interim, the applicant seeks an interim injunction to restrain the respondent from acting upon the purported transfer of a further 48 shares to herself.

The Issue

- [15] The issue is whether or not an interlocutory injunction should be granted restraining the respondent from uttering in any manner or form the purported transfer to any third parties, entities, contractors, suppliers, employees, clients, departments and/or statutory bodies including the Registrar of Companies until the final determination of the substantive claim.

The Law

- [16] The High Court Rules 1988, as amended ('HCR'), Order 29 deals with the grant of injunctions, which provides:

Application for injunction (O 29, R 1)

"1 (1) An application for the grant of an injunction may be made by any party to a cause or matter 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.

(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

The Governing Principles

[17] The applicant seeks interlocutory relief by way of prohibitory injunction. Since the applicant has applied for a prohibitory injunction, the principles as outlined by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 would be applicable in these proceedings. The principles applicable, according to *American Cyanamid*, to an application for prohibitory interlocutory relief are as follows:

- a) Is there a serious question to be tried?
- b) Are damages an adequate remedy?
- c) Who does the balance of convenience favour?
- d) Are there any special factors?

[18] *American Cyanamid* principles have been applied by the Courts in Fiji when considering interim injunction applications, for example: *Vivras Development Ltd v Fiji National Provident Fund* [2001] FJLawRp 67; [2001] 1 FLR 260 (10 August 2001) and *Digicel (Fiji) Ltd v Fiji Rugby Union*, Civil Action No.: HBC 30 OF 2014S.

Written evidence

[19] Both parties have filed their written evidence by way of affidavits. I will set out the evidence relevant to this application.

Affidavit in support

[20] In his affidavit in support, the applicant deposes, so far as relevant that [at paras 15-21]:

"...

15. *My action against the defendant is in respect of, amongst other things, obtaining a declaration that the purported transfer dated 5 February 2018, was fraudulent and/or void and that any acts, transactions and/or actions taken with the use of the purported transfer including any registrations with any relevant statutory bodies or otherwise be set aside.*
16. *The defendant intentionally or recklessly and, dishonestly and fraudulently purported to transfer a further 48 shares in an attempt to not only defeat the winding up action instituted by me and to support her claims in the other actions, but she has also done this in an attempt to deprive me of my entitlements, assets and interest in the company. (Emphasis supplied)*
17. *The defendant has already represented to me and third parties that she is now the majority shareholder in the company. On that basis she is attempting to usurp control over the company and oust me from the company and its decisions. (I now produce and annex correspondences sent by her to Mobil Oil (Australia) Limited (Fiji Branch) (being our largest client) and Property Experts (a real estate company that was assisting us to find a tenant) marked as "MD-13").*
18. *If the injunction is not granted, the defendant could dissipate, sell or otherwise dispose of the shares that she purportedly holds at present which will seriously undermine and have an adverse effect of frustrating me in my attempt to seek the reliefs in the pending proceedings. (Emphasis supplied)*
19. *My solicitors, AK Lawyers, have advised me, which advice I verily believe to be true, that I have good prospects of obtaining a favourable a judgment. I have a good and arguable case for the following reasons.*

- [i] *The defendant previously acknowledged and accepted under oath that the Declaration of Trust had come to an end which I had formally transferred her 49 shares in October 2015;*
 - [ii] *The purported transfer of a further 48 shares recently was irregularly and/or invalidly executed by her;*
 - [iii] *The purported transfer appears to have been lodged and registered with the Registrar of Companies when there was a valid order at the material time restraining the defendant from interfering with my rights and interest in the company as a director, shareholder and/or employee.*
20. *The defendant's actions are calculated and dishonest as despite her sworn evidence admitting the Declaration of Trust had come to an end, she subsequently, in other proceedings before this Honourable Court, swore that she held 98 shares in the company and did in fact thereafter transfer the 48 shares purportedly still held on trust to herself. I have been advised by my solicitors that the defendant has perjured herself. I now produce and annex copies of the following affidavits:*
- [i] *Affidavit of Shareen Lata Hans in reply and in Support of an Application to Discharge Injunctive Orders filed on 9 March 2018, marked as "MD-14". This affidavit was purportedly sworn on 9 March 2018, but the copy served on my solicitors unsworn.*
 - [ii] *Affidavit of Shareen Lata Hans in Support of Ex-Parte Application sworn on 30 April 2018, filed on 1 May 2018, marked as "MD-15" and*
 - [iii] *Affidavit in Reply of Shareen Lata Hans sworn on 19 May 2018 and filed on 21 May 2018, marked as "MD-16".*
21. *I give my usual undertaking as to damages. I have the means to pay such sums as may be imposed by this Honourable Court should the grant of the orders sought by me cause damage to the defendant. I have 50% proprietary interest in the residential dwelling located at Denarau Island, Nadi covered under Certificate of Title Number 35590 which has a value of FJ\$3,025,000.00. There is currently no debt over this property. I now produce and annex a copy of the valuation of the said property marked "MD-17". I also produce and annex my recent bank statement showing my current savings marked as "MD-18". Finally, I produce and annex a copy of the latest Income Tax Returns and financial statement of the company in which I hold an interest marked as "MD-19".*

..."

Respondent's affidavit

[21] In her affidavit in response, the respondent deposes, so far as relevant that [at paras 17-20]:

"...

17.2. *I am advised and believe that the plaintiff's allegations are baseless, and I have made an application to summarily strike out the claim. I am further advised that a declaration can only be made as a final order. The application for injunction is an attempt to obtain an interim declaration, which I am advised is not legally possible.*

17.3 *I do not accept that there was anything suspicious about the transfer of shares. The plaintiffs 2 (two) shares remain intact and he is entitled to 2% of the company.*

18.1. *I am advised that I am obligated by law to inform anyone dealing with the company of its current shareholding and that one of the purposes of registration with companies' office is to inform members of the public of the shareholding structure.*

18.2 *The emails clearly show that I am ensuring the business of the company runs smoothly and the plaintiffs attempt to sabotage it is not successful. He has only 2% interest to lose if the company fails.*

19. *I say that I am entitled to deal with the 98 shares as I wish. I have not and will not interfere with the 2 shares held by the plaintiff. By seeking the injunction orders the plaintiff seeks to interfere with my lawful entitlement to the 98 shares.*

20. *I say:-*

20.1. *I cannot comment on the advice given by AK Lawyers. I am advised and believe that the plaintiff has a very weak case which ought to be dismissed summarily.*

20.2. *The plaintiff has failed to show where I have said under oath that "the Declaration of Trust has come to an end".*

20.3. *The transfer documents were duly registered with the companies office. The plaintiff has failed to say how the transfer is "irregularly or invalidly" executed by me.*

20.4 *I have not interfered with the plaintiffs two (2) shares.*

Discussion

- [22] The applicant is seeking an interim relief upon issuing the writ of summons. The writ of summons has been served on the respondent. The respondent has filed her statement of defence. A striking-out application filed by the respondent is also pending before the court.
- [23] The plaintiff may apply for an interim injunction before or after the trial of the claim, whether or not a claim for the injunction was included in the plaintiff's writ (see O 29, R 1). In these proceedings, the plaintiff applies for an interim injunction before the trial, and after the issue of the writ, which includes a claim for the injunction.
- [24] What the applicant asks is a prohibitory injunction restraining the respondent from uttering the purported transfer to any third parties, entities, contractors, suppliers, employees, clients, departments and/or statutory bodies including the Registrar of Companies until the final determination of the substantive claim.
- [25] Injunctions are temporary orders made with the purpose of regulating the position between the parties to an action pending trial. Such an order is particularly useful where there is evidence that the respondent's wrongdoing will cause irreparable damages to the applicant's interest in the period between issue of process and trial.
- [26] The object of the granting of an interlocutory injunction is to protect the plaintiff against injury by violating of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... (See Lord Diplock in *American Cyanamid* [at 509]).
- [27] Prohibitory injunctions require the other side to refrain specified acts (such as publishing a libel or breaching a confidence).

- [28] Like all forms of equitable relief, the granting of interim injunctions is a matter within the discretion of the court.
- [29] In the era of human rights, the test to be applied may be whether the granting of relief is just and appropriate.
- [30] With the introduction of Human Rights Act 1998, the test to be applied may be whether granting relief is just and appropriate rather than just and convenient (*South Bucks District Council v Porter* [2003] UKHL 26, [2003] AC 558).
- [31] When considering an application for interim injunction, the court only needs to be satisfied that there is a serious question to be tried on the merits. A cause of action that can be described as hopeless will not satisfy the test (*National Commercial Bank Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16, [2009] 1 WLR 1405, at [11]-[12]. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of success is 90 per cent or 20 per cent (*Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 per Megarry V-C at p. 474, *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 per Megaw LJ at p. 373).
- [32] An interlocutory injunction hearing is not a trial on the merits. It is because there is no oral evidence and no opportunity for cross-examination.
- [33] If there is no serious question to be tried on the substantive claim, the injunction must be refused.

American Cyanamid principles

- [34] Since the applicant applies for a prohibitory injunction, I would like to adopt the court's approach in *American Cyanamid* case to interlocutory applications inter partes for prohibitory injunctions.

A serious question to be tried

- [35] In order to convince the court that there is a serious question to be tried at trial, the applicant (plaintiff) need not to disclose a *prima facie* case. In *Chhotabhai Patel Holding Ltd v Ba Town Council & Another* (Civil Action 164/91), Byrne J said [at para 9]:

“The AMERICAN CYANAMID case broke new ground when it held that provided the Court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case.”

- [36] The applicant alleges that the respondent has transferred a further 48 shares of PWBL, which the applicant held to herself using the Deed and the power of attorney, which had been completed and performed in October 2015. The purported transfer of shares to the respondent by the respondent is challenged on the grounds that:

- [i] *The defendant previously acknowledged and accepted under oath that the Declaration of Trust had come to an end which I had formally transferred her 49 shares in October 2015;*
- [ii] *The purported transfer of a further 48 shares recently was irregularly and/or invalidly executed by her;*
- [iii] *The purported transfer appears to have been lodged and registered with the Registrar of Companies when there was a valid order at the material time restraining the defendant from interfering with my rights and interest in the company as a director, shareholder and/or employee.*
- [iv] *The defendant intentionally or recklessly and, dishonestly and fraudulently purported to transfer a further 48 shares in an attempt to not only defeat the winding up action instituted by the applicant. The winding application is still awaiting determination. The purported share transfer in favour of the respondent was made while the winding-up proceeding is still pending before the court.*
- [v] *The transfer of shares is an attempt to deprive the applicant of his entitlements, assets and interest in the company.*

- [vi] *The defendant previously acknowledged and accepted under oath that the Declaration of Trust had come to an end which I had formally transferred her 49 shares in October 2015.*
 - [vii] *The purported transfer of a further 48 shares was irregularly and/or invalidly executed by the respondent.*
 - [viii] *The purported transfer appears to have been lodged and registered with the Registrar of Companies when there was a valid order at the material time restraining the defendant from interfering with my rights and interest in the company as a director, shareholder and/or employee.*
 - [ix] *The respondent had sworn an affidavit on 31 August 2017 in Lautoka High Court Action No. HBC 186 of 2017 that she is the holder of 50% of the issued shares and that the defendant (the applicant herein) was the owner of 50 per cent of the issued shares in the company (PWBL).*
 - [x] *The respondent did not disclose at any time prior to the purported transfer of a further 48 shares to herself that the Deed was still valid and that she still held 48 further shares in the company.*
 - [xi] *The respondent has filed an affidavit in the Nadi Magistrates Court (Family Division) on 8 August 2017 where she says that her income from business/partnership/company/trust was from 'Pacific West Builders'-50 per cent of the issued capital from October 2015. There is no mention of 48 shares held on trust.*
- [37] The respondent on affidavit states that she is entitled to deal with the 98 shares as she wished. She has not and will not interfere with the 2 shares held by the plaintiff. By seeking the injunction orders the plaintiff seeks to interfere with her lawful entitlement to the 98 shares.
- [38] Mr Ram of counsel for the respondent brings the following points before me through his written submission [at para 85 of the respondent's submission] and argues that there is no serious question to be tried:
- "85.1 *Would the fact that the defendant acted under the power of attorney to transfer the shares amount to a fraud or render the transfer invalid?*

85.1.1 *There is no evidence that the plaintiff in any way limited the powers given to the defendant under the power of attorney. In fact, it is broad and is very clear that the defendant can transfer the shares to anyone she wishes to do so.*

85.1.2 *The plaintiff cannot claim to have a cause or a serious question to be tried simply because they say that the defendant was not entitled to do the transfer under the power of attorney. The words of the power of attorney are clear. To revoke, there has to be a formal document made with notice given (see s.120 of Land Transfer Act).*

85.1.3 *It is not the power of attorney but the declaration of trust which confirm that powers given to the defendant to sign the transfer.*

85.2 *Whether the transfer of the shares while there was an injunction order in place renders it invalid. This is not a ground for fraud. At best, this may amount to a contempt of court. That, by itself, does not give a right to set aside a transfer.*

85.3 *Whether the concession by the defendant that the deed of trust came to an end render the transfer void. There was no concession. There is no argument with any prospect of success to show that there was a concession by the defendant that the trust had come to an end.*

86. *The fundamental question is whether there is an arguable case made to stop the defendant from uttering to anyone that she holds 98 shares in PWBL. It is plainly obvious that no such case has been set up. At best, if the allegations of fraud are met, the transfer of shares may be set aside, or damages can be granted in lieu thereof."*

[39] The respondent claims that she is entitled to transfer of a further 58 shares to herself by virtue of the Declaration of Deed dated 20 August 2009 and the power of attorney, which was registered on 26 August 2009.

[40] The Declaration of Trust (the Deed), which the respondent relies upon in support of her claim, reads so far as relevant:

"I hold 48 fully paid shares from my shares UPON TRUST for SHAREEN LATA DEO (father's name Chandar Hans) of Denarau, Nadi, Business woman."

[41] The power of attorney has been granted to the respondent by the applicant to further strengthen the declaration in the Deed. The relevant part of the Deed runs:

“... Shareen Lata Deo ... to be my true and lawful attorney in respect of my shares in the private limited company known as PACIFIC WEST BUILDERS LIMITED for me and in my name, place and on my behalf to act as 48 fully paid shareholder and to take any action as may be reasonably necessary to perform of the duties of a shareholder of the said company...”
(Emphasis supplied)

[42] Admittedly, the power of attorney given to the respondent was not revoked at any time before the action was filed in court on 13 July 2018.

[43] The points Mr Ram raised to show that there is no serious question to be tried themselves raises serious issues and at least: **whether or not** the fact that the defendant acted under the power of attorney to transfer the shares to herself amounts to a fraud or renders the transfer invalid.

[44] Mr Narayan of counsel for the applicant on the other hand contends that there is serious question to be tried on the substantive claim at the trial. He submits that the declaration stated in the Deed and the specific task or performance envisaged in the power of attorney has been completed and performed when the applicant actually transferred the 48 shares he was holding on trust for the benefit of the respondent on 31 October 2015. This raises an issue whether or not the respondent still exercises the power she had under the power of attorney in the circumstances where the task to be performed through the power of attorney had been completed and performed.

[45] The Deed specifically says that the applicant holds 48 fully paid shares from his shares upon trust for the respondent. It does not speak of a further 48 shares. The power of attorney appoints the respondent to be the applicant’s attorney in respect of his (applicant) shares ... to act as 48 fully paid shareholder. Both documents, the Deed and the power of attorney, are interconnected. Both of them deal with the 48 fully paid shares not the whole shares (98) the applicant held in the Company.

- [46] On 31 October 2015, the applicant had actually transferred the 48 shares he held on trust for the respondent to the respondent. By this actual transfer of the 48 shares to the beneficiary (the respondent), to my mind, the Deed and the power of attorney had become performed and executed. This follows that the applicant is no more holding the 58 shares on trust for the plaintiff.
- [47] The dispute arose when the respondent transferred a further 48 shares to herself on 5 February 2018. The plaintiff's (applicant's) claim arises out of the transfer of further 48 shares to the respondent leaving the applicant a minority shareholder having 2 shares. The applicant alleges that the transfer of shares into the respondent's name by her is wrongful and/or fraudulent with the view to sabotage the winding-up action, which is still pending in court awaiting determination.
- [48] The applicant has highlighted a number of issues to be tried at trial on the substantive claim. The primary issue is going to be whether or not the transfer of a further 48 shares which the applicant held in the company to the respondent by herself exercising the powers given in the power of attorney when the power of attorney had ceased to remain in force as a result of the actual transfer of the 48 shares which the applicant held for the respondent. Another issue that might emerge is that whether or not the transfer of the 48 shares by the respondent is wrongful/and/or fraudulent especially in the circumstances the said transfer of shares had been made when the winding-up application filed by the applicant and another action filed by the respondent in respect of the company are still pending before the court awaiting determination. These, in my view, are serious issues.
- [49] I am satisfied that there are serious issues to be tried at the trial on the substantive claim. I would accordingly reject the contention that there are no serious issues to be tried at the trial.
- [50] At this stage, I need not investigate whether the evidence put forward by the applicant is sufficient to determine the civil element of fraud. This is a matter that must be determined at the trial after considering evidence and cross-examination.

[51] Since I have determined there are serious issues to be tried at trial, I will now embark into the next stage of adequacy of damages.

Inadequacy of Damages (to either party)

[52] On this issue Mr Ram submits that the 48 shares transferred to the defendant pursuant to the Declaration of Trust have a value. There is no sentimental value attachment to these shares. Its value and the monetary benefit to the plaintiff can be quantified in terms of pecuniary damages (if the plaintiff is successful). They have clearly made a claim for damages in their statement of claim.

[53] In contrast, Mr Narayan contends that damages would not be an adequate remedy for the plaintiff. The plaintiff seeks to set aside the purported share transfer by the defendant. Damage would not be adequate for the reason that its potential damage is not merely pecuniary. An interlocutory injunction is a most convenient remedy to preserve the status quo. If the defendant is allowed to be deemed a 98% shareholder of the company, she will undermine the plaintiff's rights and interest in the company.

[54] Lord Diplock in *American Cyanamid* said:

'The court should go on to 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 trial. 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, however strong the plaintiff's claim appear to be at that stage' (at 408B-C).

[55] If on the other hand, damages would not adequately compensate the plaintiff for the temporary damages, and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a position to honour his undertaking as to damages, and

appreciable damage to the defendant is likely, an injunction will usually be refused: *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113.

- [56] The purported transfer of a further 58 shares to the respondent by herself disentitles the applicant's shareholding to that extent and reducing his shareholding up to 2%. This in effect makes the respondent a majority shareholder having 98% shares in the company. Prior to the alleged transfer, the applicant was an equal shareholder with 49% of shares in company. This is not a mere loss of shares. The applicant will lose his rights and interests, decision making powers in relation to the running of the company and his directorship. Damages, in my view, would not adequately compensate the applicant if he succeeds in his substantive claim or it is hard to assess damages for these losses.
- [57] Mr Ram submits that damages would be an adequate remedy to the applicant for loss of shares.
- [58] Assumingly, even if we assume for a moment that damages would adequate remedy to the applicant in the circumstances of the case for the loss between the date of the purported transfer and the final determination of the claim, there is no undertaking as to damages proffered by the respondent. Mr Ram told the court that the respondent is required to provide an undertaking as to damages because the respondent is not applying for an interim injunction.
- [59] I have found that damages would not adequately compensate the plaintiff for temporary damages that would be caused to the plaintiff following the said transfer of the shares until the final judgment.
- [60] The plaintiff has offered an undertaking in damages if appreciable damage is likely by the grant of the interim injunction. On affidavit the applicant states [at para 21 of his affidavit]:

"21. I give my usual undertaking as to damages. I have the means to pay such sums as may be imposed by this Honourable Court should the grant of the orders sought by me cause damage to the defendant. I have 50% proprietary interest in the residential dwelling located at Denarau Island, Nadi covered under Certificate of Title Number 35590 which has a value of FJ\$3,025,000.00. There is currently no debt over this property."

- [61] The applicant produced a copy of the valuation of the property in which he has 50% proprietary right (MD-17), a copy of his recent bank statement showing his current savings (MD-18) and a copy of the latest Income Tax Returns and financial statement of the company in which I hold an interest (MD-18).
- [62] The undertaking given by the applicant was not challenged by the respondent.
- [63] I am satisfied that the applicant is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial.
- [64] An interim injunction may be granted if damages would not adequately compensate the plaintiff for the temporary damages, and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial.

Balance of convenience

- [65] Lord Diplock in *American Cyanamid* highlighted that:

'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' (at 408E).

- [66] I have found that damages would not adequately compensate the applicant for the temporary loss in the event of the applicant succeeding at trial. I have also found that any appreciable damages that would be caused to the respondent by the grant of the interim injunction could be adequately compensated in the event of the respondent succeeding at trial.
- [67] For the sake of completeness, even if there is doubt as to the adequacy of the respective remedies in damages available to either party or both, the balance of convenience favours the grant of the interim injunction. It is because prior to the purported transfer of shares the respondent had maintained that she has 48% of fully paid capital shares in the company acknowledging that the applicant has 48

% of the shares. The said transfer of the shares to the respondent seriously interferes with the rights and interests of the applicant in the company.

Substantive claim

[68] Injunctions are only remedies, so can usually only be granted if the applicant has a substantive cause of action. As stated by Lord Diplock in *The Sikina* [1979] AC 210:

“A right to obtain an [interim] injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the [claimant] for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an [interim] injunction is merely ancillary and incidental to the pre-existing cause of action.”

[69] I am satisfied that the applicant has a substantive cause of action against the respondent to seek relief arising out of the purported share transfer. At this stage, the applicant is not required to show a *prima facie* case on the merits.

Other Factors (Status quo)

[70] In *American Cyanamid* Lord Diplock said at p. 408 that, in considering the balance of convenience: ‘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’. From *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, it appears that the status quo ante is the state of affairs before the defendant started the conduct complained of, unless there has been unreasonable delay, when it is the state of affairs immediately before the application.

[71] The applicant had 48% shares in the company. The act complained of has removed this making the applicant as having 2% shares in the company. It is prudent to take such measures to preserve the status quo. The status quo in this case means status quo ante, that is, the state of affairs before the respondent started the conduct complained of. I am of the view that the court should grant an interim injunction to maintain the status quo ante, the position before the purported transfer of shares on 5 February 2018.

Conclusion

[72] For the reasons set out above, it appears to me that it is just and appropriate to grant an interim relief in favour of the applicant. I accordingly grant an interim injunction in the way the applicant asks. This interim injunction shall remain in force until the final determination of the substantive claim. The applicant is entitled to costs of these proceedings. Therefore, I order the respondent to pay summarily assessed costs of \$3,000.00 to the applicant within 21 days.

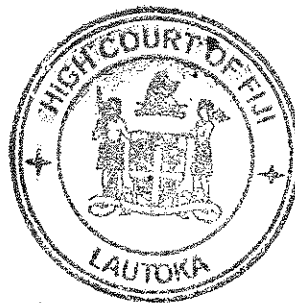
The outcome

1. Interim injunction granted restraining the defendant from uttering in any manner or form, the purported transfer of a further 48 shares to any third parties, entities, contractors, suppliers, employees, clients, departments and/or statutory bodies including the Registrar of Companies.
2. This interim injunction shall remain in force until the final determination of the substantive claim.
3. The respondent shall pay summarily assessed costs of \$3,000.00 to the applicant within 21 days.

M. H. Mohamed Ajmeer
21/11/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

21 November 2018

Solicitors:

For the plaintiff/applicant: Ms AK Lawyers, Barristers & Solicitors

For the defendant/respondent: Ms Samuel K Ram, Barrister & Solicitor