

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 330 of 2017

BETWEEN : **DALMAX INVESTMENTS LIMITED** a company duly incorporated in Fiji having its registered office at 76 Ragg Avenue, Suva.

PLAINTIFF

AND : **SERASEINI KANAILAGI VUKI** of 48 Vesi Street, Flagstaff, Suva, Fiji, Civil Servant.

FIRST DEFENDANT

AND : **JOEL KRISHMAL ABRAHAM** of Grantham Road, Raiwaqa, Suva, Chief Executive Officer (Fijian Consumer and Competition Commission)

SECOND DEFENDANT

Counsel : **Mr. V. Singh for the Plaintiff**
Mr. S. Nandan for the 1st & 2nd Defendant
Date of Hearing : **22nd January, 2018**
Date of Judgment : **31st January, 2018**

Catch words

Consent of Director Lands for proceedings for an injunction- Section 13 of State Lands Act- institution of proceedings- Suppression- non-disclosure of facts-proprietary injunction - Order 18 rule 1 of High Court Rules

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this action for specific performance and also for damages. The application for injunction was filed with a writ of summons and endorsement of claim on 17th November, 2017. The 1st Defendant had entered in to Sale and Purchase Agreement (SPA) with the Plaintiff, and had accepted a deposit for that, despite that 1st Defendant had entered another SPA with the 2nd Defendant. Considering the nature of the alleged,

infringement an *ex parte* injunction was granted on the same day, restraining the 1st Defendant from dealing with the said property. The Defendants objected to the *ex parte* injunction on the basis of material non-disclosure and also alleged non-compliance of Section 13(1) of State Lands Act, namely failure to obtain consent of Director of Land (DOL) to institute proceedings for an injunction. No Statement of Claim was filed, by the Plaintiff even at the time of the *inter partes* hearing though there is a summons filed seeking an extension of time to file Statement of Claim. The Defendants also allege that the S PA entered between the Plaintiff and 1st Defendant is void.

FACTS

2. The Plaintiff filed Writ of Summons with an endorsement of claim an *ex parte* Summons dated 17 November 2017 seeking the following orders:
 - (a) *That the 1st Defendant by themselves or by their servants agents or otherwise howsoever be restrained from dealing with the Property comprised in Crown Lease No. 2073 (being Lot 10, Section 3, Flagstaff and having an area of 31 perches) ("the Property") in any manner whatsoever*
 - (b) *For such further or other orders.....'*
3. The Summons was filed pursuant to Order 29 Rule 1 of the High Court Rules 1988 and the following affidavits were filed in support of it:
 - (a) The Affidavit in Support of Rasmir Singh sworn and filed on 17 November 2017 ("the RS Affidavit").
4. Upon the hearing of summons and the supporting affidavit *ex parte* injunction was granted preventing the 1st Defendant from dealing with the land in issue.
5. A Supplementary Affidavit of Michael Kum Kao Joe sworn and filed on 27 November 2017 ("the MKKJ Affidavit") was filed and along with that disclosed some additional facts, which had allegedly come to Plaintiff's knowledge after obtaining *ex parte* injunction.

6. When the matter was first mentioned before me *inter partes*, the injunction granted on ex parte was extended till further order of court and directions were made to file and serve affidavits in opposition to the injunction and accordingly an affidavit in opposition was filed.

7. According to the affidavit in support, the facts are as follows:
 - (a) In October 2017 the Plaintiff and the First Defendant negotiated for the sale of the Property to the Plaintiff and the negotiations successfully concluded with the First Defendant agreeing to sell the Property to the Plaintiff for \$400,000.00.
 - (b) At the said time the First Defendant was and she remains the registered proprietor of the Property.
 - (c) On 17 October 2017 the First Defendant signed a Sale and Purchase Agreement and presented it to the Plaintiff to sign. The Plaintiff signed the Agreement and on 13 November 2017 paid a deposit of \$20,000.00 into the First Defendant's solicitor's trust account.
 - (d) The Agreement was stamped by the Commissioner of Stamp Duties on 16 November 2017. The Plaintiff's solicitors were provided with the First Defendant's TIN letter on 16 November 2017. The tin letter was a mandatory requirement for the Agreement to be stamped by FRCS.
 - (e) On 16 November 2017 the First Defendant's solicitors informed the Plaintiff's solicitors that the First Defendant had engaged another firm of solicitors and had entered into a second agreement for the sale of the property to the Second Defendant and that that transaction was due to be settled on 17 November 2017. The consent from the Director of Lands to this transaction and the exemption of stamp duty by the Fiji Revenue and Customs Service was done.

8. According to the supplementary affidavit filed upon the grant of ex parte injunction the Plaintiff further revealed
 - a. she is yet to receive the consent of the DOL for lodgment of caveat and or for the institution of the proceedings, though an application was made.
 - b. her solicitors had discovered that 1st Defendant had transferred 2/3 rd of shares in the property in issue to third parties, who are step daughters of the 1st Defendant.
 - c. The said third parties along with 1st Defendant had mortgaged the property to a Bank.
 - d. the transfer of the property as well as the mortgage were not endorsed on the title.

9. The affidavit in opposition filed by the 1st Defendant admitted the transfer of 2/3 share of the property to her step daughters and stated that SPA entered with the Plaintiff is void.
10. The Defendants also allege material non disclosure, non compliance of Order 18 rule 1 of High Court Rules of 1988 and also non compliance of Section 13(1) of State Lands Act.

ANALYSIS

11. The counsel for the Defendant objected to the injunction on several grounds and they can be summarized as
 - a. No consent of DOL was obtained before instituting proceedings for an injunction.
 - b. Non-disclosure of material facts – failure to conduct due diligence before institution of the proceedings.
 - c. Non-compliance of the Order 18 rule 1 of the High Court Rules 1988.
 - d. The Sale and Purchase Agreement (SPA) entered between the Plaintiff and 1st Defendant is void as no consent of DOL was obtained before entering in to said agreement.
 - e. Clause 1.1 of the SPA makes it void in any event as no consent of DOL was obtained within the stipulated time.
 - f. The annexed copy of the title is not a certified copy hence it is in admissible as evidence in court.(Section 14 of Civil Evidence Act)

Consent of DOL to institute action for an injunction.

12. Injunctions are discretionary remedies of the court and unless statutorily prohibited it can be granted to prevent a civil wrong. If the legislature intends to prohibit an equitable remedy as injunction it should be clear. I cannot see any such prohibition contained in Section 13 of State Lands Act.

Section 13 of the State Lands Act states as follows

'13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the State Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner

¹ Earlier Crown Lands Ordinance Section 15(1) where it stated 'Protected Lease under the provisions of the Crown Lands Ordinance, 1945'

whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.'

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.

(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.

(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent. (Inserted by 21 of 1959, s. 2)

(5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.' (emphasis added)

13. I cannot see the sub Section 13(1) of State Land Act, excluding the inherent jurisdiction of the High Court to grant an interim injunction, till finally 'dealing' with the substantive action regarding a 'protected lease'. So any party who is threatened with any imminent infringement of a civil wrong, could seek interim relief by way of injunction.
14. There are certain types of 'dealings' that are declared null and void *ab initio* if the consent of DOL was not obtained. This is in terms of Section 13 (1) of State Lands.
15. The proviso contained in Section 13(1) that applies are for 'any *sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected*', in the absence of consent of DOL. There cannot be any ambiguity as to the expressed modes of transactions such as sale, transfer, sublease, assignment, or mortgage of the land. The common characteristic in

all those expressed modes of transactions are that some form of alienation of the protected lease. The institution of litigation for an injunction does not form any such alienation, though final judgment may involve such dealing and consent can be obtained subsequently. Interim injunction is granted to safeguard status quo except in a mandatory injunction.

16. The words '*other alienate or dealing*' are referring to any kind of disposition that alienate the interest of land and it should be similar to the types of expressed alienations (i.e sale, transfer, assignment etc.) This is where when one class or category or genus are followed by general words such as 'other alienations or dealing effected'. The later general words cannot deviate from the earlier category or genus, unless there is different intent shown in the statute.
17. In Sub-Section 13(1) there are instances that required consent of DOL, but such requirement is not fatal in all instances, as in litigation, where subsequent consent can be obtained.
18. Seeking an interim injunctive relief is not an alienation or dealing in the same category expressly stated, in the proviso to the subsection 13(1) of State Lands Act, hence on consent of DOL is required for institution of proceedings for an interim proprietary injunction to preserve status quo.(as opposed to a mandatory injunction where the order of the court may deal with protected lease depending on the orders sought)
19. Every time an injunction is sought it is not convenient and practically possible to obtain consent of DOL. Such a grant or refusal is a decision taken in an administrative structure, which will have inherent limitations. Eg. no such consent may be obtainable on a weekend or even on a working day after office hours or on urgent basis due to administrative restrictions that are inherent in such environment.
20. If no litigation can be institute without DOL's consent, what if the litigation is challenging or seeking a declaration against a determination by DOL relating to a land? This will create a super decision making body (an office) against whom even Judicial Review, or Constitutional Redress could not be practically obtainable.

21. The words contained in Section 13(1) of State Lands Act, as regards to litigation are '*such lease be dealt with by any court of law or under the process of any court of law*' At the time of application of this injunction there is no 'dealing' with such protected lease by the court, but only a preservation of status quo.
22. In my judgment though it may be desirable to obtain consent of the DOL regarding institution of action for an injunction it is not *sine qua non* for an urgent application like interim injunction where preservation of status quo is sought.
23. In this action there is pending summons filed by the Plaintiff to add DOL as a necessary party, and both counsel desired to adjourn the said summons, in order to proceed with hearing for setting aside the injunctive orders granted. DOL has not granted consent either to lodge a caveat or to institute action despite the Plaintiff having SPA, which was partly executed by the registered owner through acceptance of deposit in terms of the said agreement.
24. In *Mohammed Rasul v Jeet Singh and Hazara Singh* [1964] 10 FLR 16 the High Court (then Supreme Court) held that "there is nothing in the express wording of Section 15 (1) of the Crown Lands Ordinance (identical to Section 13 of the Crown Lands Act) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a "protected lease" is initiated.
25. If the consent of the DOL is unreasonably refused or DOL has exceeded its authority relating to decision, regarding a protected lease, an aggrieved party cannot practically again seek consent of the DOL, effectively to bring an action against DOL. It should also be noted there will be issues relating to limitation that needs institution of action within a certain period of time. If period of limitation for an action expires in a short period of time and one cannot practically seek consent of DOL before that can a party institute action and subsequently obtain DOL's consent? If the answer is no by the time the consent is granted no action could be instituted as it will be outside the time period of limitation.

26. In Court Bros. (Furnishers) Ltd v Sunbeam Transport Ltd [1969] 15 FLR 206 the Court of Appeal, considered requirement of DOI's consent for an options agreement to purchase a protected lease.

*"...The question of what amounts to a dealing in land has been considered by this Court in several cases involving the interpretation of a similarly worded section in the Native Land Trust Ordinance, Cap. 115, section 12. These cases were, however, decided on their own facts, and they offer no general principle which might be applicable to the present case with the exception of **Harnaru Singh and Anor. v Bawa Singh** (1957) 6 Fiji LR 31. In that judgment it is held that preliminary negotiations for the sale of land do not amount to a "dealing in land", and accordingly do not require the prior consent of the Native Land Trust Board. It is pointed out that otherwise the absurd position would arise whereby a written agreement, being null and void from the time it was executed, could not be submitted to the Board at all..."*

Further

"... Surely, with an agreement for sale and purchase, intended to be followed by a transfer, it is after the agreement has been entered into and before the transfer is made that the Director has to consider the matter and grant or withhold his consent (Of course, it would be different if possession were to be given on the agreement for sale and purchase and the agreement were to be relied on as the purchaser's title to the land so to speak.) And so also, with an option. Until it is exercised and becomes a contract for sale and purchase it is, in my opinion, not a dealing in the land. That was clearly enough the view taken by the Director himself when he gave his consent dated the 25th June, 1968, to the transaction when the appellant advised him that it was proposing to exercise the option; and in my opinion his view was the correct one. Indeed, I think that, even if the option had been exercised before his consent was sought, the consent could still have been properly obtained prior to the transfer..."

27. In the concurring decision in Court Bros. (Furnishers) Ltd v Sunbeam Transport Ltd [1969] 15 FLR 206 (Per Hutchison JA) held, p 211

*'Looking at the question free of authority I do not think that it is sale, transfer or sublease or mortgage, charge or pledge, the precise words used in subsection, all appear to me to indicate a transaction in which an immediate interest in the ald is created in the other person to the transaction. The words "in any other manner whatsoever" may certainly widen the scope of the subsection to cover transactions that do not necessarily fall within the particular words used in it and so in *Charmers v Pardoe* [1963] 3 All E.R 552, the Privy Council said that a licence to occupy coupled with a giving of possession would be a dealing within the subsection. **But that does not mean that something that does not confer an***

immediate interest in the land falls within that word.' An application for injunction does not confer interest in the land that can be declared null and void ab initio in terms of the proviso to subsection 13(1) of State Lands Act. (emphasis added)

28. The final point in this regard is one has to be mindful is what is paramount consideration in Section 13(1) of State Lands Act is not the classification of the agreement to find out whether the consent of DOL is needed, but rather what are the consequences of such an agreement, at the time of entering in to such an agreement.

29. In *Court Bros. (Furnishers) Ltd v Sunbeam Transport Ltd [1969] 15 FLR 206* , the Court of Appeal had held, that entering in to an agreement where there is an option does not need the consent of DOL, unless that option is exercised. None of these authorities dealt the issue of a party to seek injunctive relief relating to a protected lease in terms of State Lands Act, and the requirement of the DOL's consent. In my judgment no consent of DOL is needed for an application for injunction at the initial stage and court can grant some orders subject to the consent of the DOL. Court of Appeal held in *Courts Bros* (supra) case.

Non-Disclosure of Facts (Suppression of Facts)

30. A discretionary remedy like an injunction can be dismissed if there is suppression of material fact. This is more important in ex parte applications, but this should not be used as a path of least resistance to set aside an injunctive relief unjustifiably when the facts and circumstances support the grant of injunctive relief. The importance of disclosure in an injunction is a policy that should not be eroded, but it cannot be the sole decider, when there are important issues that favours the grant of injunction. The requirement full and frank disclosure in an equitable remedy cannot be carried to extreme lengths, so as to forget the need for granting equitable remedy such as an injunction and its relevance to the final relief.

31. In W Vs H [2001] 1 All ER 300 at 316

*Let me make it clear that the salutary principle of public policy set out in the long line of cases, of which the two I have mentioned are only two examples, is a principle as applicable in the Family Division as in any other place. In the Family Division as elsewhere, those who seek relief ex parte are under a duty to make full and frank disclosure of all the material facts. Those who fail in that duty, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief whether or not they have a good arguable case or even, as Behbehani's case [1989] 2 All ER 143 at 146, [1989] 1 WLR 723 at 726, shows, a strong prima facie case. On the other hand, as Balcombe LJ pointed out in the Brink's-MAT Ltd case [1988] 3 All ER 188 at 194, [1988] 1 WLR 1350 at 1358, this rule must not be allowed itself to become an instrument of injustice nor, as Slade LJ ([1988] 3 All ER 188 at 194, [1988] 1 WLR 1350 at 1359) pointed out in the same case, **must the application of the principle be carried to extreme lengths. In every case the court retains a discretion to continue or to grant interlocutory relief even if there has been non-disclosure or worse.** (emphasis added)*

32. The responsibility to disclose full and frank disclosure cannot be used as sole criterion for the convenience in dealing an injunction and should not be a slave to said public policy and devote entire reasoning to non-disclosure.
33. The counsel for the Defendant state that Plaintiff was not diligent and if diligent the true position of the title would have been discovered before the injunction. I think that this is an over expansion of the public policy for full and frank disclosure. At the time of an injunction inquiry all the evidence are not presented and what could have been further discovered and why it was not done so cannot be directly attribute to suppression.
34. In the circumstances it is not justified to expand the non disclosure of material facts to facts that were within the knowledge of the Plaintiff, at the time of the institution, unless there is clear misrepresentation on the face of it. So I reject the said contention of non disclosure of facts by the Plaintiff.
35. Even if I am wrong on that considering the decision of W Vs H [2001] 1 All ER 300 at 316, it is not a must in all cases of non-disclosure to set aside the injunction, but can consider

merits and then decide after application of accepted principles in American Cyanamid Co v Ethicom Ltd [1975] AC 396.

36. The Defendant had raised some important issues in their objections. Two of them are regarding the SPA entered between the Plaintiff and the 1st Defendant. The validity of SPA in terms of sub-Section 13(1) of State Lands Ordinance are challenged. First the form of the SPA is raised as an objection, and state that due to its form consent of the DOI. was required and in the absence it made it null and void. Next it is the time period stated in the SPA and failure to obtain consent of the DOI. within that period and lack of any evidence on the part of the Plaintiff to make any effort to obtain such consent. There are serious questions to be tried on the objections raised by the 1st Defendant and also on the endorsement.
37. There is no Statement of Claim filed despite the requirement to do so within a stipulated time in Order 18 rule 1 of High Court Rules, but there is summons seeking extension of that time period. which is yet to be determined.
38. This case involves with real property and the Plaintiff is seeking an order for specific performance in terms of the endorsement. If there is any impediment to equitable remedy of specific performance, a damage is an option. If the injunction is set aside the property may be transferred to 2nd Defendant in terms of SPA with him and the claim for specific performance of the Plaintiff cannot sustain. In such a scenario damages would not be an adequate remedy. If the injunction is extended till the final determination the damage to the Defendants as well as third parties who have claims to the property is greater. There are three parties who are yet to be added including a bank. 2nd Defendant had also entered into a SPA with the 2nd Defendant along with the other two 'unregistered' owners of 2/3 share of the property. So the intended damage will invariably to 2nd Defendant as well as to the two parties you are yet to be added to the action. The Plaintiff in the summons filed on 20th December 2017 sought to add them as parties to the action. This summons is adjourned. So, the damages would not be adequate remedy considering the nature of the

relief. There is a bank who had also obtained mortgage but their rights are yet to be registered.

39. The Plaintiff in a supplementary affidavit after obtaining ex parte injunction has revealed that there are at least two unregistered interests on the property yet to be registered. It is believed that even consent of the DOL was obtained for them to complete the transaction though it was not recorded on the title. Even the mortgage to the bank was completed though not registered on the title. (see supplementary affidavit of the Plaintiff)
40. The position of the Defendant was that if a certified copy of the title was obtained it would have revealed pending applications before it. This may be so, but all parties agree that the only registered interest on the property is 1st Defendant's interest as the owner and indefeasibility of title to the land.
41. Apart from the transfer of 2/3 of title to third parties all of them including the 1st Defendant had also mortgaged the property to a commercial bank and this is also yet to be registered on the title.
42. Considering the balance of convenience if the injunction remained on the property the said transaction will also be affected as 1st Defendant is precluded from any dealing with the property. According to the affidavit in opposition the 1st Defendant had stated that she had informed about the pending transfer to the representative of the Plaintiff company who signed SPA.
43. Further, 1st Defendant in the affidavit in opposition stated that she had informed about the pending mortgage to the Bank, to the signatory of the Plaintiff, these are evidence to be tested at the hearing.
44. The above facts are denied by the Plaintiff in their affidavit in reply, but the truth needs to be ascertained at the trial.

45. In the light of the said sworn evidence it is clear that if the ex parte injunction is extended till the final determination of this matter the transfer of 2/3 share to the respective parties as well as subsequent mortgage of the property to a commercial bank will also get affected and damage to all the parties are more compared with the loss to the Plaintiff if the injunction is lifted. The bank as a mortgagee though not a party to the action yet will get affected from the injunction.
46. On the material available to the court at the hearing the Plaintiff is relying on its SPA for the proposed claim contained in the endorsement. 1st Defendant had also entered a second SPA with the 2nd Defendant. It is believed that 2nd Defendant's transfer had also been consented by DOL whereas there was no evidence of Plaintiff even taking any step seeking consent of DOL. Apart from the 2nd Defendant there are two other 'unregistered' owners of the property having equal unregistered interests and their interests are in the process of getting registered. Once it is registered it would be difficult for only 1/3 share owner of the property to transfer the entire land as other two parties were not signatory to the Plaintiff's SPA. 2nd Defendant's SPA had all the parties as signatories and even after registration of the interests of the interests on the property the property can be transferred in terms of that SPA since all of them are signatories to the SPA with the 2nd Defendant. So balance of convenience supports dissolving of the ex parte injunction.

FINAL ORDERS

- a. The Injunction granted on 17.11.2017 and extended on 1.12.2017 is dissolved forthwith.
- b. The cost of the application is summarily assessed at \$1,000

Dated at Suva this 31st day of January, 2018.



Justice Deepthi Amaratunga
High Court, Suva