

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

CIVIL ACTION NO. HBC 173 OF 2019

BETWEEN : **ABHINESH SINGH** and **JYOTI LATA SINGH** both of Nacovi, Nadi,
Businessman and Businesswoman being the Power of Attorney of
Rodney Eichenberger of United States of America, Retired.

PLAINTIFFS

AND : **RAJESH SINGH** of Nacovi, Nadi, Farmer.

FIRST DEFENDANT

AND : **FENGDUAN GUO** of Bountiful Estate, Namaka, Nadi, Businessman.

SECOND DEFENDANT

AND : **THE DIRECTOR OF LANDS** of Government Buildings, Suva.

THIRD DEFENDANT
NOMINAL DEFENDANT

AND : **THE REGISTRAR OF TITLES** of Suvavou House, Suva.

FOURTH DEFENDANT
NOMINAL DEFENDANT

AND : **THE ATTORNEY GENERALS OFFICE** of Government Buildings,
Suva.

FIFTH DEFENDANT
NOMINAL DEFENDANT

Appearances : Mr M. Kumar for the plaintiffs/applicants
Mr R. Singh for the first defendant/first respondent

Date of Hearing : 30 August 2019

Date of Ruling : 30 October 2019

R U L I N G

[on interim injunction]

Introduction

[01] This is an application for interlocutory injunction.

[02] The plaintiffs/applicants (*‘the applicant’*), by their application filed on 11 July 2019, in conjunction with an affidavit sworn by Abhinesh Singh and Jyoti Lata Singh, the applicants, seek the following orders:

1. An injunction restraining the defendants whether by themselves or by their servants and or agents or by whosoever from selling, partitioning, disposing, assigning, mortgaging, charging or in any way dealing with all that piece and parcel of land comprised in Crown Lease No. 844743 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1054^{m2} situated at Nacovi, Nadi and all that piece and parcel of land comprised in Crown Lease No 844745 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1054^{m2} situated at Nacovi, Nadi until final determination of proceedings herein.
2. An injunction restraining the defendants whether by themselves, their agents, servants or otherwise however from interfering with the plaintiff, its agent’s and caretaker’s right of use and enjoyment of the plaintiff’s portion of all that part and parcel of land comprised in Crown Lease No. 844743 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1054² situated at Nacovi, Nadi and all that part and parcel of land comprised in Crown lease No. 844745 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1054^{m2} situated at Nacovi, until final determination of proceedings herein.

3. An Order that the first and second defendants pay for the costs of this application.

[03] The application was initially filed on *ex parte* basis and the court hearing the *ex parte* application granted an interim injunction as sought for in prayer (a) and (b) of the application and fixed the matter for *inter partes* hearing.

[04] The first defendant filed an affidavit in opposition on 7 August 2019 and the applicants filed affidavit in reply on 28 August.

[05] At the hearing, both parties tendered their respective submissions, however, only the respondent made oral submissions.

Background

[06] The plaintiffs have brought an action against the defendants. Their claim arises out of a sale and purchase agreement entered into between the first defendant and Mr Rodney Eichenberger for the sale of 2 Lots of quarters acre each in State Lease CL 69229 to Mr Rodney for the consideration sum of \$50,000.00 of which Mr Rodney paid \$25,000.00 before execution of the agreement and the balance price of \$25,000.00 on the settlement date nominated not later than 6 months from execution hereof upon approval of consent by the Director of Lands to this dealing and further grant of approval from other appropriate authorities to the sub-division of the land and partial transfer of the land duly stamped

[07] The agreement was executed on 9 June 2006.

[08] The plaintiffs sue in their capacity was the Power of Attorney of Rodney Eichenberger and seek relief against the defendant which includes declaration, injunction, specific performance and damages.

[09] The plaintiffs apply for interim injunction against the defendants restraining them from selling, partitioning, disposing, assigning, mortgaging, charging or in any way dealing with the land in dispute and from interfering with the plaintiff its agent's and caretaker's sort of use and enjoyment of the plaintiff's portion of the disputed land.

The law

- [10] The High Court Rules 1988, as amended ('HCR'), O 29, R 1 dealing with interlocutory injunction 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

- [11] Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 laid down guidelines applicable to the grant of interim injunction. The guidelines include:

- (a) A serious question to be tried;
- (b) Inadequacy of damages;
- (c) The balance of convenience;
- (d) Special cases

The parties' submissions

- [12] It is submitted on behalf of the plaintiff's that: there is serious question to be tried. The plaintiff was misrepresented by the first defendant to purchase Lots 2 and 3 and that when the sub-division of the property is approved, the buyer (Mr Reddy) will be registered as the owner of the Lot 2 and 3. The plaintiffs have a case against the defendants and there must be an interim injunction to maintain

the status quo until the conclusion of the matter. Overall justice and balance of convenience favour the grant of interim injunction.

- [13] Mr Singh on the other hand, on behalf of the first defendant, submits that: the plaintiff institutes the action as the Power of Attorney holder of Mr Rodney Eichenberger. The Power of Attorney does not give power to institute action. Fraud as a cause of action is not pleaded. The Sale and Purchase Agreement is null and void in the absence of the consent of the Director of Lands to the dealing. The only remedy that would be available to the plaintiff is a claim for monies paid under the Sale and Purchase Agreement.

Discussion

- [14] The plaintiff applies for an interlocutory order against the defendants from the dealing with the land in dispute. The application is made along with the writ of summons indorsed with the statement of claim. The plaintiff can make such an application after the issue of the writ or originating summons. If the case is one of urgency, the court may grant the injunction sought for before the issue of the writ or originating summons on terms providing for the issue of the writ or summons and such other terms (see: HCR, O 29, R 1 (3)).
- [15] The interim injunction is sought to restrain the defendants from dealing with the subject property and from interfering with the plaintiff's enjoyment of it.
- [16] The hearing of an application for interim injunction is not a trial on merits. It is usually decided on affidavit evidence and no opportunity for cross-examination. The pre-trial processes of discovery and inspection of documents are yet to take place.
- [17] I will apply the *American Cyanamid* principles to this application.

Serious issue to be tried

- [18] Lord Diplock in *American Cyanamid* said:

'The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to

the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated at more than 50 per cent ... there is not such rule ... The court no doubt must be satisfied that ... there is a serious question to be tried (at 406G-407G).

Putting it another way, the plaintiff will if he cannot show that he has 'any real prospect of succeeding in his claim permanent injunction at the trial' (at 408A).

Lord Diplock also stated that 'it is no part of the court's function at this state of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration' (at 407H).

[19] In a case where the defendant has not raised any arguable defence, there is no serious question to be tried, and an interlocutory injunction should generally be granted without considering the adequacy of damages or the balance of convenience (see: *Official Custodian for Charities v Mackey* [1985] Ch 168).

[20] At this state, it is not my intention to resolve conflicts of evidence as to facts on which the parties' claim may ultimately depend nor to decide difficult questions of law which need detailed arguments.

Consent issue

[21] The parties had entered into a sale and purchase agreement respecting the state land covered under a protected lease. The defendant raises the issue of consent of the Director of Lands for the dealing as required by section 13 of the States Lands Act ('SLA'). That section prohibits any dealing with the land without the written consent of the Director of Lands, and it declares any dealing without such consent to be *null and void*.

[22] It appears that the sale and purchase agreement to have been entered into subject to the consent of the relevant authorities. However, I leave this issue of law to be decided at the trial.

Locus of the plaintiffs

[23] Mr Singh on behalf of the defendant challenges the locus of the plaintiffs to bring this action on behalf of Mr Rodney Eichenberger (Mr Rodney).

[24] The defendant has a sale and purchase agreement with Mr Rodney and not with the plaintiffs.

[25] The plaintiffs claim to be the caretakers of the property. By his email of 28 February 2018, Mr Rodney informs the defendant that:

“Dear Rajesh: I am transferring the property to Abhinesh and Joyte so all negotiations need to be between you and them.”

[26] Mr Rodney in his email does not say that he is ready and willing to perform his part of the obligations under the agreement. Instead, he informs that he is transferring the property to the plaintiffs and any negotiations need to be had with them (plaintiffs).

[27] This is a serious question of law whether Mr Rodney could transfer his rights and obligations to another party through an email written to the defendant.

Power of attorney

[28] The power of attorney of the plaintiffs is also challenged that: it is not registered with the Registrar under section 119 of the Lands Transfer Act ('LTA'); it is limited power of attorney; it does not authorize the plaintiffs to sue on behalf of the grantor, Mr Rodney.

[29] These are difficult questions of law which need detailed arguments and matured considerations at the trial.

Breach of agreement

[30] The plaintiffs have brought this action on the allegation that the defendant has breached the agreement.

[31] The defendant on affidavit denies breach of the agreement. He alleges that it was Mr Rodney who has breached the agreement by allegedly transferring the agreement to the plaintiffs.

[32] For the purpose of this application, I am satisfied that there are serious questions to be tried at the trial, at least who has breached the agreement.

[33] The parties have shown that there is a serious question to be tried. Therefore, the case goes on to the second stage

(b) Inadequacy of damages (to either side)

[34] About inadequacy of damages, Lord Diplock 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 the 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 appeared to be at that stage' (at 408B-C).

[35] In *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 Kerr LJ said (at 534j):

'It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guideline which apply in many cases. It must never be used as rule of thumb, let alone as a straitjacket ... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions it to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial. In my view ... the present case is not in that category. Neither side is interested in monetary compensation, and once the interlocutory decision has been given little, if anything, will remain in practice.'

[36] Mr Singh on the adequacy of damages submits that the plaintiffs claim cannot sustain because of the illegality. Only claim that will survive is a claim for monies paid under the sale and purchase agreement as established in the case of *Kikuo Shakashita v Concave Investment Ltd* (Civil Action No. 121 of 1998).

- [37] Generously, Mr Singh on behalf of the first defendant conceded that Mr Rodney had paid a sum of \$25,000.00 in view of the sale and purchase agreement and that the first defendant should return that money to Mr Rodney.
- [37] However, the plaintiffs contends that the defendants are well protected by virtue of the undertaking as to damages provided by the plaintiffs and the plaintiffs have the means to pay compensation to the defendants in the event the court finds that the plaintiffs have failed to prove their case.
- [38] The property in dispute has been transferred to the second defendant as Mr Rodney through his email informed the first defendant that he is transferring the property to the plaintiffs. This translates that the property is no more available for specific performance.
- [39] In my opinion, it is not the case for interim injunction and an award of damages for breach of contract, if any, would be adequate remedy to the plaintiffs.

The *balance of convenience*

- [40] Lord Diplock in *American Cyanamid* said:

'It is where there is doubt as to the adequacy of the respective remedies in damages is available to either party or to both, that the question of balance of convenience arises (at 408E).'

- [41] The case will not go to the third stage (the balance of convenience) as I have expressed the opinion that damages would be an adequate remedy to the plaintiffs. The issue of 'special case' also does not arise in this case.

Conclusion

- [42] For the reasons I have set out above, I would exercise my discretion for not granting an interim injunction in this particular case. I would accordingly refuse to grant an interim injunction. The plaintiffs must pay the summarily assessed cost of \$500.00 to the first defendant. The substantive matter is transferred to the Registry for its normal course.

The result

1. Interim injunction refused.
2. Substantive matter transferred to the Registry.
3. Plaintiffs shall pay summarily assessed costs of \$500.00 to the first defendant.

M.H. Mohamed Ajmeer
30/10/19

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

30 October 2019

Solicitors:

For the plaintiffs: Rams Law, Barristers & Solicitors

For the first defendant: Patel & Sharma, Barristers & Solicitors