In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 209 of 2020

Mohammed Shameen Airud Khan

Applicant

v

iTaukei Land Trust Board

First Respondent

Registrar of Titles

Second Respondent

Counsel: Mr V. Filiipe for the applicant

Ms K. Suveinakama for the first respondent

Ms M. Alifor the second respondent

Date of hearing: 1st October,2020

Date of Ruling: 15th October,2020

Ruling

1. The applicant, Khan seeks an interim injunction to restrain the respondents from dealing with Native Lease 20503, known as Seaqaqa Township, Lot 64 depicted as Lot 9 on Plan M. 2716 in Macuata,(lease) comprising an area of 22 perches, until final determination of this action. The lease was initially transferred to Alam. Alam mortgaged the lease to Colonial National Bank,(Bank). He defaulted in his repayments and the lease was advertised for mortgagee sale. The Bank accepted the applicant's tender and entered into a Memorandum of terms of sale. The first respondent granted consent for the transfer to the applicant. The transfer documents were lodged with the second respondent. The second respondent did not sign the memorial, as a caveat and an Order of Court were registered on the lease.

The hearing

2. Mr Filiipe, counsel for the applicant said that the first respondent has requested the applicant to pay rental arrears for the period 2005 to 2018, in order to give consent for the transfer of the lease. He submitted that Alam was in possession of the lease during that period and he has to pay the arrears, not the applicant. The judgment of Justice Wati has established the applicant's rights.

3. Ms Suveinakama, counsel for the first respondent contended that the applicant does not have locus standi to seek relief. He is not a lessee. He was granted consent only for three months. The first respondent was ready to give its consent for the mortgagee sale, provided the arrears of rent were paid. He was given ample time to settle the arrears and breach fee. The lease was terminated, as neither the applicant nor the mortgagee paid the arrears. The undertaking as to damages provided is inadequate.

4. Ms Ali, counsel for the second respondent also submitted that the applicant is neither a lessee nor does he have a registered interest within the meaning of section 105(2) of the Property Law Act. The lease was cancelled. He does not have a proprietary interest. There is no serious issue. The balance of convenience does not favour the applicant. This application is misconceived.

The determination

5. The applicant's grievance is that the first respondent has requested him to pay the accrued rental arrears and called for tenders to lease the land knowing that he has a vested interest in the lease.

6. I find it necessary to set out briefly the facts and Orders made in the judgment registered on the title.

7. Alam filed action against the Bank, the insurer, the second respondent and this applicant. The lease was insured. Justice Wati discharged the injunction obtained against the mortgagee sale and made order for the Bank to proceed to finalize the mortgage sale to this applicant, Her Ladyship also made several Orders in favour of Alam and the Bank, which do not concern the applicant. The case is reported in [2014] FJHC 392(2 June 2014).

8. The appeals from the judgment of the High Court were dismissed by the Court of Appeal and Supreme Court,[2018] FJSC 10; CBV006.2017 (27 April 2018) . Justice Keith stated :

> ***..the Bank purported to exercise its power of resale as the mortgagee under the mortgage, and by a deed signed on behalf of the Bank on 20 May 2005, the lease was assigned to Mr. Khan for $33,333.00. The assignment purported to record that the transfer was registered by the Third Defendant, the Registrar of Titles, on 7 October 2005.*** *In the event, the Bank decided on 28 October 2005 to write off Mr. Alam's debt.* ***In order to ensure that the assignment of the lease did not go ahead in the meantime (thereby rendering nugatory his claim that the Bank had not been entitled to exercise its power of resale), he sought and obtained an interim injunction restraining the Registrar of Titles from registering the transfer of the property to Mr. Khan (notwithstanding that the assignment had purported to record that the transfer had already been registered).***
> ***Wati J. discharged the interim injunction, thereby freeing the way for the transfer of the property to Mr. Khan to proceed.***
> ***Although the way has therefore been clear at all times since Wati J's judgment for the transfer of the property to Mr. Khan to proceed, it has not done so. The Registrar of Titles is waiting for the outcome of this litigation before deciding what to do*** (emphasis added, underlining mine)

9. The applicant purchased the lease for $33,333.00. The first respondent gave the applicant its consent for the transfer. In 2005, the transfer was not endorsed, as a caveat and a judgment were registered on the lease restraining the second respondent from registering a transfer by way of mortgagee sale until trial. The caveat was removed. The restraining order was finally discharged by the Supreme Court in 2018.

10. In my view, the question whether the applicant was required to pay the arrears of rental from 2005 to 2018 and $ 10,000 for breach of terms and conditions("*summarily assessed*") and, whether the first respondent has disregarded his interest in calling for expressions of interest for the lease raise serious issues to be tried.

11. On the question whether damages would be an adequate remedy to the plaintiff, Lord Diplock in the ***American Cyanamide***, 504 at pages 509 to 510 stated:

> ***The object of the interlocutory injunction is to protect the plaintiff against injury by violation 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; but the plaintiff's need for such protection must be weighed against the corresponding need for the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against the other and determine where 'the balance of convenience' lies. .....the governing principle is that the court should first 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 application and the time of the trial.*** *If damages in the measure recoverable at common law would be* ***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. 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 hypotheses 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 plaintiff's 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 position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.*** (emphasis added)

12. In my view, there is a difficulty in attempting to determine to determine the loss of income to the applicant. I am satisfied that the difficulty in calculating damages indicates that damages would not be an adequate remedy, in the event that he is successful at the final hearing.

13. The next issue is the applicant's undertaking as to damages. The question arises whether the first respondent would be adequately compensated for any loss sustained by being prevented from leasing the land. The first respondent would be able to pay damages.

14. The first respondent has pointed out that the undertaking provided by the applicant is inadequate. The first respondent has not stated that it would suffer any injury if the interim injunction is granted.

15. In the circumstances, I dispense with the requirement of giving an appropriate undertaking.

16. On the balance of convenience, Lord Diplock in ***NWL v Woods***,[1979] 3 All ER 514 at pg 625 said:

> *In assessing whether, what is compendiously called, the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding on way rather than the other at a stage when the evidence is incomplete. On the one hand there is the risk that if the interlocutory injunction is refused but the plaintiff succeeds in establishing at the trial his legal right for the protection of which the injunction had been sought he may in the meantime have suffered harm and sought he may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense. On the other hand there is the risk that if the interlocutory injunction is granted but the Plaintiff fails at the trial the trial the defendant may in the meantime have suffered harm and inconvenience which is simply irrecompensable. The nature and degree of harm and inconvenience that are likely to be sustained in these two events by the defendant and the plaintiff respectively in consequence of the grant or the refusal of the injunction are generally sufficiently disproportionate to bring down, by themselves, the balance on one side or the other; and this is what I understand to be the thrust of the decision of the House in American Cyanamid v Ethicon.*

17. I have considered the consequences for the applicant if interim relief is not granted vis a vis the consequences to the first respondent if the injunction is granted. In my view, the balance of convenience lies with the applicant.

18. In ***Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*** [1985] 2 NZLR 129 at page 142 Cooke J (he as then was) stated:

> *Whether there is serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL (supra) speeches bring out the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case, the Judge has finally to stand back and ask himself that question. At this final stage, if he has found balance of convenience overwhelming or very clearly one way ... it will usually be right to be guided accordingly. But if, the other, rival consideration are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate.*

19. McCarthy P in ***Northern Drivers Union v. Kawau Island Ferries Ltd,*** (1974) 2 NZLR 617 at 620 and 621 stated:

> *The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the court should have to find a case which entitle the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be fully resolved.....**It is always a matter of discretion, and as the citation from Lord Pearce endorses, the Court will take into consideration the balance of convenience to the parties and the nature of injury which the defendant, on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.*** (emphasis added)

20. In ***American Cyanamid***,(*supra*) Lord Diplock at page 511 said:

> *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. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; . . .*

21. In my view, the overall ends of justice of this case requires that I grant the applicant interim relief, until the serious questions raised are determined.

22. ***Orders***

i. I grant an interim injunction restraining the first respondent from dealing with Native Lease 20503, known as Seaqaqa Township, Lot 64 depicted as Lot 9 on Plan M. 2716 in Macuata,(lease) comprising an area of 22 perches, until final determination of this action.

ii. Costs in the cause.

HIGH COURT CIVIL SUVA

A.L.B. Brito-Mutunayagam
JUDGE
15th October,2020