IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 185 of 2022

BETWEEN **CICIA PLANTATION CO-OPERATIVE SOCIETY LIMITED** a body corporate registered under the Co-operative Societies Ordinance Cap. 219 (now Co-operative Societies Act, Cap. 250) which can sue and be sued in its own name having its registered office at Tarukau Village on Cicia Island in Lau Group.

Plaintiff

A N D **SIRELI MOKUNITULEVU** of 22 Pikeu Street, Samabula, Suva, Businessman.

First Defendant

A N D **FIJIAN HOLDINGS LIMITED** of Level 7 Ra Marama, 91 Gordon Street, Suva.

Second Defendant

A N D **MERCHANT FINANCE PTE LIMITED** of Level 1 Ra Marama, 91 Gordon Street, Suva.

Third Defendant

A N D **TOKALAU SHIPPING LIMITED** of Shop 4 & 5, Lot 2 Matua Street, Walu Bay, Suva.

Fourth Defendant

Appearance: Mr. Jagath Karunaratne for the plaintiff.
The first defendant did not make an appearance.
Ms. Lynette Prasad for the second and third defendants.
No appearance for the fourth defendant.

Decision: Friday, 30th September, 2022 at 9.00am.

DECISION

[A] INTRODUCTION

[1]. The matter before me stems from an inter-parte summons filed by the plaintiff seeking the grant of the following orders:

1. *The 1st Defendant, Sireli Mokunitulevu by himself his servants and/or agent or otherwise be restrained by interim injunction from permitting or consenting to the selling, disposing and or dealing, or selling, disposing and/or dealing with his personal properties and his shares held in **Vukicea Investment Pte Ltd**, until the hearing and determination of these proceedings.*

2. *The 2nd Defendant, Fijian Holdings Pte Limited, by itself its servants and/or agents or otherwise be restrained by interim injunction from permitting or consenting to the selling, disposing and or dealing with the Plaintiff's FHL Shares by way of mortgagee sale or any other debt recovery process until the hearing and determination of these proceedings.*

3. *The 3rd Defendant, Merchant Finance Pte Limited, by themselves their agents or servants or otherwise be restrained by interim injunction from selling, disposing and or dealing with the Plaintiff's FHL Shares until the hearing and determination of these proceedings.*

4. *Other orders as the Court may deem just.*

[2]. The application is made pursuant to Order 29, Rule (1) and (2) of the High Court Rules 1988 and under the inherent jurisdiction of the court.

[3]. The following affidavits have been filed:

(A) The affidavit of Jiope Bukacaca sworn on 01.06.2022 [the Affidavit in Support].

(B) The affidavit of Mereoni Sabaria Rasovo, the company secretary and Group Manager Legal for the second defendant sworn on 13/7/2022 [the Affidavit in Opposition of the second defendant].

(C) The affidavit of Samuel Tupou, the Branch Manager for the third defendant [the Affidavit in Opposition of the third defendant].

[B] **THE FACTUAL BACKGROUND**

[4]. It is convenient at this stage to deal with the nature of the plaintiff's claim as disclosed in the Statement of Claim. The plaintiff, Cicia Plantation Co-operative Society Ltd, is a body co-operative under the Co-operatives Act 1996. The plaintiff says that the first defendant was the Chairman of the Board of the plaintiff between 1999-2020. The plaintiff says:

(i) It has 3,000,000 shares in the second defendant [FHL Shares].

(ii) It has some shares in the fourth defendant.

(iii) The third defendant currently holds the plaintiff's FHL shares as a third party security to a loan given by the third defendant to fourth defendant.

[5]. Under the heading 'causes of action against first defendant' the plaintiff alleges; [Reference is made to paragraph (9) and (10) of the Statement of Claim].

9. The 1st Defendant did not have proper authority/approval in accordance with the Plaintiff's By-Laws and the Co-operatives Act as follows: -

a). to merge or amalgamate with other companies to incorporate the 4th Defendant;

b). to mortgage the Plaintiff's FHL Shares to the 3rd Defendant: and

c). failing at all material times to act in accordance with the Plaintiff's By- Laws and in accordance with the Co-operative Act.

10. *That the 1st Defendant committed breaches of the Plaintiff's By-Laws and the Co-Operatives Act during his term in office, as follows: -*

(a) Failure to convene AGM since 2002 contrary to section 54 of the 1996 Co-operatives Act;

(b) Failure to keep proper record of all accounts so that all members can access them contrary to section 80 of the Co-operative Act;

(c) Failure to keep members updated on audited accounts undertaken under Section 81 of the Act;

d). Failure to keep the members updated on submissions of annual reports and audited financial reports to the Registrar of Cooperatives under Section 84 of the Act;

e). Failure to keep the members updated on the organization and management of the Plaintiff under Sections 52 to 79 of the Act and breach of Section 28;

f). Failure to keep the members informed of their rights and duties as members under section 37 to 43 of the Act:

g). The 1st Defendant's appointment as Chairman of the Board was no longer valid during the time: -

i). he merged or amalgamated the Plaintiff with other companies to incorporate the 4th Defendant;

ii). he mortgaged the Plaintiff's FHL shares to the 3rd Defendant: and

iii). He held office from 1999 to 2020 — 22 years contrary to the term allowable by the provisions of the By-Laws.

h). Failure to obtain the approval of the shareholders or Board through a lawfully convened AGM or SGM or Board Meeting to: -

i). deal with the Plaintiff's shares as follows: -

- *redemption of units worth $50,000.00 from Fijian Holdings Unit Trust on 16th November, 2015 by the two trustees — the 1st Defendant and the late Laisenia Qarase;*

- *Direct alternate and full payout of cash from Fijian Holdings Unit Trust on 31.02.15 and 21.03.17 with a combined total loss - of 622,124 units lost by the Plaintiff from shares held.*

- *Selling of Plaintiff's shares in the 2nd Defendant with total of 1 million share units from 14th January, 2019 to 24th January, 2019 for the sum of $1,042,805.40.*

- *Unlawful withdrawal of funds without AGM and Co-operative Registrar's consent from the Plaintiff's bank accounts being WBC Account No. 8016800 on 28th November, 2018 to 4th June, 2020 totaling $1,042,805.40.*

(ii) Joint venture the Plaintiff with other companies to form the 4th Defendant as illegal procedures were taken; and

(iii) taking a loan from the 3rd Defendant and mortgaging the Plaintiff's share certificates held with the 2nd Defendant valued at $3,000,000.00 as security on loans owed by the 4th Defendant that were and are outside the interest of the Plaintiff, as follows: -

[aa] Loan Account 1 - $758,981.50 for a term from 19.06.2019- 30.09.2026.

[bb] Loan Account 2 - $243,259.08 for a term from 19.02.2020 - 28.05.2025 totaling $1,002,240.69 with an annual interest of $168,412.33.

[6]. Under the heading causes of action against the second and third defendants, the plaintiff alleges [Reference is made to paragraph (11), (12) and (13) of the Statement of Claim].

*11. The 2nd and/or 3rd Defendants by themselves, their servants and or agents severally and/or collectively failed to apply professional and/or standard due diligence of a prudent and conscientious financial institution when approving loan facilities to the 4th Defendant in that the 2nd and 3rd Defendants should have required proper Meeting **["AGM"]** or Special General Meeting **["SGM"]**, in order to secure the Plaintiff's FHL share certificates as a third-party security to lending made to the 4th Defendant.*

12. The 2nd and/or 3rd Defendants by themselves, their servants and or agents severally and/or collectively failed to apply professional and/or standard due diligence of a prudent and conscientious financial institution when approving loan facilities to the 4th Defendant in that the 2nd and 3rd Defendants should have required the Plaintiff to execute a lawful Third Party Mortgage duly approved at a lawfully convened AGM and/or SGM of the Plaintiff to complete and perfect the loan security.

13. As a consequence of the above, the 1st, 2nd and 3rd Defendants as the ultimate beneficiaries of the Plaintiff's shares investment, by itself, its subsidiaries, servants and/or agents, severally and/or collectively, directly and/or ostensibly: -

a). Breached the trust of the Plaintiff.

b). Created an exposure of $1,002,240.69 to the Plaintiff with an encumbrance on its shares certificate held with the 2nd and 3nd Defendants.

c). Caused the loss of the Plaintiff's shares worth $50,000.00 surrendered by the 2nd Defendant and redeemed by the 1st Defendant and the late Laisenia Qarase.

d). Caused the loss of approximately $1,000,000.00 worth of 622,124 units of the Plaintiff's shares paid out by the 2nd Defendant's Unit Trust between 31st February 2015 to 21st March 2017.

e). caused the loss of $1,042,805.40 worth of 1,000,000 share units of the Plaintiff's shares between paid out by the 2nd Defendant to the 1st Defendant through the Plaintiff's Westpac Bank Account Number 8016800 between 14th January 2019 and 24th January 2019.

[C]. **THE APPLICABLE PRINCIPLES**

[7]. Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "Interlocutory "Injunction".

[8]. The plaintiff's application is made pursuant to Order 29, Rule (1) and (2) of the High Court Rules, 1988, which provides:

[9]. **Application for injunction (0.29, 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, counter claim or third party notice, as the case may be.*

(2) Where the applicant is the Plaintiff and the case is one of the 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."

[10]. The applicable principles are now generally settled and well known. The governing principles applicable when considering an application for interim injunction were laid down in the leading case of "**American Cyanamid Co v Ethicon Ltd**[1]" as follows:

(A) Whether there is a serious question to be tried?
(B) Whether damages would be an adequate remedy?
(C) Whether balance of convenience favour granting or refusing interlocutory injunction?

[11]. In that case Lord Diplock stated the object of the interlocutory injunction as follows at p. 509;

"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 favor at the trial: but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from him 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 favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies."

[12]. In **Hubbard & Another v. Vosper & Another**[2] Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defendant and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trail. At other times, it is best not to impose a restraint upon the defendant, but leave him free

[1] 1950 ALL.E.R 504
[2] 1972 EWCA CIV 9; [1972] (2) WLR 389

to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the plaintiff owned the copy right, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

[D]. **CONSIDERATION**

[13]. Counsel for the second and third defendants tendered written submissions. I am grateful to counsel for those lucid and relevant submissions and the authorities therein collected.

[14]. The plaintiff is seeking to restrain the second and third defendants from the sale and disposal of the plaintiff's shares held with the second defendant arising out of a default in payment of the loan taken by the plaintiff from the third defendant for the benefit of the fourth defendant.

[15]. By its written submissions the second and third defendants takes the following main points:

- *The plaintiff wrongly asserts that there is a mortgage over the shares held by the second defendant whereas the correct document is a share lien.*
- *An interim board cannot be appointed whilst there is a board already in place.*
- *There is no evidence available to the court to show that the current board members have been removed and especially the first defendant in accordance with the provisions of the Co-operatives Act.*

[16]. At this point it is sufficient to record that the plaintiff did not take issue with each aspect of second and third defendants' written submissions.

[17]. The plaintiff did not file an affidavit in reply to the affidavit in opposition filed by the second and third defendants. As such the court accepts the veracity of the

following matters to which the second and third defendants have deposed to[3]: (verbatim)

- *The Second and Third Defendants have a valid Share Lien over the Plaintiff's shares held with the Second Defendant for a loan taken by the Plaintiff from the Third Defendant for the benefit of the Fourth Defendant.*
- *The records kept with the Second and Third Defendants' registry (Central Share Registry Pte Limited) are correct in that the information lodged by the Plaintiff at the Central Share Registry are the same as the details provided by the First Defendant in its Loan Application applied for by the Plaintiff.*

- *Similar to the Registrar of Companies and the Registrar of Titles, the onus was on the Plaintiff to update its records with the Central Share Registry if there were any changes to the names and appointments of Board Members. The Second and Third Defendants are not required to look beyond what the Plaintiff lodges with its Registry.*

- *The Plaintiff's loan accounts with the Third Defendant is in arrears by 24 months and the Second and Third Defendants are legally entitled to sell the shares and recover the arrears of the Plaintiff in default of loan repayments under the Share Lien.*

- *The Director & Registrar of Co-operatives wrote to the Group CEO of the Second and Third Defendants on 14 April, 2021 informing the latter that the "term of the current Board had lapsed" and that the Department of Co-operatives was working together with the iTaukei Lands Trust Board to appoint a new Board for the Plaintiff and requested that the Second and Third Defendant wait until the Board was appointed before any transaction was carried out affecting the Plaintiff. On 19 April, 2021, the Group CEO of the Second and Third Defendants wrote to the Director & Registrar of Co-operatives and informed him that the Plaintiff's loan accounts were in arrears and that there was a valid Share Lien over the Plaintiff's shares held as security which is to be sold to recover the debt owed by the Plaintiff.*

[3] Jai Prakash Narayan V Savita Chandra, Fiji Court of Appeal Case No. 37 of 1985, date of Judgment 08.11.1985 HKSAR v Lee Ming Tee – unreported Hong Kong Court of Final Appeal Hklii: [2003] HKCFA 54

No Claim to Judgment for a final injunction

[18]. Ms Prasad submits that there is no permanent injunction [no claim to judgment for a final injunction] sought in the Writ of Summons and the Statement of Claim.

[19]. I accept Ms Prasad's submission. The prayers (c), (d) and (e) of the plaintiff's statement of claim only seeks an interlocutory injunction "until the hearing and determination of these proceedings". The plaintiff prays:

(c). *The 1st defendant, Sireli Mokunitulevu by himself his servants and/or agents or otherwise be restrained by injunction from permitting or consenting to the selling, disposing and or dealing, or selling, disposing and/or dealing with his personal properties and his shares held in* ***Vukicea Investment Pte Ltd****, until the hearing and determination of these proceedings.*

(d). The 2nd Defendant, Fijian Holdings Pte Limited, by itself its servants and/or agents or otherwise be restrained by injunction from permitting or consenting to the selling, disposing and or dealing with the plaintiff's FHL Shares by way of mortgagee sale or any other debt recovery process until the hearing and determination of these proceedings.

(e). The 3rd Defendant, Merchant Finance Pte Limited, by themselves their agents or servant or otherwise be restrained by injunction from selling, disposing and or dealing with the plaintiff's FHL Shares until the hearing and determination of these proceedings.

[Emphasis added]

[20]. In **Goundar v Fiesty Ltd**[4] Amaratunga JA in the court of Appeal (with whom Chandra and Muthunayagam JJA concurred) held:

[4] [2014] FJCA 20; ABU0001.2013 (5 March 2014)

"32. ***The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim****. The only claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1*;* [1975] 1 All ER 504 *at 510 Lord Diplock held;*

> *"...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any* ***real prospect of succeeding in his claim for a permanent injunction at the trial,*** *the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
>
> *As to that, 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 the application and the time of the trial' (emphasis is mine)*

33. ***How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected in limine****."*

(Emphasis added)

[21]. In the words of Lord Diplock in **American Cyanamid** (at p. 510), the plaintiff must have a *"real prospect of succeeding in his claim for a permanent injunction at the trial"* and here the plaintiff seeks no permanent injunction.

[22]. The injunction claimed in prayer (1), (2) and (3) in the inter parte summons filed on 01.06.2022 could never stand on its own without a final judgment for an injunction claimed. A right to obtain an interlocutory injunction is not a cause of

action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendants arising out of an invasion, actual or threatened, by them of a legal or equitable right of the plaintiff for the enforcement of which the defendants are amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. The injunction sought in the summons must be part of the substantive relief to which the plaintiff's cause of action entitles it; and the thing that is sought to restrain the defendants from doing must amount to an invasion of some legal or equitable right belonging to the plaintiff and **must be enforceable by the final judgment for an injunction.** Therefore, the application should be dismissed *in limine* as there are no permanent injunctions sought in the statement of claim in relation to prayer (1), (2) and (3) of the Summons. This complication weighs, and in my judgment, weighs quite significantly, against the grant of the interlocutory relief that is sought.

Whether there is a serious question to be tried as to the plaintiff's entitlement for relief

[23]. The court must be satisfied that there is a "serious question to be tried".

[24]. In American Cyanamid v Ethicon (supra) Lord Diplock at page 510 said:

> *"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."*

[25]. Lord Diplock further held:

> *"It is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavits 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 considerations. These are matters to be dealt with at the trial."*

[26]. In "**Honeymoon Island (Fiji) Ltd v Follies International Ltd**[5]" Pathik JA, Powell JA and Bruce JA enunciated the following:

> *"The grant of interlocutory injunction relief is discretionary. The court must be satisfied that there is a serious question to be tried, in other words, whether the application has any real prospect of succeeding in its claim for a permanent injunction at the trial."*

[27]. I remind myself at the outset of the fact that the present application is an interim application that does not and cannot amount to a trial or quasi-trial of the issues that will ultimately be determined.

[28]. The plaintiff must demonstrate a prima facie case. This requirement is to be understood as being whether there is a serious question to be tried as to the plaintiff's entitlement to relief, not whether it is more probable than not that the plaintiff will succeed at trial. The sense in which the test is understood is that the plaintiff must prove, prima facie, a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial. The plaintiff must show that it has a putative legal or equitable right in respect of which final relief is sought which will justify the restraint sought. The requisite strength of the probability of ultimate success depends on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought[6].

[29]. At this point Ms Prasad pressed on the court that the plaintiff's case is frivolous, vexatious and an abuse of process of the court.

[30]. As I understood the pleadings, the plaintiff is seeking to restrain the second and third defendant from the sale or disposal of the plaintiff's shares held with the second defendant arising out of a default in payment of the loan taken by the plaintiff from the third defendant, for the benefit of the fourth defendant.

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[5] [2008] FJHC 36

[6] See; Australian Broadcasting Corporation v O'Neill [2006] 227 CLR 57 (19)(Gleeson CJ and Crennan J) and (65) – (83) (Gummour and Hayne JJ) for the principles which guide the court in considering an application for an interlocutory injunction.

[31]. The plaintiff's loan accounts are in arrears and the second and third defendants have a share lien as security over the shares held by the plaintiff which can be sold to recover the debt owed by the plaintiff.

[32]. The interim injunction is premised upon the following allegations made by the plaintiff against the first defendant who was the chairman of the board for the plaintiff between 1999 – 2020 [Reference is made to paragraph (9) and (10) of the Statement of Claim].

9. *The 1st Defendant did not have proper authority/approval in accordance with the Plaintiff's By-Laws and the Co-operatives Act as follows: -*

a). to merge or amalgamate with other companies to incorporate the 4th Defendant;

b). to mortgage the Plaintiff's FHL Shares to the 3rd Defendant: and

c). failing at all material times to act in accordance with the Plaintiff's By- Laws and in accordance with the Co-operative Act.

10. That the 1st Defendant committed breaches of the Plaintiff's By-Laws and the Co-Operatives Act during his term in office, as follows: -

(a) Failure to convene AGM since 2002 contrary to section 54 of the 1996 Co-operative Act;

(b) Failure to keep proper record of all accounts so that all members can access them contrary to section 80 of the Co-operative Act;

(c) Failure to keep members updated on audited accounts undertaken under Section 81 of the Act;

d). Failure to keep the members updated on submissions of annual reports and audited financial reports to the Registrar of Cooperatives under Section 84 of the Act;

e). Failure to keep the members updated on the organization and management of the Plaintiff under Sections 52 to 79 of the Act and breach of Section 28;

f). Failure to keep the members informed of their rights and duties as members under section 37 to 43 of the Act:

g). The 1st Defendant's appointment as Chairman of the Board was no longer valid during the time: -

i. he merged or amalgamated the Plaintiff with other companies to incorporate the 4th Defendant;

ii. he mortgaged the Plaintiff's FHL shares to the 3rd Defendant: and

iii. he held office from 1999 to 2020 — 22 years contrary to the term allowable by the provisions of the By-Laws.

h). Failure to obtain the approval of the shareholders or Board through a lawfully convened AGM or SGM or Board Meeting to: -

i). deal with the Plaintiff's shares as follows: -

- *redemption of units worth $50,000.00 from Fijian Holdings Unit Trust on 16th November, 2015 by the two trustees — the 1st Defendant and the late Laisenia Qarase;*
- *Direct alternate and full payout of cash from Fijian Holdings Unit Trust on 31.02.15 and 21.03.17 with a combined total loss - of 622,124 units lost by the Plaintiff from shares held.*
- *Selling of Plaintiff's shares in the 2nd Defendant with total of 1 million share units from 14th January,*

2019 to 24th January, 2019 for the sum of $1,042,805.40.

- *Unlawful withdrawal of funds without AGM and Co-operative Registrar's consent from the Plaintiff's bank accounts being WBC Account No. 8016800 on 28th November, 2018 to 4th June, 2020 totaling $1,042,805.40.*

(ii) Joint venture the Plaintiff with other companies to form the 4th Defendant as illegal procedures were taken; and

(iii) taking a loan from the 3rd Defendant and mortgaging the Plaintiff's share certificates held with the 2nd Defendant valued at $3,000,000.00 as security on loans owed by the 4th Defendant that were and are outside the interest of the Plaintiff, as follows: -

[aa] Loan Account 1 - $758.981.50 for a term from 19.06.2019-30.09.2026.

[bb] Loan Account 2 - $243,259.08 for a term from 19.02.2020 - 28.05.2025 totaling $1,002,240.69 with an annual interest of $168,412.33.

[33]. As to the cause of action against the second and third defendants, the plaintiff pleads in paragraph (11) and (12) of the statement of claim.

*11. The 2nd and/or 3rd Defendants by themselves, their servants and or agents severally and/or collectively failed to apply professional and/or standard due diligence of a prudent and conscientious financial institution when approving loan facilities to the 4th Defendant in that the 2nd and 3rd Defendants should have required proper Meeting **["AGM"]** or Special General Meeting **["SGM"]**, in order to secure the Plaintiff's FHL share certificates as a third-party security to lending made to the 4th Defendant.*

12. The 2nd and/or 3rd Defendants by themselves, their servants and or agents severally and/or collectively failed to apply professional and/or standard

due diligence of a prudent and conscientious financial institution when approving loan facilities to the 4th Defendant in that the 2nd and 3rd Defendants should have required the Plaintiff to execute a lawful Third Party Mortgage duly approved at a lawfully convened AGM and/or SGM of the Plaintiff to complete and perfect the loan security.

[34]. The first defendant was removed on 08.07.2020 as the chairman of the Board for the plaintiff. The plaintiff has made following allegation against the first defendant [annexure JB 10 referred to in the affidavit of Jiope Bukacaca sworn on 01.06.2022].

1. *Failure to convene Annual General Meeting (AGM) since 2002 contrary Section 54 of the 1996 Co-operative Act;*
2. *Failure to keep proper record of accounts so that members can access them contrary to Section 80 of the Co-operative Act;*
3. *Failure to keep members updated on audited accounts undertaken under Section 81 of the Act;*
4. *Failure to keep the members updated on submission of annual and auditors report to your office under Section 84 of the Act;*
5. *Failure to keep the members updated on the organisation and management of the Cicia Co-operative Society Limited under Section 52 to 79 of the Act; and*
6. *Failure to keep the members informed of their rights and duties as members under Section 37 to 43 of the Act.*

[35]. The plaintiff contended that [reference is made to paragraph (15), (16) and (17) of the affidavit of Jiope Bukacaca sworn on 01.6.2022].

15. *The 1st Defendant had repeatedly breached the Co-operative Act and Regulations and By-laws he failed to convene Annual General Meetings for the members of the Plaintiff, he failed to provide statements of accounts and reports thereof to members of the Plaintiff.*

16. It is because of the aforementioned failures that the 1st Defendant could not have possibly had the proper approval and or authority of the Plaintiff and its members in accordance to the Plaintiff's By-Laws and the Co-operatives Act to mortgage the Plaintiff's FHL Shares to the 3rd Defendant.

17. It is because of the aforementioned failures that the 1st Defendant could not have possibly had the proper authority/approval in accordance to the Plaintiff's By - Laws and Co-operatives Act to amalgamate with other companies to incorporate 4th Defendant.

[36]. Ms Prasad takes issue with this and submits; [Reference is made to paragraph (38) and (39) of the written submission filed on 23.8.2022 on behalf of the second and third defendants].

[38] However, the position taken by the Plaintiff at paragraph 16 of its Affidavit in support which states,

> *"It is because of the aforementioned failures that the 1st Defendant could not have possibly had the proper approval and or authority of the Plaintiff and its members in accordance to the Plaintiffs By-Laws and the Co-operatives Act Mortgage the Plaintiff's FHL Shares to the 3rd Defendant"*

Is at stark variance with section 24 of the Act which states.

"Co-operative's actions not to be invalidated."

*24. **No act of a co-operative or any member of the Board or any officer of the co-operative shall be deemed to be invalid by reason** only of the existence of any defect in the by-laws of the co-operative or of the Board or in the appointment or election of an officer **or on the ground that an officer was disqualified for his or her appointment.***

Disqualification from Board

68.- (1) A Board member shall cease to hold office if -...

(2) ***A co-operative may remove any Board member before the expiration of his or her term of office by a resolution of its members passed at a General Meeting for which due notice was given of the intention to propose the resolution.***

[Emphasis Mine]

[39]. There is no evidence in the Plaintiff's Application that:

[A] The First Defendant was properly disqualified from the Board.

(B) Due Notice was given to the First Defendant of the Plaintiff's intention to remove or disqualify the First Defendant at the next General Meeting.

[C] That the purported removal or alleged disqualification of the First Defendant from the Board was somehow sufficient to overcome section 24 of the Act which we submit prima facie it does not. Whatever allegations the Plaintiff has against the Defendant, is not sufficient to invalidate the actions of the First Defendant to act on behalf of the Co-operative.

[37]. *Without prejudice to this position, Ms Prasad goes further and points rightly to the fact that; [Reference is made to paragraph (40) to (42) of the written submission filed on 23.08.2022 on behalf of the second and third defendants].*

[40]. The Second and Third Defendants further submit that the Plaintiff has no right of relief from the High Court as it has not exhausted the remedies under the Act, which are final and binding on the Plaintiff.

[41]. Clearly, the Plaintiff has several disputes against the First Defendant which it was required to have settled in accordance with section 115 of the Act as follows:

PART XIII-SETTLEMENT OF DISPUTES

Settlement of disputes

115.- *(1) If a dispute concerning the by-laws, election of officers, conduct of meetings,* ***management or business of a co-operative arises****-*

(a) ***among members, past members and persons claiming through members, past members and deceased members;***

(b) ***between 2 member, past member*** *or persons claiming through a deceased member, and* ***the co-operative, its Board or any other officer of the co-operative****;*

(c) ***Between the co-operative or its Board and any other officer of the co-operative;***

(d) Between the co-operative and any other co-operative,

such dispute may be referred, after due attempts to settle the issue by local informal mediators, to the Registrar or directly to the Co-operative Tribunal constituted under Section 116 of this Act for decision.

(2) Without prejudice to the generality of subsection (1) of this Section-

(a) a claim by a co-operative for a debt or demand due to it from a member, past member or the nominee or legal representative of a deceased member, whether such debt or demand is admitted or not; and

(b) a claim by a member who was a guarantor of a loan against the member whose loan he or she guaranteed resulting from the repayment by the

guarantor of the loan to the co-operative, for the repayment of the amount by the borrower, shall be deemed to be disputes concerning the business of the co-operative within the meaning of subsection (1) of this Section.

(3) ***The Registrar shall, on receipt of a reference under subsection (1) of this Section have regard to the nature and complexity of the dispute and decide whether-***

(a) to settle the dispute himself or herself; or -
(b) to refer the dispute to the Co-operative Tribunal.

(4) ***Where the Registrar decides to settle the dispute himself*** *or herself and gives a ruling thereon which aggrieves a party to the dispute, that party may, within 30 days of the date of the Registrar's ruling, appeal to the Co-operative Tribunal and the Co-operative Tribunal* ***shall make a decision within two months of receiving the appeal and that decision shall be final and conclusive.***

(5) ***Where the Registrar decides to refer the dispute to the Co-operative Tribunal*** *according to the provision of subsection (3) of this Section, the Co-operative Tribunal shall deliberate on the case and make a decision within two months and* ***that decision shall be final and conclusive****.*

(6) ***Where the parties to a dispute refer a case to the Co-operative Tribunal directly*** *according to the provisions of subsection (1) of this Section the Co-operative Tribunal shall deliberate on the case and* ***make a decision within two months and that decision shall be final and conclusive****.*

(Emphasis Mine)

[42] The Second and Third Defendants submit that the Plaintiff has failed to settle its disputes against the First Defendant in accordance with section

115 of the Act and has no right to bring this action against the Second and Third Defendants to the High Court as they have not obtained a decision under the Act which decision would have been final and binding for both the Plaintiff and the First Defendant.

[38]. The central issue between the parties depends upon the interpretation of Section 24 of the Co-operative Act, 1996, which is set out above. Specifically, it depends upon the question whether the alleged failures of the first defendant are sufficient to overcome the provisions of Section 24 of the Act.

[39]. I bear in mind that I am not conducting (and I am not asked to conduct) a trial of the issue of the correct interpretation of Section 24 of the Co-operative Act, 1996. Since, I am not deciding that issue, a detailed analysis in this decision is likely to be positively unhelpful.

[40]. The provisions of Section 68 of the Co-operative Act 1996 dictate the process to be followed for a removal of the member from the board.

[41]. **There is no evidence before the court which would enable me to find that the first defendant was offered all those procedural safeguards before the removal from the board. I gather from the evidence that the first defendant was not even present at the general meeting.**

[42]. As I understand the pleadings the plaintiff's assertion for the existence of a serious question to be tried was on the basis that equity should intervene to protect the plaintiff's shares in the second defendant held by the third defendant, notwithstanding that; (1) a substantial part of the loan account taken by the plaintiff for the fourth defendant are in arrears and (2) the third defendant is entitled to exercise the power of sale.

[43]. The question is whether there exists a serious question to be tried as to whether, by proceeding to exercise its power of sale, the third defendant would be acting unconscionably so as to warrant the grant of equitable relief?

[44]. I **seriously doubt**. Because, the plaintiff did not dispute the second and third defendants submission that;

- *The onus was on the plaintiff to update its Trustees and Officers details with the Central Share Registry PTE Ltd.*

- *The third defendant is not required to enquire beyond the information provided by the plaintiff to its share registry.*

- *There is no onus on the third defendant to ascertain who the Board Members and Trustees of the plaintiff are.*
- *The onus of providing correct information of the trustees with the Central Share registry is that of the plaintiff and the onus of informing the third defendant of any changes to the board of the plaintiff lies with the Department of Co-operatives under the Ministry of Commerce, Trade, Tourism and Transport.*

No Undertaking as to damages

[45]. The second and third defendants submit that the plaintiff has failed to provide any undertaking as to damages. No exceptional circumstances have been pleaded which may give rise to a dispensation of such an undertaking.

[46]. In the circumstances, the plaintiff's application ought to be dismissed.

[47]. Ms Prasad referred to two authorities to defeat the application for interim injunction. They are: [Reference is made to paragraph 25 and 26 of the written submissions filed on behalf of Second and Third defendants].

*In **Wakaya Ltd v Chambers [2012] FJSC 9**, the Supreme Court held as follows*:

> 34. *A further fact that emanated from the judgment of the Court of Appeal was the fact relating to an undertaking as to damages by the Petitioner which the Court stated that the Court was not aware of. The High Court in granting the interim **injunction** failed to obtain an **undertaking** regarding damages, which was erroneous as it is usual to obtain such an **undertaking** to*

*safeguard the interests of a defendant against whom an **injunction** is obtained. In the affidavit filed on behalf of the Petitioner when seeking the interim injunction it was stated that the Petitioner was a viable company and has the ability to meet any award of damages, and also a Bank statement as at that date to show their financial viability, but this would not be sufficient to be considered as an undertaking to pay damages. As Justice Marshall stated in his judgment that if the cross- undertaking is not given, the loss suffering defendant should upon vindication at trial be awarded damages in respect of his loss. This would go on to show that the 1st Respondent could vindicate his rights at the trial into the main case before the High Court*

*[26] In **Kant v Dutt [2021] FJHC 135**, Justice Mutunayagam stated as follows*:

28. Calanchini J(as he then was) in **Nand v Prasad**, [2011] FJHC 85; HBC277.2010 (21 February 2011) stated:

*The law is well settled in Fiji that an applicant for interim injunctive relief who offers an undertaking as to damages must also proffer sufficient evidence of his financial position: **Honeymoon Islands (Fiji) Ltd —v- Follies international Limited** (unreported Civil Appeal No. 63 of 2007 delivered on 4 July 2008). As a result the Plaintiff in the present application was required to proffer sufficient evidence of his financial position. The sufficiency of that evidence was a relevant consideration in determining the value of the undertaking as to damages which in turn was a matter to be taken into account by the Court in deciding whether to exercise its discretion in favour of the applicant...*

29. *In **Morning Stax Co-operative Society Ltd. V Express Newspapers Ltd** [1979] FSR 113 at pg 118 , Foster J., said:*

An undertaking as to damages if the plaintiff loses the action is the price which a person asking for an interlocutory injunction has to pay and it is only in very exceptional circumstances that the court will dispense with such an undertaking. No special circumstances were suggested here. But where the damage

cannot be quantified and it is clear that the plaintiff is unlikely to be able to pay any appreciable damages, no interlocutory relief should be given.

Adequacy of damages

[48]. Ms Prasad submits that the plaintiff's statement of claim seeks general damages and special damages in the sum of FJD4,273,932.40. Thus the plaintiff admits that damages is an adequate remedy and therefore the plaintiff's application for interim injunction ought to be declined.

[49]. The question that concerns me is whether it is just to confine the plaintiff to its remedy in damages, adopting the formulation that can be traced back to **Evans Marshall & Co Ltd v Bertola SA and Another**[7]. Evans Marshall is a decision of the Court of Appeal that pre-dated American Cyanamid.

In this regard the following dicta of Sachs L. J in **Evans Marshall & Ltd —v-Bertola S. A**[8] is apt:

> "*The standard question in relation to the grant of an injunction - 'Are damages an adequate remedy?' - might perhaps, in the light of recent authorities of recent years, be re written — 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages."*

In ***National Commercial Bank of Jamaica v Olint Corpn***[9]

> *"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction."*

[7] [1973] 1WLR 349
[8] (1973) 1 WLR 349 at 379
[9] 2009] UKPC 16, [2009] 1 WLR 1405 at [16] the Privy Council

[50]. The House of Lords in American Cyanamid did not adopt the Court of Appeal's formulation in '**Evans Marshall**' asking instead whether damages in the measure recoverable at common law would be an adequate remedy. However, the courts have routinely adopted either or both formulation, implicitly treating them as to two sides of the same coin even if, in some cases, the formulation may carry slightly different emphasis.

[51]. In **Araci v Fallon**[10], the claimant was seeking to enforce a negative covenant so that the adequacy of damages would not generally be a relevant consideration. In that case Jackson L.J [with whom Elias LJ agreed] said that **'adequate remedy'** was not appropriate and that the real question is **'whether it is just in all the circumstances that the claimant should be confined to his remedy in damages'**.

[52]. The modern approach has been accurately summarised by Coulson J in *Covanta Energy Ltd v Merseyside Waste Disposal Authority*[11] and again in *Bristol Missing Link Limited v Bristol City Council*[12] as follows:

> "(a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (***American Cyanamid***, **Fellowes** [1976] 1 QB 122 CA, ***National Bank*** [2009] 1 WLR 1405);
>
> (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in ***Evans Marshall*** [1973] 1 WLR 349 and the passage [paragraph 27/005] from ***Chitty on Contracts, 31st Edition***); …"

[53]. In the case before me, the plaintiff has not shown me that there is a real prospect that it will suffer irremediable and uncompensatable loss, if it is confined to its remedy in damages. Therefore I conclude that damages would be

[10] [2011] EWCA CIV 668
[11] [2013] EWHC 2922 (TCC) at [48]
[12] [2015] EWHC 876 (TCC) at [49]

an adequate remedy for the plaintiff and that it is not unjust for it to be confined to its remedy in damages.

The balance of convenience

[54]. The balance of convenience requires a consideration of matters favouring or militating against the granting of an injunction and will necessarily involve a consideration of the strength of the plaintiff's claim, assuming that a serious issue has been identified.

[55]. I concluded in paragraph (44) that I doubt that there exists a serious issue to be tried. Therefore, it is not necessary to assess the relative strength of the parties' case.

ORDERS

[1]. The application for interlocutory injunction is refused.

[2]. There will be costs regarding this application.

[3]. The plaintiff is to pay costs summarily assessed in a sum of $1000.00 to the second and third defendants within seven [07] days hereof.

[4]. The parties are directed to proceed with pre-trial steps before the Master of the High Court on the substantive matter.

HIGH COURT OF FIJI
SUVA

.....
Jude Nanayakkara
JUDGE

High Court - Suva
Friday, 30th September, 2022