MATASAU HOLDINGS LTD (t/as SOUTH SEAS TIMBER) v FEINT INVESTMENT LTD and 2 Ors

HIGH COURT — CIVIL JURISDICTION

JITOKO J

2 August 2002

[2002] FJHC 252

Contract — injunctions — application to set aside interlocutory injunction — object of interlocutory injunction — balance of convenience — whether damages be incurred after granting injunction.

The Plaintiff entered into agreement with Benedito Bola (3rd Defendant) for the latter to obtain logging licence which would allow the Plaintiff exclusive rights to log mahogany plantation. At some time thereafter, the 3rd Defendant independently proceeded to enter into another agreement with 1st and 2nd Defendants. The Plaintiff made an ex parte application for an interlocutory injunction to restrain the Defendants. The court approved the injunction. Defendants applied to set aside the interlocutory injunction to avoid incurring considerable damages on its present logging operations.

Held — (1) The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right but the Plaintiff's need for protection must be weighed against the corresponding need for the Defendant to be protected against the injury resulting from the injunction. The court must weigh one need against another and determine where the balance of convenience lies.

(2) The balance of convenience requires the court to weigh the extent to which the disadvantages to each party would be incapable of being compensated in damages.

(3) In considering whether to grant an interlocutory injunction, the right course of action 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 defence and then decide what is best to be done. To allow the injunction to stand would do more damages to the Defendants' business and operations, than the setting aside of it would do to the Plaintiff.

Interim injunction set aside and dissolved.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; *Cobwebb Co Pty Ltd v Ratu Kavekini Nakelia & Anr* Civil Appeal No 46 of 1990[1990] FJCA 16; *Hubbard v Vosper* [1972] 1 All ER 1023, considered.

G. O. Driscoll for the Plaintiff

I. Fa for the Defendant

Decision

Jitoko J. The Plaintiff is a duly registered Limited Liability Company trading in timber and forest produce. On 22 July 2002 it made an ex parte application for an interlocutory injunction, which the court ordered to an inter-parte hearing on 24 July 2002. The Plaintiff was to serve all the documents on the Defendant.

The affidavit in support of the application is made by one Ross Davison, of the Directors of the Plaintiff Company. He deposes that on 31 May 2002, the Plaintiff and the 3rd Defendant entered into an agreement that would entail the 3rd Defendant obtaining a logging licence which would allow the Plaintiff

exclusive rights to log mahogany plantation on the tenement known as Tawavatu being Lot 41, NLC 163 situated at Galoa in the province of Serua. The approximate area of the tenement is 3.8698 hectares. The Plaintiff claimed that it paid a sum of $250 in consideration of the said agreement. A copy of the said agreement is annexed to the affidavit.

The 3rd Defendant in the negotiations leading up to the agreement, represented himself to be acting on behalf of Tokatoka Korowaiwai, Mataqali Nareba on whose land the mahogany plantation is located. The Plaintiff through the affidavit of its director claimed that in breach of the said agreement, the 3rd Defendant sometime thereafter, independently proceeded to enter into another agreement with the 1st and 2nd Defendants, who presently are harvesting the mahogany forest on the Tenement in question.

In its motion, the Plaintiff prays for orders:

> (i) *Restraining the Defendants whether by themselves and/or by their servants and/or agents and otherwise from interfering with SSTT's interests as grantee in Tawavatu being Lot 41 NLC 163 situated at Galoa, Serua having approximately 3.8698 hectares of forest;*
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> (ii) *Restraining the Defendants whether by themselves and/or by their servants and/or in anyway using the timber that was on the said land up to and including any such timber which existed on the land as at Thursday 11th day of July 2002.*

When the application came before me on 24 July 2002, I ordered further documents to be filed by the Plaintiff and thence the Defendants to clarify the issues relating to approvals from the Native Land Trust Board and Forestry Department that normally pertain to logging licences and forest concessions as required by law. The Plaintiff filed its affidavit soon after although it did not address in details the issue of approvals.

At the hearing on 26th July 2002, the Plaintiff in the absence of the Defendants or their Counsel obtained an order for interim injunction with costs of $200 awarded against the 3rd Defendant. However, the Defendants' counsel by ex parte application obtained a stay of the order later on the same day. The court in addition ordered the Defendants to serve the Plaintiff with all the documents including all the affidavits filed in support and adjourned for hearing to 30th July 2002.

Two preliminary matters by way of opposition to the stay order obtained by the Defendants, were initially raised by the counsel for the Plaintiff at the hearing on 30th July. With respect to the first, on the affidavit of the counsel for the Defendants, the Plaintiff counsel intimated that the events as deposed did not truly reflect what transpired and at any rate, the sick certificate exhibited and annexed to the affidavit was not in proper form and did not comply with the approved form. The court however had accepted the contents of the Defendants' counsel's affidavit when it dealt with the Defendant's application on 26 July. This included the exhibits annexed thereto.

The Plaintiffs' counsel then argued that the Defendants' ex parte application for stay which the court granted on 26th July, did not comply with O 41, r 9 of the High Court Rules. This is because all the affidavits filed in support of the application were not indorsed as specifically required under O 41, r 9(2) of the Rules which states:

> *(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.*

With respect, although the Rules suggest that leave of the court is formally obtained, the very fact that the court has entertained and accepted the affidavit or documents that had been filed without a formal application presumes that the court has granted leave in the process. It is a different matter if the noncompliance to O 41, r 9 goes to the heart and substance of the cause of action. This is far from the case in this instance. At any rate the court would be reluctant to refuse leave for the filing of affidavits or any document that do not comply with procedural requirements such as those made under O 41. As made clear by England's Lord Chief Justice in his Practice Directions on July 21 1983 (*Practice Direction (Evidence: Documents)* [1983] 1 WLR 922; [1983] 3 ALL ER 33) on its RSC O 41 the equivalent of our O 41 of the High Court Rules:

> *Any affidavit exhibit or bundle of documents which does not comply with R.S.C. Ord. 41 and this direction may be rejected by the Court, or made the subject for an order for costs.* [Emphasis is mine.]

There is therefore no question in my view that the court can and has the powers to admit affidavits notwithstanding that leave had not been formally sought for noncompliance with the High Court Rules.

We now proceed to the consideration of the matter before the court namely the application by the Defendants to set aside the interlocutory injunction granted against them on 26 July 2002.

The Plaintiff's outline of the facts that has given rise to the grant of the injunction is briefly set out above in the affidavit of Mr Ross Davison, one of its directors. In his supplementary affidavit filed on 25 July 2002, Mr Davison for the Plaintiff explained that the contact with the 3rd Defendant was established through the latter's son, one Semi Cokanasiga in or around of May 2002. Mr Cokanasiga, according to the affidavit, not only interested the Plaintiff in the Mahogany plantation on Lot 41 NLC 163 at Galoa, but also advised that his father, the 3rd Defendant, was the head of the Tokatoka Korowaiwai the Fijian land-owning unit to which NLC 163 belonged. Furthermore, the 3rd Defendant had the capacity to give the consent of the landowners. There was also, according to the affidavit, assurance from Mr Cokanasiga, that there existed no agreements with any other party, for the logging of the mahogany plantation in question.

The agreement signed by the Plaintiff and the 3rd Defendant supposedly on behalf of Tokatoka Korowaiwai on 31 May 2002 is the result of the negotiations since the first contact of 9 May. The agreement headed "Logging Concession Agreement" purported to give the Plaintiff "exclusive right, licence and authority" to enter and harvest any or all of the timber that stood on Lot 41 NLC 163. The access to the tenement and what the Plaintiff could do thereupon was unfretted.

In return, the Plaintiff agreed to pay the 3rd Defendant for all the mahogany logs harvested at $80 per log cubic metre for mahogany logs 35 cm and greater in diameter, and $40 per log cubic metre for mahogany logs under 35 cm in diameter; and logs under 35 cm were to be purchased at the discretion of the Plaintiff.

Under the agreement the 3rd Defendant warrants that he is the authorised representative of the Tokatoka Korowaiwai; that he is entitled to harvest all the timber on NLC 163; that he has authority to permit the Plaintiff entry on to the tenement; and has the capacity to pass on title of the timber harvested. The

agreement further required that the 3rd Defendant to obtain all the necessary formalities including the Native Land Trust Board approval and as well as access to and from the tenement.

For all of these the Plaintiff paid a sum of $250. But even then, the voucher for the payment states that the money merely represented "Advance against log supply from Tawavatu being Lot 41 NLC 163 situated at Galoa".

The Agreement imposed on the 3rd Defendant responsibility for everything from obtaining approvals and licences and implicitly the payment of requisite fees to responsible authorities thereby, to negotiating access to and from the property, as well indemnifying the Plaintiff for claims of damages should perchance the Plaintiff encroached and harvested timber on any adjoining property. Alternatively should the Plaintiff encroach and harvest on adjoining properties, it may deduct the cost of any claims from the payments due to the 3rd Defendant.

The Agreement further makes the assumption that the 3rd Defendant possessed the full legal capacity and therefore authority to represent Tokatoka Korowaiwai, even although there exists very clear and well known procedures and guidelines to follow to ascertain such matters. The claim by the Plaintiff that the 3rd Defendant as well as his son had jointly or severally stated that the 3rd Defendant represented Tokatoka Korowaiwai, and the Plaintiff as a consequence acted on that belief, is to its own peril, given the administrative procedures I have already alluded to.

Under the Agreement, the Plaintiff, after all the ground works is done by the 3rd Defendant, is granted unfretted access and Stay on the Tenement. It may harvest the mahogany plantation or any other timber on the property so it appears, although payment was to be made only in respect of mahogany logs. It may build roads, trails, bridges or any other infrastructural necessities incidental to the logging operation.

There is no doubt that the Plaintiff with all its commercial expertise asserted and managed to gain a very favourable Agreement over a simple and unsophisticated party. Be that as it may the Plaintiff asserts that the Agreement is valid and that had secured its rights to the logging on Lot 41 NLC 163. That the Plaintiff did not at the end begin its logging operations was due to the 3rd Plaintiff not obtaining the necessary logging licence contrary to the terms of the agreement and the fact that the 3rd Defendant and Tokatoka Korowaiwai had entered into another agreement with the 1st and 2nd Defendants.

The 1st and 2nd Defendants allege that they were unaware and therefore not party to any negotiations between the Plaintiff and the 3rd Defendant. The affidavit of one Usaia Tukana on behalf of the 1st Defendant deposed that he negotiated on behalf of the 1st and 2nd Defendants with the 3rd Defendant and Tokatoka Korowaiwai, Mataqali Nareba. He too was not aware of the negotiations and agreement between the Plaintiff and the 3rd Defendant. Mr Tukana stated that he on behalf of the 1st Defendant entered into a series of negotiations with the 3rd Defendant and the Fijian land-owning unit until finally an agreement was reached. The agreement is not dated as to the day and month of 2002 and is annexed to the said affidavit. Also annexed marked "A" and "B" to Mr Usaia Tukana's affidavit are the licence issued by the Forestry Department to the 3rd Defendant to extract mahogany logs from Lot 41 as well as approval from the Native Land Trust Board for a "Free Issue Licence" which entitled the 3rd Defendant to harvest indigenous timber from around and among the mahogany trees in the same area.

Interestingly, the agreement between the Landowners' and the 3rd Defendant and the 1st Defendant is more precise and generally in conformity with the guidelines issued by the Native Land Trust Board and the Forestry Department. These are for example, making the land-owning unit besides the 3rd Defendant as the party to the agreement, provisions for arbitration by the Forestry Department, deposit payment and as well as goodwill payment. All of these are the "bread and butter" issues of such timber licences or forest concessions.

In the application before the court, the Defendants argue that the injunction granted to the Plaintiff on 26th July 2002 should be set aside to avoid the Defendants incurring considerable damages on its present logging operations.

The principles that govern interlocutory injunctions are clear and settled since Lord Diplock's pronouncement in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 per Lord Diplock at 510 said:

> *My Lords, when an application for an interlocutory injunction to restrain a Defendant from doing acts alleged to be a violation of the Plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both is uncertain and will remain uncertain until final judgment is given in the action. It was to instigate the risk of injustice to the Plaintiff during the period before the uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th Century this has been made the subject to his undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction of it should be held at trial that the Plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do.*

Later on Lord Diplock added:

> *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 protection must be weighed against the corresponding need for the defendant to be protected against the injury resulting from having from being prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiffs undertaking in damages if the uncertainty were resolved in the defendants favour at the trial. The Court must weigh one need against another and determine where the balance of convenience lies.*

Lord Denning in *Hubbard v Vosper* (1972) 1 All ER 1023 at 1029 stated as follows:

> *In considering whether to grant an interlocutory injunction the right course of action 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 defence, and then decide what is best to be done.*

In *Cobwebb Co Pty Ltd v Ratu Kavekini Nakelia 7 Anor* (Civil Appeal No 46 of 1990) the Fiji Court of Appeal recognised the authority established by the *American Cyanamid* case (above) and the following criteria to be applied:

1. Is there a serious issue to be tried?
2. Are damages an adequate remedy?
3. Where does the balance of convenience lie?
4. Are there any special factors?

There is no doubt, notwithstanding the Court's views on the same, that the Agreement reached between the Plaintiff and the 3rd Defendant on 31st May 2002, raised serious issues of a contractual nature as between the parties. For example, does the Agreement bind the Fijian land-owning unit of which the

3rd Defendant purported to represent in his dealings with the Plaintiff? Was the Plaintiff entitled to rely solely on the representation made by the 3rd Defendant?

What of the adequacy of the damages? The court in considering such criteria, has to assess whether the Plaintiff could be adequately compensated by damages if refused an injunction; or whether the Defendant could be adequately compensated in damages if an injunction was granted.

From the evidence of both parties, and the information provided by the authorities, it is clear that the forest produce to be harvested can easily be quantified. This is because the area in which the plantation is being harvested is known (approximately 3.8698 hectares) and the logs are recorded and payments effected.

For its part, the Plaintiff claims that in reliance of the agreement it entered into with the 3rd Defendant, it had entertained orders for timber or timber products from clients. In the court's view, it is difficult to envisage a scenario where the Plaintiff, upon learning of Tokatoka Korowaiwai's views on the agreement conveyed by a member of the Tokatoka in a letter dated 12 June 2002 and which was received the next day, the Plaintiff would still proceed and entertain any orders from clients. At any rate the commencement date of the agreement was still to be decided and left at as soon as practicable within the overall business plan of the grantee.

It seems to me therefore that taking all relevant matters into consideration, I am of the view that the Plaintiff would and can be adequately compensated by the 1st and 2nd Defendants should damages be awarded in its favour. The 1st and 2nd Defendants furthermore, have, through one of their directors, filed into court an affidavit of means.

On the other hand, the position of the Defendants, who pursuant to their licences are harvesting both mahogany and indigenous trees on Lot 41 NLC 163, would be adversely affected by the continuation of the injunction.

The Defendants have workers vehicles and equipment deployed on the ground and the logs are being trucked to the sawmill on a regular basis. According to the Defendants, they have expended considerable money and time to reach the stage they are now. It is also questionable as illustrated by the affidavit of Mr Christopher Donlon a director of the 1st Defendant and filed on 26 July 2002, that the Plaintiff has the capacity to undertake to the court the damages by way of compensation should the interlocutory injunction subsequently be found by the court not to have been made.

There are two other matters that perhaps fall into the "special factors" under the *American Cyanamid* criteria. First, the agreement between the Plaintiff and the 3rd Defendant contains a penalty provision for non-performance. Paragraph 7 of the said agreement makes clear that the Plaintiff can demand damages in the amount of $250 per day if the 3rd Defendant does not comply with the terms of the agreement. It seems to me that having found that there is a serious question of law to be tried, on the merits of the substantive claim, the question is whether the Plaintiff will be adequately compensated by an award of damages at the trial. Again Lord Diplock in *American Cyanamid* (above) at 408 stated:

> *If the damages in the measure recoverable at Common Law would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted.*

It is open to the Plaintiff to pursue Common Law action for breach of the terms of the agreement against the 3rd Defendant and Tokatoka Korowaiwai. After all the gist of the Plaintiff's argument on the right to harvest the mahogany plantation is premised on the clear understanding that the 3rd Defendant was acting on behalf of his Tokatoka. The counsel for the Plaintiff referred the court to the case of *Cobwebb Co Pty Limited* case (above) as authority of the existence of such representative capacity in a Fijian land-owning situation, and recognised by the courts.

The second special factor relates to the issuance of licence to log. The law stipulates that no person is permitted to extract log from native land except in accordance with a licence prescribed under the Land (Forest) Regulations. The status of the Plaintiff is this matter is that it has no licence but had relied on the 3rd Defendant to obtain one in his name. On the other hand, the 1st and 2nd Defendants have tendered to court as annexure to their affidavits, copies of the licence issued to the 3rd Defendant and in the case of the "Free Issue Licence" to harvest indigenous timber, the 1st Defendant is specifically named as the logging agent.

The balance of convenience requires the court to weigh the extent to which the disadvantages to each party would be incapable of being compensated in damages.

Having considered all the factors relevant to the application before me, I have decided that the balance of convenience lies with the Defendants. In my view, to allow the injunction to stand would do more damages to the Defendants' business and operations, then the setting aside of it would do the Plaintiff. After all, the Plaintiff has yet to overcome the first hurdle in proving the existence of a binding Agreement between itself and the Fijian land-owning unit Tokatoka Korowaiwai.

Under the circumstances, I order that the interim injunction granted to the Plaintiff on 26th July 2002 be set aside and is hereby dissolved.

I award costs of $200 to the Defendants.

Interim injunction set aside and dissolved.