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IN THE SUPREME COURT OF FIJI

ACTION NO. 115 OF 1985

BETWEEN:

HATEXIZ PTY LTD  
ANTHONY PAUL ADAMO  
TERRY VALMORBIDA  
WARWICK BENJES  
AND  
ILVARA PTY LTD

PLAINTIFFS

AND

P.D.C.CONTRACTORS LTD

AND

REGISTRAR OF TITLES OF FIJI DEFENDANTS

Mr. F.C. Keil for the Applicants  
Mr. B.C. Patel for the first defendant  
Mr. S.P. Sharma for the second defendant

DECISION

On the 8th February, 1985 the plaintiffs obtained, as a matter of urgency, before issuing a writ or originating summons, an interim injunction restraining the defendants from dealing in any manner whatsoever with the land described and comprised in Certificate of Title No. 19263.

An interim injunction was granted for 8 days and it was ordered that if any further extension was required the defendants were to be served with a writ of originating summons together with the summons for further extension of the injunction and the affidavit filed in support of the ex parte application.

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The interlocutory summons was heard on the 15th February, 1985 when I indicated that I would not be granting the application and would give written reasons for the refusal.

Pending the handing down of this written decision the interim injunction was extended until the 23rd February, 1985.

The facts in this case are as follows:

The 5 plaintiffs in August, 1981, each agreed to purchase from Soqulu Condominions Limited, a Hong Kong Company, certain lots in a subdivision of Lot No. 7 at Soqulu on the island of Taveuni, shown on deposited Plan No 4709. The Certificate of Title in respect of the said land is No.19263. It indicates that when it was issued on the 11th day of February, 1980 the registered proprietor was Nasau Limited, a duly incorporated company having its registered office in Suva. The memorials on the title indicate that at no relevant time was Soqulu Condominions Limited registered as proprietor of the said land.

The contracts which the plaintiffs entered into with Soqulu Condominions Limited were all dated 6th August, 1981, except for the contract of the 3rd plaintiff which is dated 4th August, 1981.

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On the dates that these contracts were entered into Nasau Limited was the registered proprietor of the land.

On the 27th August, 1981 Nasau Limited transferred its interest in the land to Libechan Co. Ltd., also a Hong Kong based Company. That company by mortgage No. 1292986 registered on the 12th July, 1982 mortgaged the land to P.D.C. and Allied Enterprises Limited - which on the 2nd January, 1985 changed its name to P.D.C. Contractors Limited, the first defendant in this action.

At the time that mortgage No 192986 was registered there were no prior charges or interests adverse to the first defendants mortgage registered against the Title. The contracts for sale were entered into prior to the mortgage being executed but the plaintiffs, if they had a caveatable interest, failed to protect such interest by caveat before the mortgage was registered.

On the 13th January, the first and fifth plaintiffs between them registered 5 caveats which appear as memorials on the copy of the Title furnished by Mr. Keil and put in by consent. There is no record on that copy of the title of the 2nd, 3rd and 4th plaintiffs lodging caveats to protect their alleged interests in the land.

Liebechan Co. Ltd, made default in payment of the money secured by mortgage No. 192986 and the first defendant then endeavoured to sell the land without success. The first defendant then applied for fore closure under the provisions of section 73 of the Land Transfer Act.

Mr. Keil confirms that the plaintiffs do not allege that the first defendant failed to comply with the provisions of Section 73. Their sole claim to relief they allege arises under section 74 of the Act which is in the following terms:

"Upon an application being made in pursuance of the provisions of section 73 the Registrar may cause notice of such application to be published once in the Gazette and once in each of three successive weeks in at least one newspaper published and circulating in Fiji offering such land, or estate or interest therein, for private sale, which sale if effected the mortgagee shall be bound to complete failing which his application shall be deemed to be withdrawn, and shall appoint a time not less than one month from the date of the first of such advertisements upon or after which the Registrar shall issue to such applicant an order for foreclosure unless in the interval a sufficient sum has been obtained by the sale of such land, or estate or interest therein, to satisfy the principal and interest moneys secured and all expenses occasioned by such sale and proceedings, and every such order for foreclosure under the hand of the Registrar, when entered in the register, shall have the effect of vesting in the mortgagee the land, or estate or interest therein, mentioned in such order free from all right or equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage, and such mortgagee shall upon such entry being made be deemed a transferee of the mortgaged land, or estate or interest therein, and become the proprietor thereof and shall be entitled to be registered as proprietor of the same."

On the 4th of January, 1985 the Registrar of Titles, the second defendant, granted an order for foreclosure to the first defendant, which was registered under No. 219495. This had the effect of vesting the land in the first defendant. The first defendant is now the registered proprietor of the land.

The plaintiffs contend that under section 74 the Registrar is obliged, before he makes a foreclosure order, to advertise notice of the application for foreclosure and offering the land for private sale. They complain he did not comply with section 74. That complaint is the only complaint which appears in Mr. Keil's affidavit filed in support of the ex parte application.

Mr. Keil, however, when arguing in support of the application for extension of the injunction, also alleged that the interest referred to in section 74 refers to both registered and unregistered equitable interests, and that the first defendant having notice of the plaintiffs' interests at the time Liebechan Co. Ltd executed the mortgage in its favour took title to such prior unregistered interests.

In my view, I am only concerned in considering the extension of the injunction and the complaint about the Registrar's action in making a foreclosure order without advertising notice of the application for foreclosure and offering the land for private sale. The other matters raised by Mr. Keil might be relevant if it was the plaintiffs' case that the first defendant is the legal owner subject to their alleged interests in the land and is threatening to sell without disclosing such interests to the intending purchasers. This would presuppose that the foreclosure order was properly made which is not the plaintiff's case.

Notwithstanding that AMERICAN CYNAMID CO V ETHICON LTD (1975). 1 ALL ER 504 a House of Lords case was criticised by Lord Denning in FELLOWS v FISHER (1975) 2 ALL E R 829 it is the authority which sets out the principles governing grants of interlocutory injunctions.

The American Cyanamid case laid down these principles:

1. The Court must be satisfied that the claim was not frivolous or vexatious i.e. that there was a serious question to be tried.

2. If the affidavit evidence showed there were serious questions to be tried it was necessary that the balance of convenience should be considered:

Lord Diplock at P. 509 said:

"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 of the defendant to be protected against 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 the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

At p. 510, Lord Diplock also said:

"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. 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."

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The affidavit before the Court with annexed documents do not in my view indicate that the plaintiffs have any reasonable prospects of succeeding in any of their claims for relief. So far as the first defendant is concerned it does not appear to have violated any of the rights of the plaintiffs. If it has damages would appear to be an adequate remedy.

It is the registered proprietor of the said land and the provisions of sections 38, 39 and 40 of the Land Transfer Act which deal with: (1) Registered instrument to be conclusive evidence of Title (Sec, 38), (2) Estate of registered proprietor to be paramount, and his title guaranteed, and (3) Purchaser not affected by notice except in case of fraud.

Would ensure that the first defendant's title can not be affected by any order made by this Court in this action. Again if the plaintiffs' have any rights damages would be the remedy for any breach of such rights. If section 74 is to be interpreted as Mr. Keil alleges, as to which he has not at present laid the basis for any interlocutory relief, damages would, as I earlier indicated appear to be an adequate remedy.

There is some doubt in any case whether an interlocutory injunction should be granted against the Registrar of Titles.

Rightly or wrongly he has granted an order of foreclosure and it would appear that there is nothing further the Registrar can do if he has made a mistake to rectify that mistake.

The plaintiffs, however, may be able to claim damages against the Registrar pursuant to section 140 of the Land Transfer Act.

The first defendant is a substantial company and could, if held liable, be in a position to meet any damages awarded against it to the plaintiffs.

The plaintiffs, on the other hand, are not resident in or carry on business in Fiji and nothing is known about their financial ability to pay damages.

There was a very large sum owing to the first defendant under its mortgage, and there is a prospect of the company recovering most of its money if it is able to sell the land. Mr. Gosper, the assistant to the Managing Director of the first defendant's company, in his affidavit has stated there is a strong expression of interest from a purchaser in Hong Kong for the land. He states that the prospective purchaser may lose interest if he becomes aware of any restriction on the sale of the property.

I consider that the plaintiffs should be left to their remedy in damages. The balance of convenience certainly leans heavily in favour of maintaining the status quo and allowing the first defendant to exercise the rights it presently has as registered proprietor of the said land.

It is also significant that notwithstanding that Soqulu Condominions Limited is alleged by Mr. Keil in his affidavit to have had some sort of arrangement or interest in the said contracts as a result of some dealing or dealings with NASAU LIMITED and LIBECHAN CO LIMITED that none of those three companies have shown any interest in the present proceedings.



9.

The application is refused. The interim order extending the injunction until the 25 February, 1985 is hereby revoked.

The defendants are to have the costs of these proceedings in any event.

*R. G. Kermode*  
R.G. KERMODE  
J U D G E

SUVA,

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FEBRUARY, 1985.