IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0062 OF 2003S
(High Court Civil Action No. 442 of 2003S)

BETWEEN:

BDO PICERS AUCKLAND TRUSTEE COMPANY LIMITED

Appellant

AND:

NATIVE LAND TRUST BOARD

First Respondent

LAKO MAI ISLAND RESORT LIMITED

Second Respondent

INTERVAL HOLIDAYS (FIJI) LIMITED

Third Respondent

LAKO MAI RESORT DEVELOPMENT LIMITED

Fourth Respondent

TOUCHDOWN PRODUCTIONS LIMITED

Fifth Respondent

In Court: Tompkins, JA

Hearing: Wednesday 26th November 2003, Suva

Counsel: Mr R. A. Smith and Ms M Moody for the Appellant
Mr. T. Bukarau for the First Respondent
No appearance for Second Respondent
Ms R. Lal and Mr R. Naidu for the Third and Fourth Respondent
Mr J.W.Turner, and Mr. S. Parshotam for the Fifth Respondent

Date of Judgment: Friday, 28th November 2003

JUDGMENT OF TOMPKINS JA

Introduction

[1] On 24th November, 2003 the appellant filed in this Court an ex parte summons for interim injunction seeking an order:

> ". . . that until further order of the Court the respondents and any of them or anyone for any of them be restrained from taking any step, including, but not limited to entering into or completing or performing any agreements which

> might adversely affect the interests of the owners of any Interval Holidays (timeshare occupations right) at the Lako Mai Resort on the island of Malolo, in the province of Nadronga. . ."

[2] On 24th November, 2003 at 2:15pm, at my request, counsel for the appellant appeared before me in chambers. I told him that I was not prepared to determine the summons ex parte, that the proceedings were to be served on the respondents promptly, and that I would consider the appropriate course at a chambers hearing to be held at 10am on 25th November, 2003. At that hearing counsel were agreed that it was appropriate for the appellant's summons to be heard at 2:15pm on Wednesday 25 November 2003.

[3] The hearing commenced at that date and time. It was before me sitting as a judge of the Court of Appeal. This is in accordance with s 20 (1) of the Court of Appeal Act as amended which provides that a judge of the Court may exercise the powers of the Court to make an interim order to prevent prejudice to the claims of any party pending an appeal.

The sequence of events

[4] The appellant is the statutory supervisor pursuant to prospectuses issued in support of the marketing and sale of timeshare occupation rights (referred to as Interval Holidays) of the Lako Mai Resort at Malolo Island in Fiji. It brings this action on behalf of the timeshare owners of the resort.

[5] Over 1000 purchasers, mainly New Zealanders, purchased timeshare weeks conferring rights to occupy the one and two-bedroom bures at the resort until 31st December, 2048. The prices paid by the purchasers in New Zealand ranged from NZ$13,000 to NZ$18,000 for one week and F$5,000 for those who acquired rights in Fiji. According to the appellant, these purchasers have paid a total of approximately $15 million for these occupation rights. Those monies have been applied in part in constructing or completing a number of the bures and associated infrastructure at the resort.

[6] The Native Land Trust Board (NLTB) (the first defendant), as the representatives of the owners of the land, entered into a head lease, Native Lease 22340, of the Lako Mai Resort with Lako Mai Island Resort Limited (the second defendant) as head lessee. The lease was for a term of 99 years commencing on 1st January, 1990.

[7] The second defendant subleased the Lako Mai Resort to Lako Mai Resort Developments Ltd (the fourth defendant) for a term of 53 years and three months from 1st October, 1995. The NLTB consented to this sublease. The sublease specifically permitted the fourth defendant as sublessee to issued timeshare licences to occupy the bures constructed at the resort.

[8] On 13th January, 1998 the interest of the second defendant under the head lease was assigned to the third defendant.

[9] Pursuant to a supply agreement dated 27th March, 1997 time share licences were made available by the fourth defendant to Lako Mai Resort (New Zealand) Limited, the offeror under the prospectus offering the timeshare licences for sale. It was this company that offered the Interval Holidays for sale in New Zealand and Fiji.

[10] On 27 Match 1997 a deed of participation was completed between Lako Mai Resort (New Zealand) Limited, the appellant, and the fourth respondent pursuant to which the appellant accepted appointment as statutory supervisor of the scheme and the fourth respondent entered into covenants relating to the operation of the scheme. Relevant to the issues in these proceedings is clause 11.1 which provides:

> "The covenantor [the fourth respondent] undertakes that it will not do or omit to do anything which will adversely affect the rights of the owners under the scheme.'

[11] Lako Mai Resort Management Ltd was a company set up to manage the resort, which it did.

[12] On 30 December 2002 NLTB re-entered the resort and terminated the head lease 22340 for what it claimed were fundamental breaches of the lease conditions. In particular, it claimed that the appellant is indebted to NLTB in the sum of approximately $3 million, being rent claimed to be due under the lease. That claim was the subject of a separate action by NLTB against Lako Mai Development Ltd, Lako Mai Management Limited and Frank Allen Yeates, the principal shareholder of these companies and another action by the land owners against the NLTB and the second respondent.

[13] On 23rd October, 2003 there was signed a deed of settlement, the relevant features of which are:

[a] The parties were Frank Alan Yeates, Lako Mai Resort (New Zealand) Limited, Lako Mai Resource Management Ltd, Lako Mai Resort Developments Ltd, Interval Holidays (Fiji) Limited, all referred to as the Lako Mai Group, NLTB, and Touchdown (Fiji) Limited, a subsidiary of the fifth respondent.

[b] The NLTB agreed to grant a new lease of the resort to Touchdown for 99 years from 1 November 2003 in the form of the draft attached to the deed of settlement.

[c] Touchdown agreed to pay a purchase price of $3.1 million to be disbursed as to $750,000 to the NLTB, $100,000 to the representative of the owners, the Mataqali Nasau and $2.25 million to the Lako Mai Group.

[d] Touchdown was granted immediate possession of the resort.

[e] The deed of settlement was subject to a number of conditions precedent, some of which are relevant to the present proceedings and to which I later refer.

[f] The terms set out in the deed are in full settlement of all claims between the parties.

[14] This deed of settlement was varied by a memorandum of counsel dated 30th October, 2003 which provided that the sum of $2,250,000 to be paid to the Lako Mai Group under the deed of settlement be disbursed as to $350,000 to the solicitors for the Lako Mai Group in payment of their fees and the remaining $1,900,000 to be paid into the trust account of those solicitors and not disbursed for 14 days from the date of payment.

[15] On 23rd October, 2003 the appellant filed in the High Court at Suva a writ of summons and statement of claim in respect of which the respondents are the defendants. Pleading a breach of the deed of participation by the fourth respondent, inducing a breach of contract and unlawful interference with business relations by all the respondents, it sought

injunctions restraining the respondents from entering into any agreement which would adversely affect the owners' interests. More particularly it sought an injunction requiring the fourth respondent to take all steps necessary to preserve the rights of the owners under the timeshare scheme including taking action for relief against forfeiture.

[16] On the same day it filed an ex parte summons for interim injunction seeking an interim injunction in terms similar to the interim injunction it is now seeking from this Court. Later that day counsel for the appellant appeared before Scott J who granted an interim injunction to expire on 30th October, 2003 and ordered an inter parte hearing on that day.

[17] On 28 October 2003 the third and fourth respondents filed in the High Court a summons seeking an order that the writ of summons be set aside and for a declaration that the High Court has no jurisdiction over the defendants in respect of the subject matter of the claim or the relief or remedy sought in the action. The order and declaration are sought in reliance on clause 13 of the deed of participation:

> "This deed will be governed by and construed according to the laws of New Zealand and both parties hereby submit to the jurisdiction of the High Court, New Zealand."

[18] The hearing of the application for interim injunction and of the summons referred to in [17] took place on 30th and 31st October, 2003. At the conclusion of the hearing Scott J delivered an oral judgment dismissing the application for an interlocutory injunction with reasons to follow. Those reasons have not yet been delivered.

[19] On 24th November, 2003 the appellant filed in this Court the summons for interim injunction to which I refer in [1]. At the hearing before me, no reference was made to summons to strike out. I do not consider it.

Jurisdiction of this Court

[20] As a preliminary issue, Mr Turner submitted that this Court should not hear the present application. He relied on r 26 (3) of the Court of Appeal Rules which provides:

> Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.

[21] It was his submission that the present summons for interlocutory injunction can be made either to the High Court or to this court, and in accordance with that rule, it was required to be made to the High Court.

[22] I do not accept that submission. The qualifying words of the paragraph are "Wherever under these Rules". So the rule only applies where the rules themselves provide that an application may be made to either court. An example is r 34 (1) relating to applications for stay pending appeal, the opening words of which are "Except insofar as the court below or the Court of Appeal may otherwise direct. . ." In the case of an application under that for rule, r 26 (3) would require the application to be made first to the High Court. That is not the situation with the present application. Rule 26 (3) does not apply to this summons.

[23] Mr Turner further submitted that as a matter of good practice the present application should be brought by way of a stay of execution rather than as an application for an interim injunction. In accordance with rules to which I have referred, an application for stay of execution would have to be brought first in the High Court. This is not an application for a stay of execution. A stay would not avail the appellants. There is no order or judgment in the High Court to be stayed. The only way in which the appellant can hold the present situation until its appeal against dismissal of the application for interim injunction by the High Court is heard, is by an order by way of injunction to prevent the parties taking any further action, the effect of which could render the appeal nugatory. Such an order, if otherwise appropriate, would prevent prejudice to the claims of the appellant pending the appeal in accordance with s 20 (1) (e).

[24] I agree with Mr Turner's submission that as a matter of general practice it is preferable for an application such as the present to be brought in the first instance in the High Court and to the judge who has determined the initial proceedings. However the matter is one of some urgency, the summons is now before this court with all the necessary parties present ready to have the application determined and in those particular circumstances it is preferable that the appellant's application be dealt with now rather than there be some further delay and resulting uncertainty.

Time for appealing

[25] As a further preliminary point, Mr Turner submitted that the appellant's appeal was out of time. Rule 16 of the Court of Appeal Rules requires the notice of appeal to be filed and served within, in the case of an appeal from an interlocutory order, 21 days. The notice of appeal was filed in the Court on the 21st day after the delivery of the judgment, but was not served until three days later. Thus the requirement for the notice to be served within 21 days was not met.

[26] On Mr Smith's oral application, I extend the time for serving the notice of appeal until the date on which it was served.

Touchdown

[27] Touchdown is a New Zealand company that produces lifestyle and reality television programmes. According to the evidence of its director Mr Molloy, it is a very successful business with a substantial annual turnover and profit, claims substantiated by the accounts produced.

[28] Touchdown proposes to produce a television series which is a reality programme based on a run-down and closed to tourist resort, which is to be renovated and operated by a group of 12 volunteers. Mr Molloy says that Touchdown has looked at many resorts in Fiji and elsewhere, as a result of which it concluded that the Lako Mai Resort is the appropriate location for filming the television programme.

[29] It was as a result of this conclusion that Touchdown entered into the settlement deed, one provision of which required all proceedings that had been commenced in the High Court of Fiji to be discontinued and for there to be a new lease of the Lako Mai Resort granted to Touchdown. It recognised from the start that it would need to obtain free and clear title to the leasehold land comprising the resort. Hence the provision in the settlement deed pursuant to which NLTB agreed to grant a lease of the resort to Touchdown on the terms set out in the draft lease attached to the deed.

[30] Mr Molloy gave detailed evidence of the very substantial amounts Touchdown proposes to expend on the project. Following the conclusion of the television production Touchdown intends to operate the resort as a successful island resort.

[31] Mr Molloy states that as, with all television productions, the time line for preparing, filming and producing the programme is very tight. He says that given the tight time frames involved, Touchdown will be forced to cancel the project if any delay occurs that would prevent it from filming on schedule. It is entitled to cancel the supplementary deed if the warranties set out in section 7 are not fulfilled, including the warranty by FNLP that the resort is free of all encumbrances. In his second affidavit Mr Molloy says that every day counts in relation to the deadline for production of the programme, so that any further injunction granted to the appellant is likely to have the effect that the transaction will need to be abandoned. He also describes the work Touchdown has had done on the resort since the decision of Scott J on 23rd October, 2003. The expenses incurred since that date total about $73,000 and it has received invoices for a further $75,000.

The effect of the injunction

[32] If the injunction now sought be granted, the practical effect will be that at least until the appeal is heard at the March sittings of this Court, Touchdown and NLTB will be unable to sign the lease of the resort and the lease will not be able to be registered. The consequence is that for so long as the injunction remains in force Touchdown will have to cease major work on the resort. It does have possession under the settlement deed but obviously, as a matter of commercial sense, it cannot continue spending substantial amounts on the resort when it does not have the security of the proposed lease.

[33] However, the difficulties do not end there. The determination of the appeal in March 2004 is only the start of the legal processes that will be required to resolve all the issues between the parties. The result is that the present injunction will need to remain in force not only until the hearing of the appeal but, if it be successful, also until the hearing of the other proceedings that will be required.

[34] If the injunction now sought be not granted, it is likely that the lease between the NLTB and Touchdown will be signed and registered before the hearing of the appeal, unless

the appellant is able to obtain an urgent hearing in the Court of Appeal. Once the lease is registered, Touchdown will have a guaranteed leasehold title, and the prospect of the former lease being revived by an application for relief against forfeiture will be gone.

A good arguable appeal

[35] In *Ketchum International Plc v Group Public Relations Holdings Limited and ors* [1996] CA (England and Wales) 24 May 1996, Stuart-Smith LJ, in a case similar to the present where the applicant was seeking an interim injunction pending the hearing of the appeal, said that the question will not be "does he have a good arguable case?" but "does he have a good arguable appeal?" This, he said, is likely to be a more difficult test to satisfy. Later in the judgment he says that the only matter on which the Court of Appeal may, as a rule, be in a better position to decide than the trial judge, is whether the plaintiff has a good arguable appeal.

[36] In the present case that is a more difficult question to determine where I do not have the benefit of the reasons of Scott J. Nevertheless, I approach the issues by considering, on the material before me, whether the appellant has a good arguable appeal against the decision.

Relief against forfeiture

[37] A significant issue in High Court and in this Court on appeal will be whether the appellant established a serious question to be tried sufficient to justify the Court ordering an injunction to prevent any further steps being taken while, in accordance with one of the injunction sought, the fourth defendant brought proceedings for relief against forfeiture against the NLTB. This in turn would require consideration of the prospects of relief against forfeiture being granted. Obviously, if there were little prospect of the application for relief succeeding, the other injunctions sought should not be granted. This is one of the contexts in which I should consider whether the appellant has established a good arguable appeal against the dismissal by Scott J of its application for interim injunction in the High Court.

[38] Any applications for relief against forfeiture would be brought under s 105 (4) of the Property Law Act. It authorises a sub-lessee to apply for relief against forfeiture where a lessor has enforced a right of re-entry or forfeiture on the grounds *inter alia* of non-payment of rent.

[39] In this case the notice of default dated 7 November 2002 sets out particulars of the breaches. The first breach was non-payment of rent totaling $26,558.92. The second breach was non-payment of the percentage of proceeds claimed by the NLTB to be due under the terms of the lease. The notice goes on to set out six further alleged breaches of covenants in the lease.

[40] In considering the prospects of relief against forfeiture being granted the following considerations are relevant:

Non-payment of rent

[41] I am unaware of any dispute relating to the $26,558.92 claimed in the first alleged breach. The NLTB claims that the amount due under the ground set out in the second breach is some $3 million being 20 per cent of the NZ$15 million paid by the timeshare purchasers.

[42] This issue turns on the interpretation of clause (1) (a) of the first schedule of the lease relating to the assessment of rent that includes in the rent payable:

> (b) Twenty per cent of gross rentals from any sub-lease licence or concession.

The NLTB claims that the payments made by the timeshare purchasers are within this clause. The appellant claims that they are not.

[43] It is an invariable condition of relief from forfeiture for non-payment of rent that the arrears, if not already available to the lessor, shall be paid within a time specified by the Court. If the tenant cannot pay the arrears, relief may be refused: *Woodfall Landlord and Tenant* Volume 1, paragraph 17.180.

[44] Thus, before any application for relief against forfeiture can be considered, this dispute will need to be resolved, probably by litigation. If it is resolved in favour of the NLTB, the appellant will need to pay the $3 million plus the other arrears before relief can be granted, even assuming that relief would be granted for the other alleged breaches, if they are made out.

[45] There is no evidence to suggest that the appellant will be able to pay such a large amount, if it is held to be owing. The appellant's undertaking as to as to damages is limited to $125,000.

Delay

[46] According to the uncontested evidence of an officer of the NLTB, when it exercised its re-entry powers on 30th December, 2002 Mr Ian Hazzelwood, the then chairman of the timeshare committee members accompany the NLTB staff and police officers on the re-entry. Thus the appellant has been aware of the re-entry since the day on which it occurred. Yet it did not commence its application for an injunction to force the fourth defendants to commenced proceedings for relief against forfeiture until 23rd October, 2003, some 10 months after it was aware of the re-entry. This delay is likely to be considered a factor against the grant of relief, particularly in view of the steps the other parties have taken during the period of delay.

The fourth defendant

[47] The fourth defendant appears to be insolvent. There are currently before the High Court several applications to wind the company up on the grounds of an inability to pay its debts. Mr Yeates now lives in Queensland, and appears to take no interest in the Lako Mai Group companies. Even if an injunction were granted requiring the fourth respondent to commence an application for relief against forfeiture, there must be a strong probability that it would not do so, and that would become a certainty if it were wound up by the court.

Conclusion

[48] These considerations are likely to have two consequences. First, the hearing of the current appeal by the Court of Appeal in March 2004 is only one further step along the road the appellant will have to take. Assuming the appeal is allowed and the injunctions it seeks are granted, it will then need to commence proceedings to have resolved the rent due to the NLTB. Once that has been resolved it will then need to endeavour to have the fourth defendant commence proceedings for relief against forfeiture and, if it is to have any chance of success, pay the arrears of rent in full or demonstrate that it is able to do so. If the NLTB's

contention about the arrears of rent is upheld, it is highly likely that the appellant will be unable to pay the arrears.

[49] The appellant will also have to satisfy the Court either that the other breaches of covenant alleged did not occur, or if they did, that relief should be granted in respect of them, and that its delay in commencing these proceedings should not disentitle it to relief.

[50] When regard is had to all these considerations the prospect of the plaintiff regaining possession under the currently terminated lease can only be described as remote.

[51] Secondly, this is going inevitably to result in significant further delay. If a Court of Appeal hearing in four months were likely to revolve to resolve all outstanding issues, Touchdown may be prepared to accept such a delay. But if, as seems inevitable, a period probably approaching one year if not more is likely to be required it is inevitable that Touchdown will terminate deed of settlement and look elsewhere for a suitable location for its television programme.

Unlawful interference

[52] It is apparent that the appellant issued these proceedings under a misapprehension. Paragraph 16 of the statement of claim alleges that the NLTB has threatened to exercise rights to terminate the head lease thereby terminating the sublease. Surprisingly, it appears that the appellant was not aware of the knowledge that the timeshare owners committee certainly had that the head lease had been terminated by re-entry many months before.

[53] The third cause of action alleges that the respondents, in threatening to enter into an agreement relating to the resort, are unlawfully interfering with the business relations between the fourth respondent and the appellant. No particulars and given. This appears to be an allegation relating to the deed of participation and particularly clause 11.1.

[54] Mr Turner, in reliance on the decision of the House of Lords in *Merkur Island Shipping Corporation Ltd v Laughton* [1983] AC 570, submitted that the elements necessary to establish this tort could not possibly be made out.

[55] In that case Lord Diplock spelt out the four elements of the tort of actionable interference with contractual rights as requisite knowledge and intention; interference with performance; the doing of unlawful acts; and causation of harm as a necessary consequence. It was Mr Turner's submission that to bring Touchdown within the requirement of knowledge and intention it must have known of, and deliberately intended to interfere with, the contract in order to harm or bring pressure to bear on the appellant. Further he contended that the appellant could not possibly establish any interference resulted from the doing of an unlawful act. He submitted that Touchdown, in entering into the deed of settlement, and in taking a lease of the resort, could not be held to have acted unlawfully.

[56] Mr Smith submitted that to prove the tort it was not necessary to establish an unlawful act, it was only necessary to show that the defendant acted with the necessary knowledge and intent of procuring a breach of contract. Mr Smith asked that I allow some further time to file further submissions and relevant authorities. I acceded to this request. Yesterday I received from Mr Smith and from Mr Turner further submissions and authorities. I am grateful to them for this assistance.

[57] I do not propose to resolve the difference between counsel on whether the doing of an unlawful act is a necessary ingredient of the tort, although I observe that I find the reasons in favour of this requirement as set out in *Clerk & Lindsell* 18th edition at paragraph 24 - 32 to be persuasive. For the purposes of determining whether the appellant has an arguable appeal, it is sufficient for me to express the conclusion that the requirement of requisite knowledge and intention is unlikely to be able to be made out. Undoubtedly the Touchdown directors were aware that the resort had been a timeshare, and were aware that there was or had been a lease between the NLTB and some company through whom the timeshare owners held their interest and that that lease had been terminated. I am not aware of any evidence to show that they would have been aware of the deed of participation and in particular of clause 11.1 and more particularly of the possibility that, if they entered into the deed of settlement and the proposed lease, they may be interfering with whatever rights the appellant may have under that clause.

[58] Even if, contrary to my present view, the appellant were able to establish that this tort had been committed, I consider that damages would be an adequate remedy. I accept, as Mr Smith submitted, that there may be difficulties in assessing the quantum of damages, but the

court is accustomed to that situation and is well able to take a broad brush approach and arrive at an appropriate award of damages.

The Mataqali Nasau

[59] The mataqali is the owner of the land on which the resort is located. Two affidavits have been filed by Vilame Nabiyau, the traditional head of the mataqali. From these affidavits it is clear that the members, having regard to what they regard as the failure of the fourth respondent to pay the $3 million claimed to be owing for rent and the other breaches of the lease claimed to have occurred, are hostile to the appellant and will strongly oppose any move to reinstate the terminated lease. For these reasons he says that the members have refused to accept and will continue to oppose any further timeshare involvement of the Lako Mai Resort club. The members of the mataqali are fully familiar with the proposal for Touchdown to take over the resort and support that proposal.

[60] It is apparent that the members will suffer economically if, by reason of likely delay, Touchdown terminates the deed of settlement and does not take up the proposed lease. They would be strongly opposed to this occurring and the resulting uncertainty if the injunction were granted and Touchdown prevented from entering into the lease and rebuilding the resort. They will benefit financially to a significant extent if the Touchdown proposal proceeds.

Conclusion

[61] I have reached the conclusion that the appellant has failed to establish a good arguable appeal. The reasons should be apparent from the above, but in brief they are because the appellant will have considerable if not insurmountable difficulties in obtaining relief against forfeiture, and that the attempts to do so are likely to result in delay to a degree that will cause Touchdown to abandon the project, with resultant significant financial loss to the mataqali. I am left with the very clear impression that the appellant's attempt to resuscitate the timeshare project has little chance of success. Thus the balance of convenience is against the granting of the injunction.

[62] If the appellant is able to establish a breach of contract on the part of the fourth defendant or some tortious act on the part of Touchdown, it will be able to pursue a claim for

damages. I feel considerable sympathy for the timeshare owners whose investment seems to have been lost, but from what I can judge from the material before me, this appears to be the responsibility of the Lako Mai companies and Mr Yeates.

The result

[63] The application for interim junction is dismissed.

[64] I award cost of $500 each to the first respondent, the third and fourth respondents jointly, and the fifth respondent, a total of $1,500, plus disbursements to be fixed by the registrar.

Tompkins JA

Solicitors:

Munro Leys, Suva for the Appellant
Legal Officer, Native Land Trust Board, Suva for the First Respondent
Messrs. Jamnadas and Associates, Suva for the Third and Fourth Respondent
Messrs. Parshotam and Company, Suva for the Fifth Respondent

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