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

CIVIL APPEAL NO. ABU 0072 OF 2008
(High Court Civil Action HBC 90 of 2008L)

BETWEEN : PROFESSIONAL WEST REALTY (FIJI) LIMITED

Appellant

A N D: THE PROFESSIONALS LIMITED

Respondent

Coram: Byrne, Acting President
Calanchini, JA

Date of Hearing : 22 March 2010

Counsel : Mr R Singh for the Appellant
Mr S Nandan for the Respondent

Date of Judgment: 21 October 2010

JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Phillips J) handed down on 9 October 2008. On motion heard inter partes the Court granted interim injunctive relief to the Respondent limiting the Appellant's use of the word "Professionals" in the course of promoting its business in Fiji.

[2] The background facts were stated succinctly in paragraphs 3 and 4 of the learned judge's decision. For the purpose of this appeal those facts are now summarised. The Appellant (Professionals West Realty (Fiji) Limited) was incorporated under the Companies Act Cap 247 on 26 July 2007. It carries on business as a real estate agent and property manager. The word "Professionals" is used prominently with the words "west realty fiji ltd" appearing in smaller font and lower case below the word "Professionals". The name used on its website does not have the words "west realty Fiji ltd" at all. The Appellant advertises itself using the name "Professionals" prominently as opposed to its full name.

[3] The Respondent (The Professionals Limited) was incorporated under the Companies Act on 15 November 2006. The Respondent also carries on business as a real estate agent and manager. Its office is situated at 15 Namaka Park Estate in Nadi and is co-located with a travel business operated by a Richard Beaulieu (Beaulieu) who is the majority shareholder of the Respondent. It advertises its business in the Fiji Telephone Directories and its letterhead is styled in the name "The Professionals Ltd".

[4] We note that the correct and complete name of the Appellant is "Professionals West Realty (Fiji) Ltd. The Respondent's correct and complete name is "The Professionals Ltd".

[5] In its amended Statement of Claim the Respondent claimed that the Appellant's actions were calculated to deceive and mislead the general public of Fiji and through the world wide web into the belief that the business of the Respondent is the business of the Appellant and vice versa.

[6] By way of final relief the Respondent sought injunctions (a) restraining the Appellant from using the name "Professionals" in its advertising and publications in Fiji in such manner that confuses it with the name of the Respondent, (b) requiring the Appellant to use its full and proper name with all words and letters to be in the same style, type and size in all its

advertising and publications in Fiji and (c) restraining the Appellant from continuing to advertise its business on the internet/world wide web being www.Professionalsfiji.com.fj. The Respondent also sought an order that the Appellant deliver up or destroy all advertising boarding wherein the word "Professionals" appears in such a way to confuse it with the business of the Respondent. Finally, the Respondent sought an inquiry as to damages or an account of profits.

[7] We note that the Writ with the Statement of Claim were filed on 15 May 2008. The Appellant's Defence was filed on 4 July 2008 and we assume was pleading to the amended Statement of Claim that was filed on 5 June 2008.

[8] By Notice of Motion filed on 15 May 2008 the Respondent sought the following orders from the Court:

> ***"(a) An injunction restraining the defendant either by itself, its servants or agents or otherwise howsoever from using the name "Professionals" in its business in Fiji***
>
> ***(b) The delivery up or destruction of all advertising boarding, vehicles or such like wherein the word "Professionals" appears.***
>
> ***(c) An injunction restraining the defendant either by itself, its servants or agents from continuing to advertise its business on the internet/world wide net being www.Professionalsfiji.com.fj."***

[9] In support of its application the Respondent filed an affidavit sworn by Richard Beaulieu on 1 May 2008.

[10] When the application came before the learned judge on 29 May 2008, directions were given for the filing of further affidavit material. In that Ruling the learned judge made some comments concerning the Respondent's

undertaking as to damages. The learned judge had before her an affidavit sworn by Beaulieu on 22 May 2008 deposing:

> ***"2. On behalf of the Plaintiff I give the usual undertaking as to damages in support of the Notice of Motion in these proceedings and dated 12 May 2008.***
>
> ***3. The Plaintiff is solvent and able to pay its debts as and when they fall due and I am advised is capable of paying any damages that may fall due as a result of this motion undertaking."***

[11] At paragraph 3 the learned judge stated:

> ***"The undertaking in damages does not meet the threshold requirements set out by the Fiji Court of Appeal. Unless rectified the flaw may be fatal to the application. In Natural Waters of Viti Limited -v- Crystal Clear Mineral Water (Fiji) Limited (unreported Civil Appeal No. 11 and 11A of 2004 delivered 26 November 2004) the Fiji Court of Appeal stated that applicants for injunctive relief must place sufficient material before the Court to fortify the undertaking as to damages. The Court held that applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. .... In [Air Pacific Limited and Others -v- Air Fiji Limited (unreported Civil Appeal No 66 of 2006 delivered 10 November 2006)] the Court of Appeal re-iterated the requirement in regard to the undertaking to pay damages stating that: "As an important point of practice we wish to repeat however that where a party gives an undertaking to pay damages, there must be adequate information to allow an assessment of the worth of the undertaking". Suffice to say Mr Beaulieu's affidavit sworn on 22 May 2010 does not contain sufficient information of the financial position of the Plaintiff to allow an assessment of the worth of the undertaking. The Plaintiff/applicant will be given an opportunity to put before me sufficient material fortifying the undertaking made and from which an assessment of the worth of the undertaking is able to be made."***

[12] We endorse without hesitation the learned judges comments. The Respondent purported to rectify the shortcomings in an affidavit sworn by Beaulieu on 6 June 2008. In paragraph 9 of that affidavit the deponent stated, amongst other things, that the Respondent was solvent and capable of paying any damages that might be required. However there was no material exhibited to the affidavit that would lend any weight to that bare assertion. Then at paragraph 10 Beaulieu deposed as follows:

> ***"Notwithstanding the matters relating to the undertaking as to damages averred to in paragraph 9 herein the plaintiff gives the usual undertaking and Mr Martyn Jamieson guarantees and as a director gives the usual undertaking as to damages. Annexed hereto and marked with the letter "A" is a faxed statement of the assets and liabilities and income of Mr Jamieson together with a signed faxed undertaking of Mr Jamieson."***

[13] We are compelled to comment on this undertaking as to damages. First, it was not the subject of any comment by the learned judge in her decision. We consider that it should have been. Secondly, there was no material before the court below to substantiate that Mr Jamieson was a director of the Respondent company at that time. An extract from the records filed with the Companies Office should have been exhibited to show who where the directors of the Respondent Company at the time. Thirdly, as Mr Jamieson was giving the undertaking he should have done so in an affidavit sworn by himself. Fourthly, the faxed material all purports to be signed by and in the handwriting of Mr Jamieson. This court is not and the court below was not in a position to determine whether the signature was Mr Jamieson's signature and that the information was provided by Mr Jamieson. Fifthly, all the financial information was handwritten and purportedly provided directly by Mr Jamieson rather than from the records kept by an independent institution such as the ANZ Bank Branch or a firm of accountants. The information is not verified or certified and is unreliable and unsatisfactory. In our opinion the undertaking has not been fortified in the manner contemplated by the observations of this court in its earlier decisions.

[14] The Appellant then filed an answering affidavit sworn by Atiria Armstrong on 4 July 2008 and the Respondent filed a reply affidavit sworn by Richard Beaulieu on 31 July 2008.

[15] After a careful consideration of the affidavit material and the submissions, the learned judge concluded that the Respondent had made out an arguable case of passing off sufficient to carry it over the threshold of a serious question to be tried. The judge stated that whether there had been a passing off by the Appellant was a matter to be determined at the trial of the action.

[16] The learned judge also concluded that the balance of convenience fell in favour of the court protecting the Respondent's position until the action was finally heard and the issue was determined. As s result the Respondent was granted interim injunctions as follows:

> ***"(I) An interim injunction is granted until further order of the court restraining the defendant whether by its directors, officers, servants or agents or otherwise from prominently using the word "Professionals" to promote or advertise its business in Fiji.***
>
> ***(II) An interim injunction is granted until further order of the court restraining the defendant whether by its directors, officers, servants or agents or otherwise from continuing to advertise its business on the internet/world wide web as www.Profesionalsfiji.com.fj.***
>
> ***(III) This interim injunction is to take effect 14 days from delivery of this judgment.***
>
> ***(IV) This interim injunction is not to prevent the defendant from using the word "Professionals" in its business, or the promotion and advertising thereof so long as its correct and full name is used and the word "Professionals" is not given any prominence over the words "West Realty (Fiji) Limited".***

[17] The Court ordered the Appellant to pay the Respondent's costs of the application that were assessed at $750.00.

[18] By Notice of Appeal dated 30 October 2008 the Appellant sought an order that the decision of the learned judge be discharged and that the Respondent's application for interim injunctive relief be dismissed on the following grounds:

> ***"1. That the Learned Trial Judge erred in law and in fact in not considering whether damages would be an adequate remedy for the Respondent or addressing the issue of damages being appropriate in the circumstances.***
>
> ***2. The Learned Trial Judge erred in law and in fact in granting an interim injunction as the Respondents failed to establish or produce evidence that."***
>
> > ***(i) The Respondent had a goodwill or reputation attached to the services provided by the Respondent.***
> >
> > ***(ii) The Appellant was misrepresenting the public or the public was likely to be led to believe that the services offered by the Appellant were the services of the Respondent.***
> >
> > ***(iii) The Respondent had suffered or likely to suffer damage by reason of to the Appellant trading in manner complained off.***
> >
> > ***(iv) The Respondent failed to produce evidence that it was using the Professionals name in the manner used by the Appellant.***
>
> ***3. The Learned Judge erred in law and in fact in not considering the elements of passing off whilst deciding on the issue of whether there was a serious question to be tried in that:***
>
> > ***(i) Not considering whether the Respondent had shown that it had an established goodwill or reputation attached to its services.***

(ii) Not considering whether the Respondent demonstrated misrepresentation by the Appellant whether the public is aware of the identity by the plaintiff.

(iii) Not considering whether the Respondent had produced evidence to show that it suffered damages or was likely to suffer damages in the event the Appellant was allowed to continue its business operations.

4. The Learned Trial Judge erred in law and in fact in holding that an arguable case was sufficient to grant an interim injunction restraining the Appellant in a "passing off" matter when the Respondent was required to show more than an arguable case to obtain an interim injunction.

5. The Learned Trial Judge erred in law and in fact in holding that the Respondent would suffer financial loss when there was no evidence offered by the plaintiff to show such a finding.

6. The Learned Trial Judge erred in law and in fact in holding that the balance of convenience lay in favour of the Respondent when the Respondent had not established that it had an ongoing business, failed to show that it had goodwill and failed to produce any evidence of monetary loss suffered or likely to be suffered.

7. The Learned Trial Judge erred in law and in fact in striking out paragraph 5.3 and 15, of the affidavit of Atiria Armstrong sworn on the 4th of July 2009 on the basis that the deponent did not depose the source of her information when she did so.

8. The Learned Trial Judge erred in law in fact in striking out paragraph 17, 19, 20 and 24 of the affidavit of Atiria Armstrong sworn on the 4th of July 2008 on the basis that the deponent did not disclose the source of her information."

[19] By Notice of Motion dated 23 October 2008 the Appellant sought the following order from the High Court in Lautoka:

"That there be stay of the orders granted by this Honourable Court on 9 October 2008 and sealed on 21 October 2008 until further order of this Honourable Court and in the Alternative until such time the stay application is determined the time be extended for the Defendant to comply with the Order made on 9 October 2008 by this Honourable Court."

[20] In a Ruling delivered on 31 October 2008 the learned judge concluded that the Respondent would suffer greater prejudice (if the application were granted) than the Appellant (if it were refused). The judge also concluded that the Appellant's appeal would not be rendered nugatory or substantially so if a stay was not granted. In weighing up the competing interests of the parties and in her assessment of where the overall justice lay, the judge declined the stay application.

[21] However, on 20 November 2008, this Court (per Byrne J as he then was) granted a stay to the Appellant until 4.00pm on 1 December 2008. On 1 December 2008 this Court extended the stay until 20 January 2009. On that day the proceedings were adjourned to 4 February 2009. Thereafter the appeal proceeded in the usual manner. There is no reference in the file as to what happened to the stay after 20 January 2009.

[22] The Appellant's grounds are concerned with (a) the failure to consider the issue of damages being an adequate remedy, (b) whether the material before the judge established a serious question to be tried in passing off, (c) the judge's assessment as to the balance of convenience and (d) the answering affidavit filed by the Appellant.

[23] This is an appeal against the granting of interim injunctive relief brought pursuant to section 12 (2) (f) (ii) of the Court of Appeal Act Cap 12. As such it is an appeal against orders made within the judge's discretion. In such a case an appellate court will not lightly interfere with the exercise of the judge's discretion. The position was stated by Lord Diplock in ***Hadmor***

Productions -v- Hamilton [1982] 1 All ER 1042 whilst commenting on the limited function of an appellate court in an appeal of this kind. His Lordship at page 1046 stated:

> ***An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court ... is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."***

[24] Since the claim by the Respondent includes an inquiry as to damages or an account of profits that may possibly proceed to trial, we propose to briefly set out the facts that were disclosed in the affidavits that were before the learned judge at the hearing of the application.

[25] In its supporting material "The Professionals Limited" (the Respondent) claimed to have carried on business as a real estate agent or broker since incorporation on 15 November 2006. It had conducted that business under the same name at all relevant times. Professionals West Realty (Fiji) Ltd (the Appellant) had also carried on business as a real estate or broker in Fiji since its incorporation on 26 July 2007. The Appellant had at all material times carried on business under the name "Professionals". That name has not been registered to the Appellant under the Registration of Business Names Act Cap 249. The Appellant it is claimed, uses the name "Professionals" on its web site, advertising boarding and its motor vehicle.

[26] The Respondent claimed that it has advertised under the name of "Professional Real Estate" with its own telephone number in the yellow and white pages of the Fiji Telephone Directory since the 2007 Directory. The Respondent claimed that it had at all times operated in the real estate industry. The Respondent intended to apply for a licence under the Real Estate Agents Act 2006 upon the licencing provisions coming into effect. The Respondent used letterhead marked "The Professionals Ltd". The word "Professionals" is in a style, type form and colour which is the same as that used by the Appellant. The Respondent claimed that there had been instances where members of the public have assumed that the corporate entities are the same business because of the presence of a sign on the Denarau Road.

[27] The Appellant claimed that it had the right to use the brand "professionals". It claimed that it carried on business at all times under its registered name. It acknowledged that its website was www.professionalsfiji.com.fj. The Appellant claimed that the letterhead which the Respondent claimed to use was a sham.

[28] The principles that the learned judge was required to consider in the application before her were clearly stated by Lord Diplock in ***American Cyanamid Ltd v. Ethicon Ltd*** [1975] AC 396. First, the Respondent was

required to establish that its claim raised a serious question to be tried. The Respondent was not required to establish a prima facie case that it would gain a permanent injunction after that. The test required the affidavit material contain sufficiently precise factual supporting evidence to satisfy the judge that the claim was not frivolous, vexatious or hopeless.

[29] The application of this test should be considered in the context of the observations made by Lord Diplock in **American Cyanamid** (supra). His Lordship started by noting at page 406 that:

> ***"In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination."***

Then at page 407 he continued:

> ***"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavit 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."***

[30] His Lordship at page 409 continued on the same point by adding:

> ***"The Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."***

[31] On the issue of evaluating evidence at the interlocutory stage he noted at page 410 that:

> ***"In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case."***

[32] This Court has on a number of occasions adopted the approach proposed by Lord Diplock in ***American Cyanamid*** (supra) [See for example ***Chung Exports Ltd -v- Food Processors (Fiji) Ltd*** (unreported Civil Appeal No. 12 of 2003 delivered 26 August 2003) and ***Natural Waters of Viti Limited -v- Crystal Clear Mineral Water (Fiji) Limited*** (unreported Civil Appeal No. 11 and 11A of 2004 delivered on 26 November 2004)].

[33] At paragraph 7 of her judgment the learned judge stated:

> ***"The essence of a passing off action in a similar name case like the present is that the use of a trade name or description or device by the defendant is calculated to deceive others into a belief that the business is the business of the Plaintiff or that there is some close association between them. An injunction will lie even where there is no deliberate intention to deceive but in fact people are or likely to be deceived or led to believe that there is some close association."***

And at paragraphs 9 and 10 the learned judge stated:

> ***"I am mindful that contested questions of fact should not be decided in interlocutory applications such as this. I have also taken into account that in cases such as this, the grant or refusal of an interlocutory injunction can have the practical effect of putting an end to the action ...."***

> ***"The threshold question in each case must be whether the Plaintiff has established that there is a serious question to be tried. In order to determine that question***

the court must consider – first, what each of the parties claims the facts to be; second, what are the issues between the parties on these facts; third, what is the law applicable to those issues; and fourth, is there a tenable resolution of the issues of fact and law on which the Plaintiff may be able to succeed at the trial (Klissers –v- Harvest Bakeries [1985] 2 NZLR 129 at page 133). I have considered the evidence of alleged confusion arising from the way each party has used the word "Professionals". Both parties are involved in the same trade and common field of activity. Likelihood of confusion must be judged in the market place in which both operate. The likelihood of confusion is obvious. The ordinary and unwary member of the public is likely to be deceived by the manner in which the defendant is using the word "Professionals" in its advertising and promotion of its business. The Plaintiff has made out an arguable case of passing off sufficient to carry it over the threshold of a serious question to be tried. Whether, however, there has been a passing off by the defendant is a matter to be determined at the substantive trial."

[34] We consider that the learned judge was correct when she stated that the issue of similarity in the use of the word "Professionals" has to be decided at the substantive trial. We also consider that the learned judge has correctly determined the primary issue, namely whether having regard to the use of the word "Professionals" by both parties and any other relevant evidence the Respondent had established a serious question to be tried in relation to the passing off claim. The questions whether the use of the word may cause confusion, whether there is a sufficient degree of similarity in the trading names of the parties, whether a potential client is likely to be misled and whether the Appellant's use of the word amounts to a misrepresentation are issues to be decided at the trial of the action.

[35] We therefore conclude that there was no appealable error by the learned Judge in the exercise of her discretion in dealing with the first test under the ***American Cyanamid*** (supra) principles.

[36] However the learned judge's approach to the next limb of the ***American Cyanamid*** (supra) tests does raise an issue that requires further consideration.

[37] Having determined, correctly in our opinion, that the material did raise a serious question to be tried, the learned judge was required to consider the balance of convenience. In some decisions the balance of convenience test is considered under two separate heads and in others the approach is that there are a number of factors that need to be considered in determining the balance of convenience. However, regardless of the approach adopted, the learned judge was required to consider whether an award of damages would be an adequate remedy for the Respondent if successful on the question of liability at the trial of the action.

[38] The learned judge considered briefly the balance of convenience in paragraph 11 of the judgment. On a careful reading of that paragraph it is apparent to us that the adequacy of damages as a remedy has not been expressly referred to by the judge. We do not consider that it is sufficient to simply state that the relevant factors have been weighed. The question required consideration by the learned judge in a manner that would indicate to the parties that the discretion has been exercised according to accepted principles.

[39] In ***Honeymoon Island (Fiji) Ltd –v- Follies International Ltd*** (unreported Civil Appeal No. 63 of 2007 delivered 4 July 2008) the Fiji Court of Appeal stated at paragraph 13:

> ***"As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "If damages ... would be an adequate remedy and the defendant would***

be in financial position to pay them, no interlocutory injunction should normally be granted" American Cyanamid (supra) at 408."

[40] As a result we are left with the conclusion that the learned judge has exercised her discretion without considering a relevant principle and as a result has erred in law. Under those circumstances an appellate court is entitled to exercise an original discretion of its own. (See ***Hadmor Productions v Hamilton*** supra at 1046).

[41] On that point we refer to the comments made by this court in ***Chung Exports Ltd v. Food Processors (Fiji) Ltd*** (unreported Civil Appeal No. 12 of 2003 delivered on 26 August 2003) at paragraph 13:

> ***"... the Court will consider whether there is a serious question to be tried and if so, where lies the balance of convenience. The latter will require consideration of such factors as the relative strength of the Plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages and any other relevant factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end the court is required to determine where the overall justice lies."***

[42] We consider that not only did the learned judge fail to consider the adequacy of damages, she has also not indicated what factors she has considered in reaching her conclusion that the balance of convenience lay with the Respondent.

[43] The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is

granted. There is no indication in her judgment that the learned judge has undertaken such an inquiry.

[44] Although the Respondent has claimed for an inquiry as to damages or an account of profits, it is likely that any grant of interim injunctive relief might effectively bring an end to the proceedings. The Respondent had only been incorporated for a period of 18 months up to the date of the issue of the writ. There was no material to suggest that it had been engaged in business prior to the date of incorporation. The Appellant had been incorporated for only about 11 months prior to the issue of the writ.

[45] Under those circumstances we consider it appropriate to refer to the comments of Lord Diplock in ***NWL Ltd -v- Woods*** [1979] 1 WLR 1294 at page 1306:

> ***"Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."***

In other words, in a case such as the present, the relative strength of the Respondent's case should be considered in assessing the risk of any injustice that may result from deciding wither to grant or refuse the application.

[46] Consistent with Lord Diplock's comments are the following observations by Whitford J in ***Parncess/Pelly Limited v. Hodges*** [1982] FSR 329 (Chancery Decision) concerning applications for interim injunctive relief in the context of passing off actions. His Lordship stated:

> ***"It must always be remembered that the grant of such relief as is sought by the Plaintiffs upon application for an interlocutory injunction may very well be effective finally to determine the proceeding, for, if an interlocutory injunction be granted, it is going to stop the defendants from trading ... under the name ... until judgment or future order. In those circumstances, if the defendants want to continue in business, it is likely that they will adopt some different name and it will never be worth their while to fight the proceedings through so as eventually to establish the justice of their claim, particularly in circumstances such as we find in this case, where they have only started very recently and have not so far spent a great deal of money. It is accordingly not one of those cases where one can perhaps say, "Well, so long as there is an arguable case, that is good enough for the grant of interlocutory relief." In my view, the Plaintiffs have got to do somewhat better than that."***

[47] In addition, we accept that it is now appropriate in exercising its discretion for the court to consider where the overall justice lies. This was emphasised by Cook J in ***Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd*** [1985] 2 NZLR 129 at 142:

> ***"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula : an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."***

[48] Therefore, in addition to establishing the existence of a serious question to be tried, the Respondent was required to demonstrate that, based on the affidavit material, the balance of convenience and the overall justice of the case lay firmly in favour of the Court exercising its discretion in favour of granting the application.

[49] The learned judge did not, in our opinion, exercise according to law her discretion when considering the balance of convenience and she appears not to have considered the overall justice of the case.

[50] At the outset we are satisfied that, in the event that the Respondent succeeds at the trial of the action, damages would not be an adequate remedy. There would be no objective method of determining how much loss and damage, if any, would result from the Appellant's prominent use of the word "Professionals" in the course of its business activities.

[51] In considering the balance of convenience, we also take account of the fact that both parties had only been incorporated for a relatively short period of time prior to the commencement of proceedings. There was no supporting evidence from the Respondent to indicate the extent to which it was involved in the real estate business. There was no evidence as to how it presented itself in advertisements or to what extent it marketed itself. It was difficult to establish on the basis of the material before the lower court whether its level of activity over a relatively short period of time had generated a market presence or goodwill that could be confused with the Appellant.

[52] The affidavit material did disclose active advertising on the part of the Appellant. The word Professionals is prominently displayed in those advertisements. Apart from one blank letterhead piece of paper and some material concerning telephone directory entries the Respondent did not lead any evidence to suggest that it marketed or advertised itself in a manner which had been copied by the Appellant. It should be noted that it is not the inclusion of the word "Professionals" by the Appellant in its name that the

Respondent seeks to restrain. It is rather the manner in which the word is prominently displayed by the Appellant in its advertising that the Respondent seeks to enjoin the Appellant. However the Respondent's evidence does not establish on the balance of probabilities that the Appellant had used the word in a manner that was similar to its own use.

[53] We have concluded that the harm to the Appellant in terms of expense and inconvenience to what is an active business concern that may result if the injunctive relief is granted outweighs any detriment to the Respondent's business, the extent of which is indeterminable, if the injunctive relief is not granted.

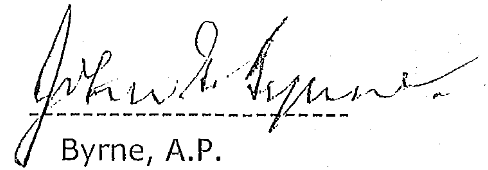
[54] We have concluded that the Respondent failed to establish that the balance of convenience and the overall justice of the case required the intervention of the court.

[55] The ground of appeal relating to the learned judge's ruling concerning the affidavit sworn by Atiria Armstrong is as a result of academic concern. However it is appropriate to make some observations concerning the Ruling. We see no objection to the deponent's reliance in paragraph 5 on records kept by the Companies Office. We see no objection to the deponent's reliance in paragraph 15 on information provided to her by Nadi Town Council. Whilst paragraph 19 may include a legal submission it must be noted that it was made in response to a similar legal submission in the Respondent's earlier affidavit. We note that affidavits prepared for use in interlocutory proceedings often, in breach of Order 41, contain legal submissions and hearsay material the source or grounds of which are not stated. In this case the affidavit material filed by both parties was in places in breach of Order 41.

[56] The injunctions should be discharged. The Appellant is entitled to costs which we fix at $4000.

[57] We order:

1. The Appeal is allowed.
2. The interim injunctions granted on 9 October 2008 are discharged.
3. Respondent to pay costs fixed at $4000.



Byrne, A.P.

Calanchini, J.A.

Solicitors:

Patel and Sharma for Appellant

S N Law for the Respondent