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

CIVIL APPEAL NO. ABU 62 OF 2014
(High Court No. HBC 263 of 2012)

BETWEEN	:	**HARLEY ALFRED JONES AND MARIE JONES ALEXANDER JOSEF HENRY**
		Appellants
AND	:	**iTAUKEI LAND TRUST BOARD**
		Respondent
Coram	:	**Calanchini, P** **Basnayake, JA** **Almeida Guneratne, JA**
Counsel	:	**Mr. H. K. Nagin for the Appellants** **Ms. L. Komaitai for the Respondent**
Date of Hearing	:	**9 November, 2017**
Date of Judgment	:	**30 November, 2017**

JUDGMENT

Calanchini, P

[1] I have read the draft judgment of Guneratne JA and agree that the appeal concerning the interim injunction should be dismissed and the appeal concerning the action be allowed.

Basnayake, JA

[2] I agree with the reasons and the proposed orders of Guneratne, JA.

Almeida Guneratne, JA

Background to this Appeal

[3] This is an appeal from the judgment of the High Court of Suva dated 14th July, 2014. By that judgment the learned High Court Judge declined the summons for interim relief and dismissed the action as well.

[4] The appellants (original plaintiffs) had sought an interim injunction to restrain the Respondent (original defendant) a statutory body established under the iTaukei Land Trust Act (Cap 134), vested with the control and administration of all Native Land for the benefit of iTaukei owners, from terminating two native leases (Nos. 25324 and 26629) given to two limited liability companies (namely, DIL and NVL respectively).

[5] The Respondent (iTLTB) having found that the said lessees (DIL and NVL) were in breach of the terms of the said leases had issued notices of discontinuance dated 8th August, 2012.

The Statement of Claim (pages 14 – 20 of the Copy Record)

[6] The Appellants instituted the present proceedings on the basis that they were creditors of DIL and NVL. The first Appellant alleged that it secured Mortgage No. 6667 over DIL's native lease 25324 and a caveat over native lease no. 26629. The second Appellant alleged that it is a creditor under a "2008 agreement" for a sum of $12,975,984.00, the payment of which was guaranteed by DIL and NVL. The Appellants also alleged that they were the holders of a Mortgage Debenture over the assets of DIL dated 15/3/99.

[7] The 2nd Appellant (2nd Plaintiff in the original action) had joined in the action on the basis that, it was an unpaid vendor who had sold nearly all its shares to a New Zealand limited company (NIL) under "the 2008 agreement" referred to above.

The Statement of Defence (pages 109 – 117 of the Copy Record)

[8] The main defences urged by the Respondent (iLTB) may be condensed as follows in as much as I felt that the other defences were peripheral but which I shall refer to when dealing with the judgment of the High Court.

[9] The said main defences were:

(a) That, the said two leases being given to DIL and NVL, they had fallen foul of the terms of the said leases which entitled the Respondent to take steps to issue notices of discontinuance of the said leases.

(b) That, the Appellants cannot exercise rights as a Mortgagee to remedy the breaches on the said lessees.

(c) That, on account of the said breaches the leases that belonged to the DIL and NVL stood forfeited.

(d) That, consequently, the substantive action comprised in two alleged causes of action were misconceived and the interlocutory injunction sought was not sustainable in as much as the Appellant lacked *locus standi* to maintain the impugned proceedings which defence had been pleaded impliedly (vide:

Paragraph 12 of the Statement of Defence (page 112 of the Copy Record) and expressly (vide: paragraph 14 thereof, page 113).

The Judgment of the High Court (pages 6 – 12 of the Copy Record)

[10] On the facts and pleadings as recounted above, upon an examination of relevant documents and on the basis of the findings made by him, the learned judge declined the interim relief sought. The action itself was dismissed on the basis that, the Appellants lacked *locus standi* to have brought the impugned proceedings.

Grounds of Appeal (pages 2 to 4 of the Copy Record)

> *"1. The Learned Trial Judge erred in law in not property taking into consideration the legal principles in an application for an injunctive relief when dismissing the Appellants' application dated 20th September, 2012.*
>
> *2. The Learned Trial Judge erred in law in dismissing the Appellants' action filed on 21st September, 2012 summarily when there was no application before the Court for striking out of the same and there were no grounds for doing so.*
>
> *3. The Learned Trial Judge erred in law in holding that Appellants had no locus standi to bring proceedings when the records show that First Appellant was the mortgagee and paragraph 18 of the mortgage give powers to the mortgagee to step in-place of mortgagor. The Second Appellant was vendor in respect of the 2008 Agreement for Sale and Purchase of shares of the Companies owning the Resort Leases and directly affected by the failure of the Respondent to grant approval to the transactions having advised by the parties that it would do so on the 31st August, 2010.*
>
> *4. The Learned Trial Judge erred in law and in fact in not properly considering the Appellant's Submission and Affidavits filed in Court, when they clearly showed that 1st Appellant's Mortgage Nos. 6667 and 03993, the Company Debenture dated March of 1999, Sale and Purchase of Agreement made in 2008 and Caveats Nos. 732406 and 732409 when all these Security documents give locus to the Appellants to step into the shoes of the Mortgagors.*
>
> *5. The Learned Trial Judge erred in law not considering paragraph 14 of Schedule referred to in Section 68 of the*

Property Law Act when this specifically states that it's lawful for a mortgagee to pay and rent and to perform and observe the covenants and conditions of the Lease.

6. *The Learned Trial Judge erred in law in not properly taking into account that Respondent failed and/or neglected to release the Native Lease when there was a request made on 8th January, 2002.*
7. *The Learned Trial Judge erred in law and in fact in not properly considering and applying the principles relating to relief against forfeiture.*

8. *The Learned Trial Judge erred in law and in fact in holding that there was no mortgage over Native Lease 25324.*

9. *The Learned Trial Judge erred in law and in fact in holding that there was no infringement of the Appellants' proprietary or legal rights.*

10. *The Learned Trial Judge erred in law and in fact in not properly considering all the material facts and authorities that the Appellants had submitted before the Court and hence there was a substantial miscarriage of justice."*

Consideration of the Grounds of Appeal

[11] I shall take first grounds 3, 4, 5,7 and 9 since they all relate to what the learned Judge regarded as a preliminary issue, namely, whether the plaintiffs (appellants) had *locus standi* to have brought the impugned proceedings.

The Right (of relief) to forfeiture

[12] This was central to the Appellants case. Section 105(2) of the Property Law Act (Cap. 130) reads thus:

> *"Where a lessor is proceeding to enforce a right of re-entry or forfeiture, the lessee may, in any action brought by himself, apply to the Court for relief: and the Court may grant or refuse relief including the granting of an injunction to restrain any like breach in the future.*
> *A lessee includes a sub-lessee."*

[13] On a reading of the said provision, it is clear that, the right of relief to forfeiture could have been exercised only by DIL and NVL as lessees. The first Appellant (as

mortgagee) may have entered into a mortgage with the lessees (as Mortgagor) and paragraph 18 of the Mortgage may well have given powers to the first appellant to step into the shoes of the Mortgagor. Furthermore, the 1st Appellant's Mortgage No. 6667 and the Company debenture 03993 of March, 1999 and in respect of the Sale and Purchase Agreement of August, 2008 of which the 2nd Appellant was the vendor and the Caveats Nos. 732406 and 732409 may have constituted evidence of security the Appellants had offered for the Mortgagors (DIL and NVL).

[14] But, none of those transactions could have conferred on the Appellants the status of lessees. To hold otherwise would amount to defying the terms of Section 105(2) of the Property Law Act even if one were to go so far as accepting that the Appellants had made good the breaches by DIL and NVL of the terms of the leases in question as provided in Section 68, Paragraph 14 of the Schedule thereto.

Was there an infringement of the Appellants' proprietary or legal rights?

[15] A proprietary right is a right of someone who owns a property. (Collin, Law Dictionary, 2nd ed., p.192) A legal right is a right allowed by the law (supra, p. 138).

[16] Applying those definitions, while the Appellants could by no stretch of imagination have been regarded as owners of the property that formed the subject-matter of the present action, clearly, Section 105(2) of the Property Law Act did not allow the Appellants as Mortgagees of the native leases in question to a right of forfeiture.

[17] Thus, there was no infringement of any proprietary or legal right in the Appellants enabling them to have instituted the present proceedings they did.

[18] Learned Counsel for the appellants did not refer to any decision of the Fijian Courts that has extended the right of relief to forfeiture to a Mortgagee in the said circumstances but he did rely on the English Court of Appeal decision of **Escalus Properties Ltd v. Robinson and Others; Escalus Properties Ltd v. Dennis and Others; Escalus Properties Ltd. v. Cooper-Smith and Another; Sinclair Gardens Investments (Kensingtom) Ltd. v. Walsh and Others** [1995] 4 All ER 852, to

support his contention on the basis that Section 146 of the English Law of Property Act, 1925 which is couched in terms similar to Section 105(2) of the Property Law Act in Fiji has been interpreted as extending a lessee's right of relief to forfeiture to a mortgagee of a lessee.

[19] The factual matrix in that decision I find is not on all fours with the instant case and the impact of other statutes on the said Law of Property Act of England as well which that decision had taken into consideration. The past judicial precedents which that decision had examined also had not been consistent.

[20] Apart from that, the contention which the Appellant's counsel sought to place before this Court had not been urged before the learned High Court Judge as revealed in the written submissions of the Appellants.
(vide : pages 119 – 129 of the Copy Record).

[21] Consequently, the learned Judge made his determination on the pleadings and the submissions made before him.

[22] For the aforesaid reasons, I reject the said grounds of appeal nos. 3, 4, 5, 7 and 9 taken cumulatively.

Re : Ground of Appeal No. 6

[23] In that regard, I do not think it necessary to say more than that, a unilateral request made on 8th January, 2002 to release the Native Leases in question could not have had a bearing on the relationship between the Appellants and the Respondent in view of what has been articulated above in regard to Grounds 3, 4, 5, 7 and 9 of the appeal.

Re : Ground of Appeal No. 8

[24] The Mortgage purporting to be over Native Lease No. 25324 is contained at pages 53 to 57 of the Copy Record.

[25] The learned Judge found that the said Mortgage No. 6667 was not registered with the Registrar of Titles in accordance with the provisions of Section 63 of the Land Transfer Act.

[26] For the said reasons I reject the said Ground No. 8 as well.

Re : Grounds of Appeal Nos. 1 and 10
Principles relating to the grant or refusal of interlocutory (interim) injunctions and their application to the instant case

[27] Those principles have been well established across all developed jurisdictions including Fiji over the years.

Requirement of a prima facie case

(i) The plaintiff seeking an injunction must establish a prima facie case meaning a serious question to be tried and the probability of success.

In **Preston v. Luck** [1884] 27 Ch. 497 Cotton LJ, though not using the expression "prima facie case" defined the said requirement thus:

> *"... though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and on the facts before it there is probability that the plaintiffs are entitled to relief."*
> (at pp. 505 – 06)

[28] Later cases appear to have regarded the requirement of a "prima facie case" as being definitive of the dual criteria of first, a serious question to be tried and second, the probable entitlement of the plaintiffs to relief.

[29] Subjectively viewed, that is, from the perspective of the Appellants, there was a serious question to be tried but there could not have been a probable entitlement to relief in the face of Section 105(2) of the Property Law Act which limits a right of forfeiture to lessees only and which right is not extended to Mortgagees of leases though expressly including sub-lessees.

[30] Consequently, in assessing the relative strengths of the cases of the parties the Appellants could not have disclosed a legal right (that is a right permitted by law – the Property Law Act (See in that regard **Hubbard v. Vosper** [1972] 2 QB 84 at page 96 per Lord Denning M. R.

[31] The Court will issue an interim injunction only to support a legal right (vide: **Montgomery v. Montgomery** [1965] P.46 and **Gouriet v. Union of Post Office Workers** [1978] AC 435.

[32] On an examination of the aforesaid principles, I venture to crystallise the same in the form of a proposition that, there must be some apparent violation of rights to which the Appellants (as plaintiffs) were entitled and not merely of rights they claimed.

A consideration of the American Cyanamid Case [1975] AC 396

[33] Said to be a new doctrine as propounded by Lord Diplock where His Lordship took the view that, expressions such as "a probability", "a prima facie case" in the context of discretionary exercise of power in granting or refusing an interim injunction leads to confusion and therefore a plaintiff claiming an interlocutory injunction should first establish not a prima facie case but merely that there is a serious question to be tried and that the claim is not frivolous or vexatious.

[34] If one were to stop there, the Appellants (as plaintiffs) certainly had a serious question to be tried, looking at their grievance from a subjective perspective.

[35] But was that sufficient?

[36] Ten years earlier, in the House of Lords decision in **Statford & Sons Ltd. v. Lindley** [1965] AC 269, Lord Upjohn had said:

> *"An appellant seeking an interlocutory injunction must establish a prima facie case of some breach of duty by the respondent to him."*
> (at pages 338 – 339)

[37] That case was not referred to by Lord Diplock in his celebrated speech (with which all the other Lords agreed).

[38] No doubt, the **American Cyanamid** case has come to be regarded as a binding authority in England as well as in Fiji and not for a moment am I seeking to distance myself therefrom save as to absorb the thinking reflected in the **Statford & Sons Ltd. v. Lindley** case (supra) as well for the reason I have stated at paragraph [36] above as being subsumed in the criterion of "a serious question to be tried."

[39] I say that for the reason that, if one were to stop at the criterion of "a mere serious question to be tried" it could lead to more confusion than what Lord Diplock sought to resolve as could be seen in the English Court of Appeal decisions in **Fellowes and Son v. Fisher** [1975] 3 WLR 184 and **Hubbard v. Pitt** [1975] 3 WLR 201.

[40] Indeed, the **American Cyanamid** case has been distinguished and/or not strictly applied to certain classes of cases like those concerning a breach of restrictive covenants or passing off cases (vide: **News Week Inc. v. British Broad Casting Corporation** [1979] RPC 441.

[41] Further, the case has not been followed in certain common law jurisdictions such as Australia (vide: **Firth Industries Ltd. v. Polygas Engineering Pty Ltd**. [1977] RPC 213) and Sri Lanka (vide: **Bandaraike v. The State Film Corporation** – CA 163/81 – 10/04/81 and **Ceylon Cold Stores v. Whittal Boustead Ltd.** C.A L.A 35/80 – 22/04/1980).

Does the High Court Judge's approach to the matter at hand bear scrutiny? – Did he consider the relevant principles?

[42] On a consideration of the aspects I have addressed, I cannot see any error in the learned High Court Judge's conclusion in declining the application for the interim injunction that was sought on the basis that there was no legal or proprietary right in the Appellants to have sought the said injunction. That was a threshold issue, for, there could not have been then a serious question to be tried if the plaintiffs had no *locus standi* and could not have shown a breach of any legal duty owed to them by the

defendant in the first instance. The other considerations such as balance of convenience were all hinged to that. As the learned judge further noted, there was the additional factor of the Appellants (as plaintiffs) failing to give an undertaking as to damages, another factor relevant in regard to the granting of an interlocutory injunction.

[43] It must be noted that, it was the lessees that, the Respondent had privity with. It was the lessees who were in breach of their obligations as covenanted, although some arrears of rental had been paid by the Appellants. Could the said lessees then have been permitted to continue in their breach, which reminds me of Lucius Veratius who went around "the streets of Rome accompanied by his slave carrying a basketful of coins and slapping people and throwing them twenty-five asses a piece making the law look ridiculous?"

[44] Could the appellants on their contention that, by taking over the breaches of the said lessees as a Mortgagee of the said leases in question have invoked the criteria of "balance of convenience", "prejudice to parties" and "equitable factors" in seeking the interlocutory injunction they sought? In the face of the express provisions of Section 105(2) of the Property Law Act?

[45] Hence the reason why the learned High Court Judge regarded the question of *locus standi* as being a preliminary issue.

Some further reflections in regard to the expanding canvass of the scope of interlocutory injunctions and its limitations

[46] The interlocutory (interim) injunction originally lay to prevent a party from doing something in derogation of another party's rights. Thereafter came the mandatory injunctions, *quia timet* injunctions, the Mareva injunctions and the Anton Pillar Orders as well. In all those contexts the dispute had been between parties who had stood in privity to each other.

[47] Indeed, I recall it being said somewhere that applications for injunctions, the number of which is legion, "thick as they were as autumn leaves that strow the brooks in Vallombrosa."

[48] The law in Fiji is yet to recognise however, a case where a third party, as in the present case, could claim to step into the shoes of a party (the lessees) as against another (the Respondent lessor) on the basis of an "implied locus" which I construe as being the theme pursued by the Appellants in this case.

[49] The learned Judge held that there was no registered mortgage. While I agree with learned Counsel's submission that it was inappropriate to speak of "the mortgage (in any event) having lapsed," the important question was whether there was a mortgage in the first instance as required under the Land Transfer Act, as the learned Judge held.

[50] I fail to see how the provisions of Section 62 proviso (b) of the Land Transfer Act could have in any way helped the Appellants in that regard.

[51] The appellants referred to an application for consent to mortgage in terms of section 12 of the native Land Trust Act (Cap 134) as between the alleged mortgage entered into between the 1st Appellant and DIL. That document is at page 205 of the Copy Record.

[52] But, the issue was whether that gave the said Appellants to claim as a mortgagee of the lease in question in view of Section 105(2) of the Transfer Act

[53] In fact, rather than assisting the Appellants in that regard, Section 63 of the said Act, to my mind, appears to go against them.

> *"Section 63: A mortgage registered in accordance with the provisions of this Act shall affect as a security, but shall not operate as a transfer of the land, or of the estate or the interest therein charged."*

[54] In that context, I saw merit in the Respondent's Counsel's argument that, there being no "registered interest" as requisite in law, the said mortgage had no effect on the leases in question.

[55] Appellant's Counsel's counter in his reply to that being that, the Mortgage document (p.205 of the Copy Record), though conceding was not registered with the Registrar of Titles as a title it was still a deed registered with "the Registrar of deeds", which appeared to suggest a somewhat farfetched contention in the light of the well established *"Torrens System"* in Fiji.

[56] Furthermore, Counsel's argument that, the learned Judge ought to have interpreted Section 105(2) (LTA) in the light of the English decision referred to earlier in this judgment taken together with the authority of Halsbury (Vol. 27, 4th ed.) being not matters placed before the learned Judge, I am of the view that, the question of *locus standi* stood as being germane to the application for the interlocutory injunction. The learned Judge hinged the principles applicable to the granting of the same to that, regarding it as a preliminary issue. It is therefore not correct to say that he did not consider the principles applicable to an application for an interlocutory injunction, which he did consider as being subsumed in the question as to the *locus standi* of the Appellants.

[57] The said matter of interpretation of Section 105(2) of the LTA in the light of the English Court of Appeal decisions (supra) cited by the Appellants taken together with Halsbury's authority is a matter the Appellants would be free to argue more freely at the trial (viz: given the fact that, the learned Judge employed a literal interpretation of the said Section).

[58] The legality or otherwise of the 2008 Sale of New Zealand Shares Agreement (at page 199 of the Copy Record) which the learned Judge regarded as being 'void' is also a matter the parties could go into at the trial, the Respondent's Counsel's argument being that, the lands referred to in the said agreement (as borne out from the

documentary material on Record) were outside the survey boundaries and therefore contrary to the provisions of the Land Transfer Act.

Conclusion as regards the refusal of the application for the interlocutory injunction that was sought

[59] For the aforesaid reasons, I hold that, the refusal by the learned High court Judge to grant the interlocutory injunction that was sought was in order and accordingly I reject grounds of appeal nos. 1 and 10 and the appeal in that regard.

The High Court's dismissal of the substantive action

[60] This matter stands entirely on a different footing.

[61] An interlocutory injunction by its very nature is restrictive, its aim being to preserve the *status quo* of the disputing parties.

[62] Apart from that, the High Court Act and Rules do not permit an action (which had originated in summons as in the present case) liable to have been dismissed *ex mere motu*. There was no application by the Respondent in that regard as urged by the Appellants in Ground 2 of their grounds of appeal. As observed by this Court in **Gounder v. Fiesty Limited et al**, (ABU 0001 of 2013, 5th March 2014), where there was no summons filed by the defendants to strike out the writ of summons in terms of Order 18 Rule 18 of the High Court Rules *"it is presumed that the parties were not heard on the issue of striking out of the summons ... Even a weak case needs the time of the Court ... and a case that is doomed to fail will be struck out (only) after an inter partes hearing."* (at page 5 of the judgment, per Amaratunga J :

> *"18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)((a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

[63] Furthermore, the case having originated in summons, only affidavit evidence was available in regard to the application for the interlocutory injunction.

As held in this Court's decision in **Roxy Motorparts Limited & Another v. Habib Bank Limited** [2005] ABU 60/04, 15th July, 2005;

"...applications for summary judgment or striking out are quite different from those applying to the continuation of an interlocutory injunction. Where an action is struck out the plaintiff is wholly debarred from prosecuting it. An interlocutory injunction is merely an interim remedy which the Court has the discretion to order in certain and well defined circumstances. Unlike summary orders the referral of an injunction or the refusal of its continuation does not put an end to the litigation."

[64] Consequently, Ground 2 of the grounds of appeal is entitled to succeed and I hold that the learned Judge exceeded his jurisdiction and erred in dismissing the appellants substantive action.

[65] It is in the substantive action that, *interalia*, the Court would be in a position to determine whether the Appellants could be said to have stepped into the shoes of the lessees of the native leases in question interpreting and extending Section 105(2) of the Property Law Act.

[66] Accordingly, I proceed to make the following Orders.

Orders

1. *The appeal against the refusal to grant the interlocutory injunction is dismissed.*
2. *That part of the judgment dismissing the action is set aside.*
3. *In the circumstances, parties to bear their own costs.*
4. *The matter is to be remitted to the High Court for the purpose of proceeding with the action in accordance with the Rules.*

Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Justice E. L. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL