

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

CIVIL APPEAL NO. ABU 0067 of 2017
(High Court No. HBC 273 of 2016)

BETWEEN : SWEET RAINBOW INVESTMENTS (FIJI) LIMITED
Appellant

AND : MOHAMMED AFZAL KHAN
SILVER FERN INVESTMENT LIMITED
Respondents

Coram : Lecamwasam, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Ms J Lal for the Appellant
Mr D Sharma for the Respondent

Date of Hearing : 15 February, 2019

Date of Judgment : 8 March, 2019

JUDGMENT

Lecamwasam, JA

[1] I totally agree with the reasoning and conclusion of Guneratne, JA.

Almeida Guneratne, JA

- [2] This is an appeal from the judgment dated 30th May, 2017 of the High Court of Fiji in Suva. By that judgment the High Court dismissed the Appellant's inter-partes summons seeking an injunction to restrain the 2nd Respondent from selling, leasing, transferring, assigning, or dealing or disposing of the property held under Certificate of Title (CT No. 41486, hereinafter referred to as "the property").
- [3] The basis on which the said injunction was sought is contained in the Statement of Claim and the supporting affidavit (at pages 15-22 and pages 25-31 respectively of the Copy Record). While the 1st Respondent's statement of defence and supporting affidavit are at pages 134-140 and pages 146-156 respectively, the 2nd Respondent's Statement of Defence and supporting affidavit are to be found at pages 142-144 and 158-164 of the Copy Record.
- [4] For the purpose of completing my recount of the pleadings I make reference first, to the Appellant's replies to the 1st Respondent's Statement of Defence. (pages 166 – 168 of the Copy Record) and the 2nd Respondent's statement of Defence (at pages 170 – 171 of the Copy Record). Secondly, I perused the affidavits of Satya Sekran (Director of the Appellant Company contained at pages 173-176 of the Copy Record) and of Mr. Nikheel Narren Nambiar (Solicitor) who had acted on behalf of the Appellant Company (at pages 222-223 of the Copy Record).
- [5] I pause at this point to state that, I did not feel the need to repeat the matters contained in the said pleadings in detail for the reason that, the same stand revealed from the judgment of the High Court taken in the light of the Grounds of Appeal urged against it which constitute the conspectus in which this Court needs to make a final determination as to whether the judgment of the High Court bears scrutiny or not. The learned Judge himself made a lucid account of the premises on which the case before him stood (vide: paragraphs 1 to 8 of the Judgment) which I adopt.

- [6] Approaching the matter thus, I shall now proceed to examine the reasons given in the judgment for refusing the injunction sought first and then address my mind to the grounds of appeal.

Judgment of the High Court (vide: paragraphs 10 to 14 of the Judgment)

- [7] In dismissing the Inter-Partes Summons for an interim injunction, the reasons adduced by the learned Judge may be summarized as follows: That:-

- (i) *There is not even the slightest allegation against the 2nd Defendant nor even a single demand made of (it). The first time there is any claim against the 2nd Defendant is in the prayers (paragraph 10 of the Judgment).*
- (ii) *The pivotal issue is whether the plaintiff has an arguable claim against the 2nd Defendant. The SPA from which the Plaintiff's claim stems shows that it is made between the 1st Defendant and the plaintiff. It has absolutely no connection with nor any relation to the 2nd Defendant. (paragraph 12 of the Judgment).*
- (iii) *Clause 14 of the SPA provided that, if the Vendor (First Defendant) defaults, the SPA shall be deemed to be cancelled and of no effect. There is no provision for the purchaser (Plaintiff) to apply to Court for specific performance of the SPA. This is in sharp contradiction to the Vendor's right to sue for specific performance given to it by Clause 13 (c) (of the SPA).*
- (iv) The 1st Defendant having had no title to the property in question (CT 41486) at any time or even to CT No. 16663 the plaintiff could not have sought specific performance of the said properties (paragraphs 15 and 16 of the Judgment).
- (v) In regard to the undertaking as to damages, which is an integral criterion applicable in injunction applications seeking specific performance, there is no such undertaking by the plaintiff but by a third party. (Paragraph 17 of the Judgment).
- (vi) The Plaintiff has not complied with the principles laid down in **American Cyanamid Co. v Ethicon Ltd.** [1975] AC 396. (paragraph 11 read with paragraph 19 of the Judgment) (in as much as) it did not have any claim whatsoever against the 2nd Defendant, let alone a good arguable one.

The Grounds of Appeal

1. *The Learned Judge erred in law and in fact in refusing to grant an interim injunction when the Appellant had established the following facts through its Affidavit evidence:*
- (i) *That the Appellant had on 5 March 2013 entered into a legally binding sale and purchase agreement with the First Respondent had agreed to sell three and a half acres of land being part of Certificate of Title No. 16663, Lot 1 on deposit plan no. 8805 ('the land') for the sum of \$650,000.00 (six hundred and fifty thousand dollars) to the Appellant.*
 - (ii) *That the Appellant was at all material times ready and willing to complete the sale with the First Respondent and had paid a sum of \$50,000.00 as deposit.*
 - (iii) *That the First Respondent had agreed to procure a new title to the three and half acres of land from a third party and sell the same to the Appellant.*
 - (iv) *That the First Respondent in breach of the sale and purchase agreement failed to disclose to the Appellant and/or its counsel that he had secured a new title to the three and half acres of land which he was required to obtain under the sale and purchase agreement from a third party.*
 - (v) *The First Respondent admitted by his Affidavit that he had entered into an agreement with the Estate of Ram Narayan to acquire the three and half acres of land.*
 - (vi) *That the First Respondent was successful in procuring a separate certificate of title to the three and half acres of land and thereby ought to have sold and transferred the said land to the Appellant.*
 - (vii) *That the First Respondent was involved or was instrumental in having the said three and half acres of land to be transferred to one Ajit Dushiyant Rahut and then subsequently to the Second Respondent company in which the First Respondent's wife held majority shares or interest.*
 - (viii) *That the First Respondent was directly involved in having the said land transferred to the Second Respondent and did so with the clear intentions of defeating the Appellant's equitable interest in the land under the sale and purchase agreement dated 5 March 2013.*
2. *The Learned Judge erred in law and in fact in holding that there is no allegation against the Second Respondent when the Affidavits filed by the Appellant provided sufficient evidence from which the Court could*

reasonably infer that the Second Respondent was not a bonafide purchaser of the said land.

3. *The Learned Judge erred in law and in fact in holding that the Second Respondent could not be restrained as it was not a party to the sale and purchase agreement dated 5 March 2013.*
4. *The Learned Judge erred in law and in fact in holding that the Appellant had no contractual right to apply for the specific performance of the sale and purchase agreement dated 5 March 2013 by virtue of the clause 14 of the said agreement when specific performance is available to the Appellant as an equitable remedy.*
5. *The Learned Judge misdirected himself in law and in fact in holding that if the "Vendor" (First Respondent) was in default of the sale and purchase agreement, the sale and purchase agreement shall be deemed to be cancelled and of no effect when, the Appellant argued that the First Respondent could not be regarded as having defaulted under the sale and purchase agreement.*
6. *The Learned Judge misdirected himself in law and in fact holding that even if the Appellant was entitled to apply for specific performance, it could only compel the First Respondent to transfer to the Appellant some other price of land, when the Appellant had provided sufficient evidence through its Affidavits that the Second Respondent could not be regarded as a bonafide purchaser for valuable consideration.*
7. *The Learned Judge erred in law and in fact when holding that no sufficient undertaking as to damages had been provided by the Appellant when Ram Sami and Sons Limited did provide a sufficient undertaking for and on behalf of the Appellant which it agreed could be enforced against it.*
8. *The Learned Judge misdirected himself in law and in fact in failing to correctly consider the principles stated in the case of American Cyanamid Limited v Ethicon Limited [1975] AC 396 and thereby failed to exercise his discretion in accordance with the accepted principles.*
9. *The Learned Judge misdirected himself in law and in fact when he embarked on resolving conflicts of evidence in affidavit as to facts and deciding questions of law when these were matters to be dealt with at trial."*

Determination of this Court

- [8] I shall now proceed to deal with the factual and legal issues in order to make a determination as to whether the judgment of the High Court bears scrutiny or not. I shall

deal with them as follows, categorizing them as (a) The Threshold Issues (b) Peripheral Issues.

(a) The Threshold Issues

Did the Plaintiff have *locus standi* to sue the 2nd Defendant? Was there any privity of contract (re: the SPA in question) between them? If not, could the plaintiff have maintained an application for an interim injunction which it sought against the 2nd Defendant on the basis that a prima facie case (based as it were on an apparent cause of action) lay against the 2nd Defendant? Was not the 2nd Defendant a bona fide purchaser for value in re: the Property in dispute?

[9] I shall address my mind to the aforesaid issues cumulatively for they are intrinsically connected.

Re : Locus Standi

[10] As one of the plaintiff's supporting affidavits seems to have suggested the 1st Defendant's wife being a Director (a majority shareholder) in the 2nd Defendant Company, there was a link between the 1st Defendant and the 2nd Defendant. Was this sufficient to pierce the corporal veil, a principle that has stood the test of time ever since the seminal ruling in Salomon v. Salomon & Co. Ltd. [1895-9] All ER Rep. HL. 33? I saw no exceptional ground in the present case to depart from the *Salomon rule*.

Was the 2nd Defendant then a *bonafide* purchaser for value?

[11] The deed by which the 2nd Defendant purchased the property was for valuable consideration. (*vide: the attestation clause*). It did not purchase the same with any notice that it had been sold to any party, leave alone the plaintiff. From a common sensical and/or logical reasoning could the 1st Defendant have sold the said property to which he had not had title? It is trite law that what one does not own cannot be alienated to any other.

The Appellant's contention that, the Appellant had an 'equitable interest' in the property

- [12] An 'equitable interest' in law is an interest held by virtue of an equitable title (that is, a title that indicates a beneficial interest in a property which gives such a holder the right to acquire formal legal title) or claimed as an interest held by a trust beneficiary.
- [13] The present case is not even a far cry from that kind of situation. Moreover, having regard to Clause 14 of the SPA read with Clause 13(c) thereof, the plaintiff itself failed to perform other obligations it was required to fulfil and further, Clause 14 of the SPA put the final lid on other claims he might have had even against the 1st Defendant, leave alone the 2nd Defendant.
- [14] In any event, could a party (the Plaintiff) have had an equitable interest in a property that had been sold to another? (the 2nd Defendant).

Could it be said that the Plaintiff had a cause of action against the 2nd Defendant? (Was there privity of contract between the Plaintiff and the 2nd Defendant?)

- [15] In the background of the aforesaid factors, could it be said that, the Plaintiff had a cause of action to sue the 2nd Defendant? Was there privity between the Plaintiff and the 2nd Defendant?
- [16] I think not. As to what constitutes a cause of action I venture to extract from decided precedents as follows:

What constitutes a cause of action

- [17] (i) It is a set of facts that gives rise to an enforceable claim ... comprising every fact which if traversed the plaintiff must prove in order to obtain judgment.

- (ii) It is simply a factual situation the existence of which entitles one person to obtain from the Courts a remedy against another person.
- (iii) ... any facts or series of facts which are complete in themselves to found a claim (for relief). (vide: Dean v Shah [2012] FJHC 1344; Read v Brown 22 QB 128; Letang v Cooper [1965] 1 QB 232 at 242 – 243 and Dominion Insurance v Pacific Building Solutions [2015] FJHC 633).
- [18] While deriving guidance from the aforesaid precedents and reading between their lines, I venture to construe as to what constitutes a cause of action as follows.
- [19] A cause of action is that which a plaintiff must disclose in his claim against a defendant based on a right existing in him whether it be in contract, trust or a duty or obligation on the part of the defendant owed to him referable to a statute, common law or equity. In all those instances a plaintiff must disclose in his claim a necessary nexus or privity between him and the defendant. In other words a plaintiff is required to disclose a defendant's liability to be sued in an action.
- [20] In doing so, I have re-iterated what I opined and held in this Court's decision in Fiji Rugby Union v Cardsfee Jee Ltd. & Anr. (Civil Appeal No. ABU 0053 of 2017 – decided on 30 November 18, with Basnayake and Lecamwasam JJ's agreeing).

Did the Plaintiff then disclose a prima facie cause of action against the 2nd Defendant?

- [21] Following upon what I have articulated above, I have no hesitation in saying that, the Plaintiff had failed to disclose a prima facie cause of action entitling it to an interim injunction against the 2nd Defendant failing in that quest to establish any privity by the Plaintiff with the 2nd Defendant.
- [22] Did the application conform to and satisfy the principles laid down in the Cyanmid Case?

[23] I think not. I agree with the learned High Court Judge's conclusions on that.

The Peripheral Issues

[24] Those issues relate to the (a) undertaking as to damages (b) the relevant clauses in the SPA and (c) consequently the availability of other remedies that may have been open to the Plaintiff. But, given the fact that, that is a matter for the plaintiff against the 1st Defendant, I shall not address those issues for the purpose of this Appeal.

Re : Respondent's submissions made at the outset of the hearing before this Court and the Court's Response thereto

[25] Mr. Sharma (Counsel for the Respondents) submitted at the outset that, the hearing of this Appeal has been rendered academic since the 2nd Defendant has been struck off from the proceedings in the present case.

[26] However, Appellant's Counsel was not amenable to that application on the grounds that:-

- (a) those subsequent proceedings are not part of the record.
- (b) the suit in appeal as well as the High Court action are still on foot against the 1st Defendant and;
- (c) Mr Sharma has entered appearance for the 1st and 2nd Defendants (1st and 2nd Respondents);

[27] Accordingly, it is in view of those submissions on that aspect that this Court, in its discretion, proceeded to hear the appeal.

Conclusion

[28] For the reasons stated in this judgment, we see no reason to interfere with the conclusion reached by the learned High Court Judge in dismissing the Appellant's (Plaintiff's) application for an interim injunction.


Jameel, JA


[29] I agree with the findings, conclusions and proposed orders of Almeida Guneratne, JA.


Orders of Court:

1. *The appeal is dismissed.*
2. *The Appellant shall pay as Costs to the 1st and 2nd Respondents a sum of \$5,000.00 (\$2,500 a piece) within 21 days of this Judgment.*
3. *This sum shall be in addition to the costs ordered by the High Court to be paid to the 2nd Defendant (2nd Respondent).*




Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL


Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL


Hon. Justice F. Jameel
JUSTICE OF APPEAL