

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU0109 OF 2023
[Lautoka High Court No: HBC 100 of 2023]

BETWEEN : **ABDUL SAIYUB**

Appellant

AND : 1. **ABDUL SARIF & 3 Others**
2. **DIRECTOR OF LANDS**
3. **REGISTRAR OF TITLES**
4. **THE ATTORNEY-GENERAL OF FIJI**

Respondents

Coram : **Prematilaka, RJA**
Qetaki, JA
Winter, JA

Counsel : **Mr R. P. Singh for the Appellant**
Ms V. Tosokiwai for the 1st Respondent
Ms Raman for 2nd, 3rd and 4th Respondents

Date of Hearing : **11th November, 2024**

Date of Judgment : **28th November, 2024**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading on draft the judgment of Qetaki, JA and agree with the conclusions and orders.

Qetaki, JA

Background

[2] The Appellant/Original First Defendant is challenging the Ruling/Orders of the High Court (per Seneviratne, J) delivered on 20th day of October 2023.

[3] In an Ex-Parte Summons filed in the High Court by the 1st Respondents/Original Plaintiffs, which was converted to Inter-Parte Summons, the following reliefs were sought:

1. *That the First Defendant be restrained from dealing with or disposing of wholly or in part any or all the land known as Crown Lease No.27554 and Crown Lease No. 27445.*
2. *That notwithstanding the above, the Second Defendant be restrained from giving any consent to any dealing in respect of Crown Lease No. 27554 and Crown Lease 27445.*
3. *That the Third Defendant be restrained from registering any dealing in respect of Crown Lease No. 27554 and Crown Lease 27445 either wholly or partially.*
4. *That the injunctions (1) – (3) above remain enforceable until the final determination of the substantive case.*
5. *That the Court may impose any additional order as it deems fit in the circumstances of the matter.*

[4] A substantive Summons was filed by the 1st Respondents/Original Plaintiffs seeking the following reliefs:

- (a) The First defendant had fraudulently subdivided crown Lease No.27445 & Crown Lease No. 27444 without the consent of the Plaintiffs.

- (b) The First defendant had breached his duty as the Trustee & Executor of the Estate of Abdul Aziz (a.k.a) Abdul Haziz.
- (c) Addul Sarif to be appointed to be the Trustee & Executor of the Estate of Abdul Aziz (a.k.a) Abdul Haziz.
- (d) To remove the First Defendant as the Executor & Trustee of the Estate of Abdul Aziz (a.k.a) Abdul Haziz.
- (e) To provide an account/statement of account of the Estate of Abdul Aziz (a.k.a) Abdul Haziz at all material times he was the Executor and Trustee.
- (f) To be restrained from disposing of any asset of the Estate.
- (g) Further or other relief(s).

[5] The Orders that the learned High Court judge made restrains the Appellant/First Defendant from dealing with or disposing of wholly or in part any or all the land known as Crown Lease No. 27554 and Crown Lease No. 27445, which was relief (1) sought in the application for the grant of injunction, dated 2nd May 2023, as set out in paragraph [3] above. This appeal seeks to have that order set aside, although, it is noted that the Notice of Appeal “*be set aside*”.

Facts

- [6] The Appellant and 1st Respondents are brothers. The deceased is their father, who died on the 24th February 1973 intestate. The Letters of Administration was granted to their mother, the wife of the deceased, on the 9th of November 1973.
- [7] Their mother died on the 13th of February 1998 and Letters of Administration De Bonis Non was granted to the Appellant (Abdul Saiyub) and his brother Abdul Samad. Now Appellant remains as the surviving Administrator of the Estate of the said deceased due to the death of Abdul Samad.

- [8] The Estate property comprised in Approval Notice LD 4/7/2012, for a period of 10 years commencing from 1st April 1973, containing 11 acres. This was at all times an Agricultural Lease for agricultural use and purposes only.
- [9] The deceased wife applied and obtained an extension of the said Agricultural Lease, which extension was granted on 15 December 1984 for a term of 20 years with effect from 1st April 1983, containing at least 10 acres.
- [10] The Appellant as Administrator in the Estate of the deceased got the Lease renewed for a period of 30 years.
- [11] After another extension, the Appellant has now re-zoned a portion of the Estate land to Tourism Lease containing 2.907 hectares or 7.183 acres. The said Lease is issued in the name of the Estate and the balance also remains in the name of the Estate. Both Leases are in the name of the Estate.
- [12] The Appellant had disclosed that he has now entered into a Sale and Purchase agreement for the sale of the Estate land comprised in Tourism Lease No. 27444 for the sum of \$1,200,000. He had also deposed that he was of the view to sell the rezoned portion and distribute the sale price amongst the beneficiaries of the Estate. The Appellant has complained that the first 3 Respondents all reside abroad and do not contribute to the cultivation of sugar cane, as they have officially migrated from Fiji.
- [13] The Appellant had surrendered the Estate Lease and obtained State Lease 27444 for Tourism purposes in the name of the Estate, not himself.

Discussion

High Court Ruling dated 20th October 2023

- [14] In his Ruling, the learned judge sets out the law on injunctions, and states that it is an equitable remedy granted at the discretion of the court. The power which the court

possesses to grant an injunction should be cautiously exercised only on clear and satisfactory grounds.

[15] The learned judge stated that an application for injunction is an appeal to an extraordinary power of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise: **Hubbard & Another v Vosper & Another** [1972] 2 QB 84, **American Cyanamid Co. v Ethicon Ltd** [1975] 2 WLR 316, [1975] AC 396, where Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as leading source of the law on interim injunctions. They are:

- (i) Whether there is a serious question to be tried at the hearing of the substantive matter;
- (ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and
- (iii) In whose favour the balance of convenience lie if the injunction is granted or refused.

[16] The learned judge referred to **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523, per Kerr LJ at 534, which said at page 534,

“It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunction when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket..... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues can only be resolved by a trial.”

[17] The learned judge also referred to the case, **Series 5 Software Ltd v Clerk and Others** [1996] 1 All ER 853, where, the court after considering the decision in **American**

Cyanamid and other authorities held that: In deciding whether to grant interlocutory relief, the court should bear the following in mind:

- (1) *The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.*
- (2) *There are no fixed rules as to when an injunction should or should not be granted. The rule must be kept flexible.*
- (3) *Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed facts and law.*
- (4) *Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.*

[18] The learned judge stated that the First Plaintiff (Abdul Sarif) in his Affidavit in Support alleges that the First Defendant (Abdul Saiyub) has breached his duties as the Trustee and Executor of the Estate of the deceased, as follows:

- (1) The 1st Defendant failed to seek consent from the First Plaintiff and the other beneficiaries before he had subdivided the Crown Lease into residential lots.
- (2) The 1st Defendant did not inform the 1st Plaintiff and the other beneficiaries that a tenant is renting in his late brother's property, and he was collecting rental income from it. He has also not provided any account of the estate.
- (3) The 1st Defendant had also sold the sugar cane equipment that were not equally distributed to the rest of the beneficiaries.
- (4) On 17th of April 2023, when the Plaintiff went to the estate with Police Officers the 1st Defendant had chased them away using vulgar words.
- (5) The 1st Defendant and his son had told the Plaintiffs that the property did not belong to them and that they have no right or interest in the estate.

[19] The learned judge noted that:

- (a) 1st Defendant had admitted in the affidavit in response that he has rezoned the land and portion of the agricultural land had been converted into a tourism land and he has entered into a sale and purchase agreement to sell that part of the land for \$ 1,200,000.
- (b) 1st Defendant had entered into the Sale and Purchase Agreement without informing the other beneficiaries. He states in the affidavit that he could not sell the land and proceed to settlement as the Director of Lands the 2nd Defendant did not consent to the transfer.
- (c) It is clear from the affidavit evidence of the 1st Defendant that there are serious issues involving the rights of the beneficiaries of the estate, to be determined at the hearing of the substantive matter.
- (d) The learned judge also stated that it is important to note that if the property is disposed by the Defendant, before the substantive matter is determined, the entire action would be rendered nugatory and damages would not be sufficient remedy.
- (e) Injunctive orders sought against 2nd and 3rd Defendants who are public officers must necessarily fail under section 15 (2) of the State Proceedings Act 1951.

[20] The learned judge also ruled that the courts are restrained from granting injunctions against the State in line with section 15(2) of the State Proceedings Act.

Grounds of Appeal

[21] There are nine (9) grounds of appeal as follows:

Ground 1: That the learned judge erred in law and in fact in granting the interim injunction as there was no permanent relief for an injunction sought in the statement of claim filed by the 1st Respondents.

Ground 2: That the learned judge erred in law and in fact in granting the interim injunction when there was no appropriate undertaking as to damages proffered by the 1st Respondents in favor of the Appellant.

Ground 3: That the learned judge erred in law and in fact in holding that the Appellant as the Surviving Executor & Trustee of Abdul Aziz (a.k.a) Abdul Haziz was required to obtain consent from the 1st Respondents to subdivide the land comprised in State Lease No. 16340 into Estate land comprised in State Lease No. 27444 and State Lease No 27445 and sell the same.

Ground 4: That the learned judge erred in law and in fact in holding that the principles as prescribed in **American Cyanamid v Ethicon Ltd**, for the granting of an interim injunction should not be construed as the substantive law of interim injunction however, thereafter went on to apply the same principles as applied in **American Cyanamid v Ethicon Ltd** and find that there were serious questions to be tried and failed to consider the balance of convenience and the lack of undertakings as to damages proffered by the 1st Respondents.

Ground 5: That the learned judge erred in law and in fact in granting the injunction when the 1st Respondents were guilty of delay in bringing the proceedings before the High Court.

Ground 6: That the learned judge erred in law and in fact failed to consider that the interests of the 1st Respondents in the Estate of Abdul Aziz a.s.a Abdul Haziz is in the residue of the Estate.

Ground 7: That the learned judge erred in law and in fact by failing to consider the section 11(1) and (3) of the Succession, Probate and Administration Act provide the Appellant with a power of sale.

Ground 8: That the learned judge erred in law and in fact by failing to consider that none of the 1st Respondents reside on the Estate land comprised in State Lease 16340 and do not cultivate the same and more significantly did not consider that;

- (i) The 4th named 1st Respondents interest was assigned to the Appellant in persona propria and,

(ii) The 1st, 2nd and 3rd named 1st respondents reside abroad out of the jurisdiction of this Honourable Court and do not farm the Estate Land for Agricultural purposes.

Ground 9: That the learned judge erred in law and in fact when the High Court failed to consider that the substantive application filed by the 1st Respondents was only for removal of the Appellant as Administrator of the Estate of Abdul Asziz a.k.a Abdul Haziz, accounts and issues pertaining to farm equipment.

Case for the Appellant

[22] **Ground 1:** The appellant submits that the interim injunction relief was sought in isolation as the Statement of Claim did not seek the interim injunction by way of relief in their Writ of Summons. (Sought by way of relief in their writ of Summons, and the injunction). The relief sought is not supported by the claim. Under the circumstances, the 1st Respondents could not maintain an application for an interim injunction: In **David Conrad Peterson v Christine Badia Nkanka** HC HBC224 of 2020, the High Court declined the interim injunction on that basis. It was submitted that the application for interim injunction ought to have been refused. At paragraph 32. It was held :

“32. The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim”

33. How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that have been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application should have been rejected in limine.”

[23] **Grounds 2, 4 & 9:** These grounds are related/connected. The Appellant submits that, there was no appropriate undertaking as to damages given by the 1st Respondents, (as to

ground 2). The ground is related to grounds 4 and 9. The learned judge did not rule on this issue which was raised as a preliminary issue. He held that the principles enunciated in **American Cyanamid Co. v Ethicon Ltd** (supra) must not be construed as substantive law on interim injunctions, and later held that, “*From the affidavit evidence it is clear that there are serious issues involving the right of the beneficiary...*” It is submitted that the Court should not have confined itself to whether there are serious question to be tried issue, but go further and apply the remaining requirements on whether there is an adequate undertaking for damages and, where the balance of convenience lies., that is, in applying the test, the court must go further and apply the other requirements of the test. It should weigh the balance of convenience and also consider whether the appropriate undertaking as to damages has been given. It is submitted that the issues of whether there is a serious issue or question of law to be tried cannot be treated in isolation. So, when the court assesses that there is a serious question to be tried, the court would assess whether damages would be an adequate remedy also.

[24] It is submitted that the learned trial judge did not consider whether the 1st Respondents gave a proper undertaking as to damages. The Appellant was proposing the sale of the Estate property and was to distribute the proceeds as required. That the 1st Respondents’ interest is not in the land per say but the Estate. As such, the loss from the sale not going through would be borne by the Estate and a proper undertaking as to damages was to be given.

[25] The Appellant submits that the requirement for an undertaking in damages was considered in the case **Honeymoon Island (Fiji) Ltd v Follies International Ltd**, FJCA ABU0063of 2007, where the Court of Appeal discussed the importance of an undertaking as to damages and also the manner in which the undertaking needs to be given. The Court of Appeal stated that:

“[16] *Applicants for interim injunction who offer an undertaking as to damages must also proffer sufficient evidence of their financial position.*” *The court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy: **Natural Waters of Viti Ltd v Cristal Clear Mineral Water (Fiji) Ltd** [2004] ABU0011 at 12.*”

The Appellant submits that the undertaking as to damages proposed by the 1st Respondents by affidavit is not inappropriate undertaking when the sale worth \$1,200,000.00 of the Estate property is involved, for the benefit of the Estate.

[26] Further, it is submitted that the Appellant has the power to sell the Estate property under Section 11(1) and (3) of the Succession, Probate and Administration Act; Subsection (3) states:

“(3) An executor to whom probate has been granted or administrator, may, for the purposes of administration, sell or Lease such real estate, or mortgage the same, with or without a power of sale, and assure the same to a purchaser or mortgagee in as full and effectual a manner as the deceased could have done in his life time.”

[27] On the requirement as to where the balance of convenience lies, the Appellant submits that , the adequacy of damages and whether proper undertaking has been given needed to be examined against the statutory provisions of section 11 (2) and (3) of the Succession, Probate and Administration Act, the section which specifically bestowed the power of sale to the Appellant.

[28] Following on from the above, the Appellant further submits that, when the learned judge considered that there was a serious question to be tried as a fact, to consider whether to grant or refuse the injunction, the learned judge was required to consider:

- (i) Whether damages were adequate remedy under the circumstances,
- (ii) The balance of convenience, and
- (iii) Undertaking as to damages,

If the learned judge failed to do that, the appellant submits that, in that case, the injunction could not have been granted. That, taking all things into account, the substantive action did not relate at all to the sale of the Estate property. The Appellant submits that, the Writ that was filed was purely on removal of the Appellant as the Administrator of the Estate and accounts and in relation to the farm equipment. It is not about the Estate.

[29] Grounds 3, 6 and 7: These grounds are related closely as they relate to the rights and interests of the beneficiaries in the Estate, which are covered under sections 5 and 6 of the Succession, Probate and Administration Act. The Appellant submits that the interlocutory application for which the injunction was granted, and which is the subject of this appeal, relates to an Estate which needs to be distributed in accordance with the entitlements of the parties, more specifically the beneficiaries. That Section 11 (1) and (3) of the said Act provides for the power of sale. The Appellant submits that, there has been no alternative proposal on how the Estate land is to be utilized from the First Respondents. Also, the Appellant has added value to the Estate by the attainment of a Tourism Lease and finding a buyer for \$1,200, 000.00. As of now, the Estate remains unadministered. With reference to the 1st Respondents' complaints, the Appellant submits that the complaints made by the 1st Respondents' (see Statement of Claim) are without substance or evidence. They do not warrant a grant of an injunction. Also, only part of the farmland that has been subdivided and intended to be sold, not the family home location. There has been no proper pleading to support the allegation/claim of fraud: **Phul Kuar and Others v Rajend Singh, SCFJ** CBV 0017 of 2018.

[30] Ground 5: The Appellant submits that the 1st Respondents sought the injunction to stall the sale of the Tourism Lease, and it is submitted that the injunction was granted on the 11th hour, as the negotiations on the sale was progressing well, it stalled the sale. The Appellant submits that, none of the beneficiaries had sought the administration of the Estate for some time, until after 2000 when the Appellant was appointed Administrator. It appears that the parties were content with the administration of the Estate, and they did nothing while the Appellant rezone to Tourism the Agricultural Use, which took a number of years. That could be taken as "*acquiescence*" to the act and mode of distribution of the Estate by the Appellant: **De Bussche v ALT** 1874-1880 All ER 127 at page 1253. The Appellant holds the statutory power of sale in any event under section 11(3) of the relevant Act. The evidence suggests that that there is substantial delay in the making of an application for an injunction, and the appellant has been administering the Estate since 2000. Also the Appellant submits that there is no evidence advanced by the 1st Respondents that they had been dissatisfied with the running of the Estate so far.

[31] On Ground 8: The Appellant submits that this ground could be considered together with the assessment of the balance of convenience (that is under Ground 4) in granting an injunction. The 4th named 1st Respondents (Jairul Nisha) had assigned her interest as contained in a Family Deed (page 52, Vol1 of record). She has no locus to bring the proceedings. The other 1st Respondents are all residing out of the jurisdiction of the Court. Section 7(c) of Act requires that a person appointed must be a resident in Fiji. All of the Respondents (except the 4th named Respondent who has renounced her interests), reside permanently abroad, and are not entitled to be appointed as Administrator.

[32] Finally, the Appellant submits that the High Court had erred in law in restraining the sale of the Estate property as the power of sale is contained within the Act and also the interest of the 1st Respondents are on the residue of the Estate which is established at the distribution of the Estate.

Case for the 1st Respondents

[33] Ground 1: The 1st Respondents submit that the reliefs sought in the Statement of Claim clearly states the permanent relief sought is to restrain Appellant from disposing off any assets of the estate.

[34] In response to Grounds 2, 4 and 9, the First Respondents submit that;

- (a) There are exceptional circumstances where the Court may waive undertakings as to damages, if there is urgency to prevent harm (such as preventing the destruction of property or violation of rights) , the plaintiff may apply for an interim injunction , which may be granted without an undertaking, depending on the circumstances (see **Tagivetaua v Vakacegu** [2020] FJHC 457;HPP 18.2020 (25 June 2020),**Pillay v Rokosuka** [2019] FJHC 318; HBC30.2019 (5 April 2019), and **National Australian Bank Ltd v Bond Brewing Holdings Ltd** [1991] Vic Rp 31; [1991] 1 VR 386 (3 April 1990).
- (b) That the court has discretion to grant injunctions in situations where it feels it is just and equitable to do so, even without an undertaking as to damages. The Appellant has already entered to a Sale and Purchase Agreement with a

purchaser of Crown Lease 27444 for personal gain without even considering the beneficiaries. The Appellant will not be at loss. That the appellant's promises and statements made by him about the distribution of the monies has only surfaced in the courts when he knows what he was doing is wrong.

[35] Grounds 3, 6 and 7: It is submitted that;

- (i) The Appellant need to obtain the consent from other beneficiaries when dealing with Estate matters, as that will ensure that the interests of the beneficiaries are protected.
- (ii) That the 1st Respondents have certain rights, such as the right of information about the Estate, and the right to challenge the administrator's decisions if they believe their interests are not being protected; **Eugenio Tagliaferri v Lystra Allison Tagliaferri and Lisa Dianna Sawyer** [2013] WASC 321 (23 August 2013); contrasting with **Devi v Prasad** [2015] FJHC 141; HPP19.2014 (2nd March 2015) , and comparison to **Prasad v Prasad** [2023] FJHC 799; HBC165.2018(19 October 2023) at paragraphs 63, 97 and 98.
- (iii) The Appellant has a fiduciary duty to seek consent and inform the beneficiaries of the next steps he would take in administering the Estate.
- (iv) The Appellant had acted in serious breaches of his role as administrator, and has pursued personal gain. The 1st Respondents had not known about the Appellant's actions until he was chased by the Appellant and his son from the property. The 1st Respondents had conducted title search when they discovered that the Agricultural Lease was completely surrendered and two Crown Leases were issues on 6 March 2023 (one of which is an Agricultural Lease & the other is a Residential lot).
- (v) There are circumstances where beneficiaries' opinion may be taken into account, particularly when the Estate is being administered in a way that affects their interests. If a dispute arises regarding the administration of the Estate, for example, if a beneficiary objects to the action of the administrator, the court may be asked to intervene and resolve the issue: **Singh v Kuar** [2016] FJHC 792; HBC83.2008(6 September 2016) .

[36] Grounds 5 and 8: It is submitted that, under section 7(a) - (c) of the Succession, Probate and Administration Act, are categories of persons who can be appointed as an administrator, who, is to manage the deceased's estate, including distributing assets and paying debts in accordance with our laws. **Nizam v Shah** [2014] FKHC 218;

HBC47.2009 (28 March 2014), highlighted the primary consideration to remove/appoint an executor or a trustee. To be compared to Tagivetaua v Vakacegu (supra).

[37] Finally, the 1st Respondents submits that the grounds submitted by the Appellant are to be dismissed with costs.

Analysis

[38] The Estate of Abdul Aziz a.k.a Abdul Haziz who died intestate on 24th February 1973 has remained unadministered after 53 years and 2 days (to the date of hearing of this appeal), despite the fact that the Letters of Administration was first granted to the deceased's wife (also deceased), on the 9th of November 1973. The Appellant is the surviving Administrator of his deceased father's Estate after the death of his brother Abdul Samad, the co-Administrator of the Estate.

[39] This appeal emanated from the decision of the High Court, on an interlocutory application initiated by the Plaintiffs Ex-Parte but which was converted as an Inter-Partes application for an injunction as set out earlier in this judgment. The learned High Court judge had ordered in favour of the Plaintiffs, which Order is being appealed against, with the outcome that the First Defendant/Appellant be restrained from dealing with or disposing off wholly or in part any or all the land known as Crown Lease No. 27554 and Crown Lease No. 27445, the property of the Estate of the deceased. The Appellant's case are set out in paragraphs [22] to [32] above, and the case for the Respondents are outlined in paragraphs [33] to [37] above.

[40] Ground 1: The application for grant of injunction was made pursuant to Order 29 Rule 1 of the High Court Rules which state:

“An application for the grant of an injunction may be made by any party before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party

notice, as the case may be.” The Statement of Claim did not contain or seek a relief for grant of permanent injunction. The relief sought by the Plaintiffs are in respect of:

- (1) Allegation of fraudulent subdividing of Crown Lease No. 27445 and Crown Lease No.2445, without the Plaintiffs’ consent;
- (2) Breach of duty as Trustee and Executor of the deceased’s estate;
- (3) The Removal of the Appellant as Trustee and Administrator; etc.

[41] Grounds 2, 4 and 9. These grounds are connected. It is alleged that the learned judge was at fault in not considering that adequate undertaking as to damages is an essential requirement to be obtained from a party who seeks to apply for an interim injunction, and failure to consider such, in the exercise of the grant or otherwise of an injunction is critical. Lord Diplock, in **American Cyanamid Co v Ethicon Ltd** (supra) had said on this point:

“.....If, on the other hand, damages would not provide an adequate remedy for the Plaintiffs in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the Plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.”

[42] The purpose of an undertaking is to provide the person seeking injunction, with security against losses as recognized in **Wakaya Limited v Kenneth Chambers and Marsha Nussbaum** [2012] FJSC 9; CBV 0008.2011, a case where the essential requirements of obtaining an undertaking was overlooked by the High Court, before granting an injunction. The Supreme Court stated:

“36.....But the risk is now so well known, as the question of damages has to necessarily await the conclusion of the trial in the High Court. If in the High Court the Petitioner fails, then in addition to any other relief, it will be obliged to make an order for damages against the Petitioner for the loss, if any, that was sustained, as a result of the grant of an injunction by the High Court.”

[43] Commenting on the requirement for the undertaking in damages, Jameel, JA in **Gounder v Padayachi** [2022] FJCA 16; ABU 109.2016, ABU 122.2016; ABU2017 (4th March 2022), stated:

*“104. My understanding of the ratio in **Wakaya** (supra) in regard to obtaining an undertaking in damages from the Plaintiff, is to put him on notice should it turn out at the conclusion of the trial that he was not entitled to a quia timet application, he bears the risk of the defendant being entitled to damages, however; that too would be only after the latter has established such right, at the conclusion of the trial. The preponderance of authority is however that, obtaining this undertaking is a matter of discretion of the trial judge.....” (Underlining is for emphasis).*

[44] While the rights and interests of the beneficiaries to the assets of the Estate being administered by the Appellant is recognized, it is also important to bear in mind that, the Administrator of the deceased Estate has a statutory role and responsibilities to which he is accountable under law. The Succession, Probate and Administration Act, regulates/ controls the conduct of the Administrator of the deceased’s Estate. Paramount to the role and duties is to ensure that the deceased’s Estate is effectively administered under law, for the benefit of the Estate and the beneficiaries. That is why, the said Act entrusts and empowers the Administrator of the Estate with certain duties and “powers”, to assist the Administrator carry out his/her statutory duties and responsibilities. In this case, one such duty is to invest and ensure that the value of the Estate does not diminish but to grow as the Administrator is duty bound to distribute the proceeds to each beneficiary, in accordance with the provisions of the said Act. The requirement for an undertaking as to damages is critical to the Estate for the reason that the Administrator’s work in enhancing

the Estate Property value would suffer, when he is not permitted or is restrained, from continuing the commendable work in enhancing the value of the Estate for enhancing the share in the distribution to beneficiaries after all accounts are settled.

- [45] In this case, the sale that has been negotiated has consideration of \$1,200,000.00, and an undertaking must be of an amount that would be sufficient to maintain the Lease value, such that the property value and attractiveness in the Tourism Property Market does not deplete, to the detriment of the Estate and likewise the beneficiaries. In **Honeymoon Island (Fiji) Ltd v Follies International Limited**, FCA ABU0063 of 2007, the Court of appeal discussed the importance of an undertaking as to damages and also the manner in which the undertaking needs to be given. This Court stated:

*“[16] Applicants for interim injunction who offer an undertaking as to damages must also proffer sufficient evidence of their financial position,” The court needs this information in order to assess the balance of convenience and whether damages would be adequate remedy.” **Natural Waters of Viti Ltd v Cristal Clear Mineral Water (Fiji) Ltd** [2004] ABU0011 at 12.”*

- [46] The Administrator is empowered to sell the estate property under the power of Sale conferred under section 11 (1) and (3) of the Succession, Probate and Administration Act., subsection (3) states:

“(3) An executor to whom probate has been granted or administrator, may, for the purposes of administration, sell or Lease such real estate, or mortgage the same, with or without a power of sale, and assure the same to a purchaser or mortgagee in as full and effectual a manner as the deceased could have done in his life time.”

In carrying out an assessment of the adequacy of damages and whether proper undertaking has been given, it may be helpful for a court exercising a discretion in the context of an application of interim injunction against an Executor or Administrator of an Estate, to have regard to the role, duties, and responsibilities, and accountabilities of such

positions and the objects and purpose of having appointment made by the High Court for individuals to be Executor and Administrator. The grounds have merit and is allowed.

[47] Grounds 3, 6 and 7: The 1st Respondents as beneficiaries of the Estate have a right to raise their grievance with regard to the administration of the deceased's Estate. If the grievance is serious, they have the right to seek the intervention of the courts. The Succession, Probate and Administration Act provides avenues which empower the beneficiaries to take their grievances to court. The 1st Respondents are of the view that they ought to be consulted, and their consent should be obtained, when the Administrator deals with Estate matters, as that will ensure the interests of the beneficiaries are protected. It is submitted that it is a right of the beneficiaries to receive information about the Estate, and the right to challenge the decisions of the Administrator, if they believe their rights are not adequately safeguarded.

[48] The 1st Respondents are aggrieved by the steps being taken by the Administrator in obtaining the approval of the relevant authorities to rezone part of the existing Agricultural Leasehold from Agricultural Use to Tourism Lease, and a portion as to remain as Agricultural with a Residential site. However, as alluded to earlier, the Administrator is appointed under an Act and has duties and responsibilities, a major one of which, is to ensure the Estate is distributed in accordance with the Act to the beneficiaries. The rights and interest of the beneficiaries are provided for in sections 5 and 6 of the Succession and Probate Act. As a trustee of the assets of the Estate the Administrator is also subject to a certain measure of control under the Trustees Act.

[49] It is apparent also that the injunction sought by the 1st Respondents, and granted in the High Court, which is the subject of this appeal, relates to an Estate which needs to be distributed in accordance with the entitlement of the parties, more specifically the beneficiaries. The Appellant has done much to add value and enhance the assets of the Estate, no doubt for the benefit of the beneficiaries. With the rezoning of the Agricultural Lease to a Tourism Type Lease, enormous financial benefits will accrue to the Estate,

which the beneficiaries will benefit from. Meanwhile, the Administrator is empowered to sell the Lease. The Grounds have merit. They are allowed.

[50] Ground 5: The record suggests that there were no issue arising relevant to the administration of the deceased's Estate for quite some time, since the appointment of the Appellant as the Administrator in 2000. It would appear that the move to destabilize the Administrator arose suddenly, due mainly to the progress being made in the conversion of part of the Agricultural Lease, on rezoning to be zoned Tourism Lease, with the approval of the Rural Local Authority and the Director of Lands. Otherwise, the Administrator's work in the Estate was not challenged. It would appear that the beneficiaries /1st Respondents acquiesce to the act and mode of distribution of the Estate by the Appellant. As such, it would appear that there has been substantial delay in the Respondents taking the step to issue a Summons to challenge the Administrator of the Estate and to seek an injunction to stall his progress, in particular to obstruct the effort of the Administrator to sell the Tourism Lease. These Grounds have merit. They are allowed.

[51] Ground 8: One must be qualified to be appointed as an Executor or Administrator of an Estate to exercise the statutory powers, duties and responsibilities conferred under the Act. There are good and sound reasons why the qualifications are set out under statute, including the accountability, and the public interest considerations. These can be considered when looking at the question, of where the balance of convenience lies. In this case, it would appear, and there is no evidence to the contrary, that the Appellant's assessment is to be accepted, that all of the Respondents do not qualify to be appointed as Administrator, should the Appellant relinquish his appointment for some reason. The Appellant contends that the 1st Respondents do not qualify to be appointed as Administrator, as:

- (i) The 4th named 1st Respondents interest was assigned to the Appellant in persona propria. She assigned her interest via a family Deed which is at page 52, Volume 1 of the record as exhibit 5 to the Affidavit of the 1st respondent filed in support

of the application for injunction in the High Court on the 2nd may 2023. She has no locus.

- (ii) The 1st, 2nd and 3rd Named 1st Respondents reside abroad out of jurisdiction from the Court and they do not farm the Estate land for Agricultural purposes.

[52] Section 7(c) of the Succession, Probate and Administration Act, provides :

“7. The court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being not less than 21 years of age -

(a).....;

(b).....;

(c) any other person, whether a creditor or not, if there is no person entitled to a grant under paragraphs (a) and (b) resident within the jurisdiction and fit to be so entrusted, or if the person so entitled as aforesaid fails, when duly cited, to appear and apply for administration.” (Underlining is for emphasis)

This Ground has merit It is allowed.

Conclusion

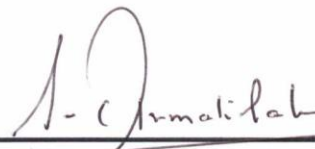
[53] In the light of the discussions and taking account of the submissions of the parties and all the circumstance of the appeal, and the law, I allow the appeal

Winter, JA

[54] I agree with the conclusions and proposed orders.

Orders of Court:

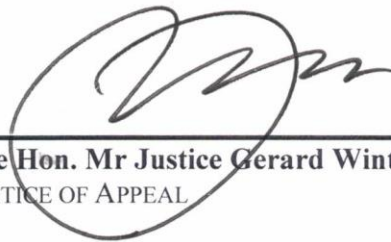
1. *Appeal is allowed.*
2. *Order 1 sought in the Summons filed on 2nd May 2023 and granted, is set aside.*
3. *That Orders (2) and (3) sought in the Summons filed on 2nd May 2023 and refused, are set aside.*
4. *The First Respondents to pay costs to the Appellant in the sum of \$5,000.00, and to be paid within 21 days of this judgment.*



The Hon. Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL



The Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL