IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CIVIL JURISDICTION]

CIVIL ACTION NO : 155 OF 2009

BETWEEN : **BRETT WILLIAM WHITTAKER** and **LOUISE WHITTAKER,** both of Unit 204, Golf Terrace, Denarau Island, Fiji.

PLAINTIFF-APPLICANTS

AND : **NATIONAL BANK OF FIJI LIMITED TRADING AS THE COLONIAL NATIONAL BANK,** a company incorporated in the Fiji Islands with its registered office at Level 10, Central Building, Cnr Renwick and Pratt Street, Suva.

DEFENDANT-RESPONDENT

Counsel

Mr Peter Lowing with Mr N Vakacakau for Plaintiff-Applicants

Mr Jon Apted for Defendant-Respondent

Date of Hearing : 05 April 2013
Date of Judgment : 08 May 2013

I N T E R L OC U TO RY J U D G M E N T

1. The plaintiff-applicants (the plaintiffs), by an amended Notice of Motion dated 19November 2012, are principally seeking interim injunctions to restrain:

   (i) The defendant-bank, its officers, solicitors, servants and agents from taking any steps to act upon or in furtherance of the exercise of any of the powers referred to in documents purporting to be Notices addressed to the Plaintiffs dated 4 June 2009 and 22 August 2009 including advertising and sale of any land being the land described in certificate of title number 35941, Lot 3, DP 9135, Sovereign Quays, Denarau, Nadi (the ***Land***);

   (ii) The defendant-bank, its servants or agents, pursuant to Sections 145 and 147 of the *Commerce Commission Decree 2010 (as amended),* from, howsoever, dealing with any of the Land or part thereof (including but not limited to) selling the Land, foreclosure or appointment of a Receiver/Manager over the Land: and,

   (iii) The defendant-bank, its servants or agents from, howsoever, exercising any power of sale or any of its powers as first mortgagee over the Land or part thereof (including but not

limited to) selling, foreclosure or appointment of a Receiver/Manager or in anyway whatsoever over the Land.

2. The motion is supported by affidavits of Mr Brett Whittaker, the first plaintiff, dated 9 August 2012 and 17 September 2012.The essence of the contents of the affidavits is such that Mr Whittaker had met with Mr Ajay Singh, formerly of the defendant-bank, on 28 June 2010 where he [Me Whittaker] had engaged in a conversation, which was surreptitiously recorded by Mr Whittaker on a hidden device. The transcribed version of the conversation is annexed as 'A' to the affidavit dated 09 August 2012. Similarly, Mr Whittaker had met with Mr Singh on 06 July 2010, 08 July 2010 and13 September 2010 where the contents of their conversations were again stealthily recorded on the hidden device, of which the transcriptions are annexed as 'B', 'C' and 'D' to the affidavit. On 22 October 2009, Mr Whittaker had met with Ms Jasmine Khan, formerly of the defendant-bank, and the wife of Mr Singh, whose conversation, too, was recorded on the device and its transcription is marked as 'E'.

3. Based on the contents of the transcribed conversations, Mr Whittaker has made complaints to police pursuant to which, Mr Singh appears to have been now charged before the Magistrate's Court in Suva for making a contradictory statement on oath under Section 185 of the Crimes Decree No 44 of 2009 (Annex 'I').

4. Mr Whittaker states that the defendant-bank, having *inter alia* relied on the affidavits sworn by Mr Singh when he was in employment with the defendant, got an interim-injunction in plaintiffs' favour conditional by requiring the plaintiffs to pay a sum of $ 400,000.00 to court.

5. Mr Whittaker further deposes that the plaintiffs were not able to conform to the condition imposed by this court for extension of the interim injunction; and, upon the dissolution of the interim-injunction, the defendant-bank was taking steps from March 2012 to sell the property.

6. The defendant-bank has filed a response by way of affidavits from Mr Lawrence Munia, its Head of Corporate and Commercial, and Mr Kevin Yuen, its Manager/Recoveries, sworn on 28 August 2012 and 04 September 2012 respectively. Mr Munia specifically states that he was unable to identify a matter in annexes 'A'-'D' where Mr Singh attributes falsity, untruth or inaccuracy in the affidavits that Mr Singh had earlier sworn for the defendant-bank.

7. It is common ground that the plaintiffs got an *ex parte* interim-injunction on 31 August 2009 restraining the defendant-bank from proceeding with a sale of the land on the same grounds as they now seek in the present application. The only difference between the present and the previous application is the reference to the Commerce Commission

Decree of 2010, which, however, has not been shown to be of any significance insofar as the current application before me is concerned.

8. After an *inter-partes* hearing into the extension of the interim-injunction, Inoke J. of this court ordered, in a comprehensively reasoned-out judgment dated 09 December 2009, that the interim-injunction was only to be extended if the plaintiffs paid into court a sum of $ 400,000.00 before 4.00 p.m. on 01 March 2010. This was how Inoke J. concluded:

> *Taking all these factors into account, I think the continuation of the current injunctions should be conditioned on the Whitakers minimizing the Bank's exposure. I think they should pay into Court the deficit in value between the Bank's exposure and the securities of $264,000. As well I think they should also pay a whole year's interest of $140,000. Rounded down, they should pay the total sum of $400,000. I will give them 3 months to pay this amount into Court otherwise the injunctions will be lifted automatically.*

(Paragraph 47)

9. The plaintiffs, admittedly, did not conform to that order. They do not appear to have taken any other step either against the order for almost three years until they chose to re-litigate the issue of injunction after the long hiatus. The only basis upon which the plaintiffs re-agitate their plea for injunctions is that, what Mr Ajay Singh had deposed to then could not have been true, on the basis of what Mr Whittaker had heard in the course of conversations as transcribed in annexes 'A'-'D' and 'E'.

10. There is indeed no material before me to find that Mr Singh had deposed matters on oath in his affidavits in 2009, which materially contributed to persuade Inoke J. to make the *ex parte* injunction conditional after the *inter partes* hearing on 2-3 December 200; and, such affidavits are demonstrably untrue in light of the contents of 'A'-'E'. Inoke J., instead, considered the affidavits of the plaintiffs and ruled in their (plaintiffs) favour when his Lordship concluded:

> *I think the nine affidavits filed in this application disclose that the Plaintiffs have a claim that is not frivolous or vexatious. The conflicting evidence cannot be resolved by me on the affidavits. If I were to accept the Plaintiffs evidence as deposed to in their affidavits, I think they have some prospect of obtaining a permanent injunction at the trial. According to principle therefore, the Plaintiffs should be given the benefit of testing their case in a hearing. As was said in Cyanamid:*

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

(Paragraph 17: footnote omitted)

11. Therefore, the plaintiffs' contention that, Mr Singh's affidavit could have impacted the order on 09 December 2009, absolutely bears no merit. Instead, Inoke J. considered overall cases of each party at the *inter partes* hearing as his Lordship concluded on 09 December 2009 as follows:

> *[41]However, this is a case outside the Inglis general rule because of the claim for equitable set-off. The Plaintiffs ability to obtain a permanent injunction rests primarily on the success of that claim and the quantum of damages. The Plaintiffs claim in their Statement of Claim "equitable damages including expectation damages in the sum of $5.589m". The initial loan facility was for $3.5m. So the Whittakers are claiming that they can prove expectation damages of $2m. It is too early at this stage to gauge whether such an amount can be proven at trial and it may well be much less than the amount owed to the Bank.*
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> …
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> *[46] [Learned counsel for the plaintiffs] now concedes that the plaintiffs claim will have to be amended. That will take some months depending on how quickly he files and pursues the application to amend. The Court diary is just about full for next year. It is more likely than not that it will take a year before this matter goes to trial.*

12. It is, therefore, clear that the plaintiffs are re-agitating a claim for injunctions with no acceptable basis. The application of the plaintiffs, in the circumstances, is nothing more than re-litigation of a cause that has already been decided upon by this court.

13. As regards the desirability of re-litigating a matter, it was held in ***Brimaud v Honeysett Instant Print Pty Ltd***(1988) 217 ALR 44 at 46, that:

> *Interlocutory orders, of their very nature, create no res judicata or estoppel, and the court retains jurisdiction to set aside, vary or discharge an interlocutory order up to the time of the final disposition of the proceedings. However[,] the general rationale of the principles [of res judicata and estoppel] applies even in the case of interlocutory orders. It would be conducive to great injustice and enormous waste of judicial time and resources if there were no limit on the power of a party to have any interlocutory application or order re-litigated at will.*

14. The parameters for re-litigation of an interlocutory matter are well settled. In ***Chanel Ltd v F W Woolworth & Co Ltd and Others*** [1981] 1 WLR 485 at 492-3, the English Court of Appeal held that:

> *Even in interlocutory matters, a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter.*

15. This court needs to be receptive to the above principles as reinforced in ***Ajimat Ali v Merewai M Raniga*** [1996] 42 FLR 182. These principles are decisively relevant in the context of the series of applications, one after the other, for interlocutory inunctions in this case by the plaintiffs. In *Ajimat Ali*, Lyons J. held at pp.185-186 as follows:

> *As I have said the application before me is now substantially the same as the other applications in that it seeks the same practical relief. On reading all of the material, there is no suggestion that there has been a material change of circumstances or the discovery of new evidence. In fact, the affidavit in support of the application now before the Court substantially repeats previously raised allegations.*
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> *To allow the application now before me to continue would be 'a scandal to the administration of justice (as per Lord Halsbury in Reichel v Magrath (1889) 14 App. Cases at 668-9.*

16. I conclude that this application is nothing but an application to re-litigate an issue that has already been decided by this court. On application of the above principles, the

notice of motion of the plaintiffs for interim injunctions ought to be dismissed as there is no change of circumstances acceptable to court warranting their grant.

17. In coming to the above conclusion, I took serious notice of the mendacious conduct of Mr Whittaker in moving for injunctions on the basis of his affidavit dated 09 August 2012. Rather than establishing that Mr Singh was contradictory and unreliable, Mr Whittaker has proved himself to be untruthful as he had deposed an affidavit on 12 October 2012 before this court in this case stating that:

> *Between 5 July and 13 August 2010, I made numerous attempts to make contact with both Mr Singh and Mrs Khan by telephone and text message and drove to Suva on several occasions for the purpose of endeavouring to meet with them. All of those attempts were unsuccessful as neither of them would respond to my telephone calls or text messages.*

(Paragraph 7 of the affidavit dated 12 October 2010)

18. It is selfsame Mr Singh that Mr Whittaker now claims to have met on 06 July 2010 and 08 July 2010 and engaged in long conversations, which were recorded surreptitiously, and placed before court to advance his plea for interim injunctions. These contradictions in the assertions of Mr Whittaker inevitably make his (Mr Whittaker's) accounts untruthful and his conduct unreliable. On this ground alone, the plaintiffs are disentitled to any interlocutory injunctive relief.

19. In the circumstances, I dismiss the notice of motion of the plaintiffs dated 19 November 2012for interim injunctions. As the conduct of Mr Whittaker constituted an abuse of process for the reasons given in the foregoing paragraph, I am persuaded to order costs at a higher scale. I, accordingly, award costs in a sum of $ 4000.00 payable to the defendant-bank on or before 28 June 2013.

20. Mr Apted has raised many an issue in opposing the present plea for interim injunctions as he had done so previously. If they are considered by me again in the present application, I would be doing so at the expense of offending the principles on re-litigation of pleas for interlocutory relief as set-out above. There is, indeed, no reason for me to do so especially in the absence of any meritorious grounds besides the unreliable conduct of Mr Whittaker.

21. Plaintiffs' notice of motion for interim injunctions dismissed. Costs awarded. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
08 May 2013