

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action HBC No. 245 of 2013

BETWEEN: Patrick John Jay
Plaintiff

AND: Rajendra Prasad a copy of the proposed subdivision of the land ka Jena
Naren Autar
1st Defendant

AND: Credit Corporation Fiji Limited
2nd Defendant

Appearances: Mr N.Nawaikula for the plaintiff
Mr K. Jamnadas for the first defendant
Mr Ritesh Naidu for the second defendant

Date of hearing: 7th October, 2013

JUDGMENT

1. The plaintiff has filed inter-parte summons seeking an interim injunction restraining the defendants and agents “*from selling, transferring or dealing with any property or chattels, including Hitachi Excavator Digger REG FQ 518*”, mortgaged under bill of sale by the first defendant to the second defendant” .
2. The affidavit in support of the plaintiff, refers to his affidavit in support of the originating summons and states further:
 - a) The first defendant agreed to sell an excavator(digger) to the plaintiff for a sum of \$ 58,000. The plaintiff paid the first defendant the sum of \$ 58,000.
 - b) The plaintiff persuaded the first defendant to transfer the digger to the plaintiff.
 - c) The first defendant signed the transfer forms. When the plaintiff went to the LTA, he found that the digger was mortgaged to the second defendant.
 - d) The first defendant made a fraudulent misrepresentation and deceived the plaintiff to pay him a sum of \$58,000.Copies of a memorandum signed by the first defendant

acknowledging the sum of \$58,000 and the plaintiff's statement of account are attached.

- e) The first defendant does not have "*cash on hand*" to repay this money.
 - f) The second defendant, has confirmed in his affidavit in reply to the originating summons, that the first defendant is indebted to the second defendant for \$74,352.74. The vehicle was mortgaged to the second defendant.
 - g) The plaintiff does not want the vehicle transferred to him. There is a danger that parts of the vehicle may be removed or "*sabotaged as the first defendant has previously done, to purposely extract money*".
 - h) The first defendant signed the LTA transfer. His signature was witnessed. He also stated on his letterhead, that he has sold the digger to the plaintiff .
 - i) The plaintiff states he gives the usual undertaking as to damages. The plaintiff states he is a permanent resident of Fiji and owns a NLTB lease.
3. The affidavit in opposition of the first defendant, provides that:
- i) The first defendant did not enter into a contract with the plaintiff, in respect of digger bearing registration number FQ 518, nor did the plaintiff pay him the sum of \$58,000.
 - ii) The plaintiff has not adduced any evidence to substantiate his assertion as regards the first defendant's financial circumstances . The plaintiffs' comments are scandalous.
 - iii) There is a registered bill of sale over the digger.
 - iv) The plaintiffs' claim is based on a forged contract and a pre-signed LTA transfer stolen from the first defendant's personal files in his office.
 - v) The first defendant will be severely prejudiced, if he is unable to deal with the digger. He would lose at least \$1,500 per week in profit, from the use of the digger and a considerable sum, if he is unable to deal with all his other business properties.
 - vi) The first defendant is unable to provide the financial records of his business, since his accounts book were stolen from his office. The plaintiff has since approached the Fiji Police Force and tried to lodge false claims against the first defendant. He produced the stolen book to them. The first defendant was shown copies of the book provided to the Police Force by the plaintiff "*and have confirmed them to part of the stolen accounts book*".
 - vii) The LTA transfer was a pre-signed document effected, in order that the first defendant's wife and/or daughter could easily and quickly transfer the digger to

themselves and carry on the business, in the event “*that something happened*” to the first defendant. The plaintiff had unsupervised access to his office daily and stole this document, in order to fraudulently transfer the property to himself.

- viii) The first defendant will suffer substantial loss and hardship, if an injunction is granted. The matter concerns a digger, but the plaintiff is seeking an injunction on all the first defendant’s assets. This is oppressive.
- ix) The plaintiff was able to purchase an NLTB lease, because the first defendant loaned him \$5000.
- x) The plaintiff is not entitled to work under his work permit, nor is he able to conduct business in Fiji as he does not have a foreign investors’ certificate.

4. The affidavit in answer of the second defendant provides:

- i) By a bill of sale registered on 17 April, 2013, made between the first and second defendant, the first defendant assigned the digger to the second defendant, by way of security for the payment of his loan.
- ii) The first defendant cannot sell or transfer the digger to the plaintiff or any third party, since the second defendant has a first registered bill of sale over this digger.
- iii) The plaintiff has wrongly sued the second defendant.
- iv) The second defendant is at liberty to exercise its powers of sale under its securities, if the first defendant defaults in the payment of his monthly instalments.

5. *The hearing*

5.1 Counsel for the plaintiff, Mr Nawaikula supported the case for the plaintiff. He relied on the tests laid down in the *American Cyanamid* case, (1975) 1 All ER 504 as applied by the courts in Fiji. He submitted that there is a serious issue to be tried, since the first defendant denies the contract as well as receiving the money. Damages, it was submitted is not an adequate remedy, since the first defendant has no assets. Finally, he submits that the balance of convenience is in favour of the plaintiff.

5.2 Mr Jamnadas, counsel for the first defendant in reply, submitted that:

- the interim injunction sought is in broad general terms. It is vague and oppressive.

- the plaintiff has made a bare assertion, with respect to his undertaking in damages.
- the plaintiff cannot conduct business in Fiji.
- the first defendant denies the entire claim of the plaintiff.
- the signature on the contract is not that of the first defendant.
- the transfer documents were stolen from the first defendant's office by the plaintiff, who had access to his office.
- the contract filed with the affidavit in support of the originating summons is not the same as the contract with the affidavit in support of the present application.
- there is no evidence placed by the plaintiff that the first defendant cannot pay back the sum alleged to have been paid to him.
- the second defendant has legal rights over the digger. An equitable right cannot supersede a legal right.

5.3 Mr Naidu, counsel for the second defendant, begged the question why the second defendant is being sued. There is no relationship between the plaintiff and the second defendant. The second defendant has a registered bill of sale over the digger.

5.4 Mr Nawaikula, in reply, reiterated that there is a serious issue to be tried, since the contract is denied. He submitted that a sufficient undertaking has been given by the plaintiff. Finally, Mr Nawaikula stated that no relief was sought against the second defendant.

6. *The determination*

6.1 The starting point of this dispute, as the plaintiff claims, is 16th July, 2012. According to a memorandum of that date written in manuscript, as produced by the plaintiff, the first defendant agreed to sell a digger bearing registration no FQ 518 to the plaintiff for \$58,000. The plaintiff had already paid \$ 11,700. The memorandum provides further that the digger will be transferred to the plaintiff, in January, 2013, or alternatively on another factor, which is illegible. This is followed by the signatures of the plaintiff and the first defendant.

6.2 The plaintiffs' case is that the first defendant signed the LTA transfer forms in his favour, pursuant to the contract between the parties, but refused to hand over the

digger to him. A bill of sale was registered in favour of the second defendant. The plaintiff alleges that the first defendant made a fraudulent misrepresentation and deceived him to pay \$58,000.

6.3 The first defendant contends that the contract was a forgery and his transfer form was stolen by the plaintiff. The matter is under investigation by the Police, as stated in a letter from the Nausori Police to the first defendant. Mr Jamnadas pointed out that the contract attached to the affidavit in support of the originating summons is not identical to the contract filed with the present application. I do find that the contract filed with this application has a postscript setting out payments made, which is not contained in the contract filed earlier.

6.4 In my view, the affidavits raise “*a conflict of evidence..having sufficient prima facie plausibility to merit further investigation as to their truth*” to quote Lord Diplock in *Eng Mee Young v Letchumanan*, (PC)(1980) AC 331 at 341. This is not the stage for an assessment of the strength of either case. As Lord Diplock stated in the *American 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 claim 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. (emphasis added)

6.5 Kerr J in *Cayne V Global Natural Resources plc*, (1984) 1All ER 225 at page 235 stated:

The test for the application of Cyanamid is therefore whether the case is one where the court can see that it is likely to go to trial at the instance of the plaintiffs, and whether the grant of an injunction is therefore appropriate or not, as a way of holding the situation in the interim. (emphasis added)

6.6 In *Pacific Timber Developments Ltd v NZ Forest Products Ltd*, (1994) 40 FLR 193 as cited in the written submissions filed by the first defendant, Fatiaki J (as he then was) found that the claim raised serious allegations of fraud which are incapable of being resolved without a trial.

6.7 The case before me presents serious allegations of fraud and deceit. The fact that the first defendant contends that the pivotal contract relied on by the plaintiff is a forgery and his transfer documents were stolen underscores that there is a serious issue to be tried. In my judgment, the first in the trinity of guidelines laid down by Lord Diplock in the celebrated *American Cyanamid* case, is satisfied.

6.8 Damages

6.8.1 Once the threshold of a serious issue is reached, then the merits of the case are generally not considered further. The court should go on, according to Lord Diplock “to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought”. The “governing principle” is “whether the plaintiff would be adequately compensated by an award of damages”. If damages would adequately compensate the plaintiff, if successful at the hearing, and the defendant could pay damages, no injunction should be granted.

6.8.2 In the present case, damages would provide an adequate remedy to the plaintiff. The question arises whether the first defendant can pay damages.

6.8.3 The plaintiff asserts that the first defendant has no “cash on hand”. This assertion is not substantiated, as Mr Jamnadas quite correctly points out.

6.8.4 But the first defendant has not met the plaintiff’s assertion and shown that he has assets, to meet an award of damages. The first defendant states that he has been unable to provide the financial records of his business, since his accounts book were stolen from his office. In the light of this assertion, I have grave doubts on the ability of the first defendant, to meet an award of damages.

6.8.5 Next, I consider the undertaking as to damages given by the plaintiff.

6.8.6 Lord Diplock in the *American Cyanamid* said :

the court should then, consider whether, on the contrary hypothesis that the defendants 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 plaintiff's undertaking as to damages.

- 6.8.7 Both counsel for the defendants pressed that the plaintiff's affidavit in support of the interim relief, contains a bare assertion that he owns a NLTB lease. But the first defendant, in his affidavit in opposition, avers that he loaned the plaintiff \$ 5000 as a part payment, to purchase this lease.
- 6.8.8 Albeit, the plaintiff has not provided the value of the lease, the first defendant would not suffer any loss under the restricted injunction that I have decided to grant, as discussed in paragraphs 6.9.3 and 6.9.4 below.
- 6.8.9 In all the circumstances, it is appropriate to proceed to consider the balance of convenience.

6.9 *Balance of convenience*

- 6.9.1 Lord Diplock stated that "***where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises***" (emphasis added).
- 6.9.2 His Lordship proceeded to state:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies.

6.9.3 An important consideration in this context, is the probable damages that the first defendant would suffer if the interim injunction is granted. In this regard, the defendant states that he would stand to lose \$ 1500 a week, if he is restrained from using the digger.

6.9.4 If an interim injunction is granted restraining the first defendant from selling or transferring the digger and the plaintiff finally fails in this action, the first defendant would not incur this loss. On the other hand, if the injunction is not granted, the plaintiff would have no remedy. In my judgment, the balance of convenience favours the plaintiff.

6.10 I would also consider the question of the overall justice of this case. The FCA in *Air Pacific Ltd v Air Fiji Ltd* (2006) FJCA 63 stated:

The two stages in American Cyanamid are not to be regarded as an inflexible process, and in the end the question is where overall justice lies: Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd, (1985)2 NZLR 140.

6.11 In my judgment, the overall justice of this case requires that the Court exercises its discretion and injunct the first defendant .

6.12 Mr Jamnadas submits that the interim relief sought is in broad general terms and extends to any property or chattels owned by the first defendant. I agree that the injunctive relief sought is widely cast. I would restrict the interim injunction to restraining the first defendant from selling or transferring the digger, until final determination of this matter.

6.13 ***The second defendant***

Mr Nawaikula submitted that no relief was sought against the second defendant. The second defendant's rights, as mortgagee under the bill of sale entered into with the first defendant, would not be affected under the interim injunction I grant.

6.14 ***Illegality***

One last point for consideration. Mr Jamnadas submits that the alleged contract is illegal and void, for the reason the plaintiff has resident status in Fiji, as disclosed in his affidavit. He is not entitled to work or conduct business in Fiji. A letter dated 3rd October, 2013, from *Investment Fiji* to the first defendant's solicitors

provides that the plaintiff is not registered with them and cannot conduct business in Fiji, under the Foreign Investment Act, 1999, and its amending act of 2004.

6.14.1 This point requires a fuller deliberation on the relevant activities prohibited under the legislation cited and the legal consequences thereof.

6.14.2 I would refrain from deciding this issue at this stage, as this could finally dispose this matter. In *NWL Ltd vs Woods*, (1979) 3 All ER 614 Lord Diplock qualified his decision in the *American Cyanamid* when he stated at page 625:

My Lords, when properly understood, there is in my view nothing in the decision of this House in American Cyanamid Co v Ethicon Ltd to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. American Cyanamid Co v Ethicon Ltd, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial. (emphasis added)

7. Orders

I make order as follows:

- a) The first defendant and its employees or representatives are restrained from selling or transferring Hitachi excavator digger reg. No. FQ 51, until the final determination of this action.
- b) The costs of this application are to be on a party to party basis as costs in the cause.

7th November, 2013

A.L.B. Brito-Mutunayagam

Judge