

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 123 of 2014

Between: Javier C Izquierdo and Expanse Superannuation Fund
Plaintiffs

And: International Wise Property Developments (Fiji) Ltd
First defendant

And: Grant Paul Cullen & Michelle Christy Cullen
Second defendant

Appearances: Mr G.O' Driscoll for the plaintiff

Mr S.Nandan for the defendant

Date of hearing: 30th June,2014

Judgment

1. By ex parte notice of motion and injunction, the plaintiffs sought the following orders against the first and second defendants, and a third party, added without the leave of Court:
 - a) *An injunction restraining the defendants from disposing, dealing with and/or removing from the jurisdiction of this Honourable Court all assets and monies owned and/or subject to the care custody and control of the 1st and 2nd defendants limited to the sum of \$150,000.00 or any other sum that this Court deems just and equitable.*
 - b) *The 1st and 2nd defendants do forthwith each disclose by affidavit the full value of their assets within the jurisdiction of this Court identifying with full particulars assets, their whereabouts and whether the same are held in their name or by nominees on their behalf together with the sums standing in such accounts as disclosed to be made by the 1st and 2nd defendants' and served on the plaintiff within 14 days of service of this order or as directed by the Court.*
 - c) *The 3rd defendant forthwith disclose by affidavit the details of proceeds received by him from the sale of any assets of the 1st and 2nd defendants within*

the jurisdiction of this Court identifying the sums standing in such accounts and serving the same on the Plaintiff's solicitors within 14 days of service of this order or as directed by the court.

2. The plaintiffs, in their statement of claim, state that the first of the second defendants carries on a residential home building business in Suva, named International Wise Property Developments(Fiji)Ltd. At the request of the first of the second defendants, the plaintiffs made several loans to the accounts of the first and second defendants, to provide the required foreign capital to the first defendant and upgrade the first plaintiff's ginger business in Lami. The loans were to be secured against the first defendant's excavator machine and the land lots belonging to the first of the second defendants in Bowen, Queensland, by way of his "Cullen Unit Trust". The first of the second defendants failed to issue the plaintiff with written security or carry out any works for the first plaintiff. The plaintiffs sought judgment for the monies advanced and several other reliefs.

3. The first plaintiff, in his affidavit in support of the injunctive relief, states:
 - a) It was agreed that any funds that the plaintiff gave to the second defendants directly or on behalf of the first defendant were the second defendants' liability and responsibility.
 - b) The plaintiff states that the monies were advanced on trust and secured against the first defendant's excavator machine financed by Credit Corporation (Fiji) Ltd, (Credit Corp) and also Mr Cullen's seven land lots in Bowen, Queensland.
 - c) The plaintiff details the several payments made to the first defendant, to Credit Corp and Mr Cullen's Australian bank account, all totalling a sum of FJ \$133,000. In particular, the plaintiff states that a sum of US\$45,000 was paid from his Expanse Superannuation Trust Account to Grant Paul Cullen Trust. This was to be transferred to the first defendant's bank account and paid to Credit Corp, as an instalment for the first defendant's machine. This was not effected nor did the first of the second defendants issue a written acknowledgment of surety against the machine, the other payments and his Bowen land titles.

- d) The first of the second defendants had falsely stated the level of equity in his property, when there is none.
 - e) The plaintiff was advised by Mr Cullen that the funds from the excavator machine sale were to be deposited on trust with Anthony Ho's trust account on 2 May, 2014.
 - f) The basis of the application of the plaintiff for interim relief is as follows:
 - (i) The absence of the proceeds of sale from Fiji will materially prejudice the recovery of monies owed to him. It is unnecessary and counterproductive in terms of costs to be expended to pursue the defendants in a foreign jurisdiction.
 - (ii) The defendants have assets in the jurisdiction or monies placed in an account conducted by Anthony Ho, over which they have custody and control.
4. In a supplementary affidavit, the plaintiff states, as far as relevant to his undertaking for this application that he has US \$ 19,969.58 in his ANZ Bank account in Fiji.
5. Lasaro Tokalau Senibulu, an employee of the first defendant, in his affidavit in opposition states as far as relevant, that:
- neither the first or second defendants have any intention of dissipating their assets within the jurisdiction of the Court
 - the second defendants did not advise the plaintiff that ANZ Bank was granting a facility.
 - US\$45,000 was transferred to the second defendants' account in Australia.
 - *There* was no agreement to provide security or surety to the plaintiff over the first defendant's machine.
 - The plaintiff paid monies to the first defendant. A caveat was to be placed in favour of the plaintiff's superannuation fund but this could not be done.
6. The first plaintiff filed affidavit in reply.

7. *The determination*

- 7.1 On 9th May,2014, the ex parte notice of motion was supported on behalf of the plaintiff, I declined to grant the interim relief sought and directed that notice of the motion be given to the defendants.
- 7.2 When the matter was supported inter partes on 19th May,2014,Mr O'Driscoll, counsel for the plaintiff drew my attention to a letter dated 5th May,2012, written by Reddy & Nandan Lawyers, solicitors for the defendants,in these terms:

You paid US\$45,000 to Cullen's account.A copy of our client's bank's confirmation of receipt is attached hereto.

*Cullen as the Trustee of the Trust hereby gives you notice that pursuant to the said agreement, **the Trust will exercise its option and cancel the said agreement on or about the 23rd of May 2014.**Could you kindly forward your bank account details in Australia to us or our client for this purpose. A copy of the notice by our client is attached hereto.(emphasis added)*

- 5.1 On 19th May, 2014,I granted interim relief as prayed for in sub-paragraph a) of the preceding paragraph, limited to the sum of USD \$ 45000 until 26 May,2014. On 28th May,2014,Mr Nandan stated that the USD \$45000 has not been paid by the defendants. Mr Nandan agreed to the extension of the interim order, until final determination of the plaintiff's application.
- 5.2 I turn to the remaining injunctive reliefs sought.
- 5.3 The first relief is to restrain the defendants from disposing, dealing with and/or removing from the jurisdiction all assets and monies owned and/or subject to the care custody and control of the first and second defendants limited to the sum of \$150,000.00. The second and third reliefs seek a disclosure of the full value of the assets of the defendants and details of sale of proceeds of any of their assets.
- 5.4 The defendants do not dispute that they received monies from the plaintiffs. But they do dispute the purpose for which the monies were advanced. They contend that the payment of USD\$ 45000 was made in respect of purchase of land in Australia and instructions have been given to their accountants to pay the monies owed to the plaintiffs in Fiji. The affidavit states that there are monies to be paid

in Australia by the Cullen Unit Trust to the plaintiff. Finally, the affidavit states that the sale proceeds of the excavator machine have not been transferred overseas.

5.5 The present application is to restrain the defendants from disposing their assets. But the plaintiffs have not provided any evidence of any risk or danger that the defendants may dispose their assets.

5.6 In *Third Chandris Corporation v Unimarine SA*,(1979) 2 All ER 972 the “*plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.*”(emphasis added)

5.7 Lord Denning MR in *Mareva v International Bulkcarriers*,(1980) 1 All ER 213 at page 215 stated:

If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

5.8 At the hearing, Mr O’ Driscoll conceded there is no evidence, in this regard. He submitted that he was making an application for preservation of the monies under Or 29 r 2.

5.9 I would agree with Mr Nandan that a Mareva injunction cannot be invoked simply for the purpose of providing plaintiffs with security for their claims. As *Halsbury’s Laws of England*, Vol 3 (1),(4th Ed), paragraph 329 states:

The purpose of the jurisdiction is not to improve the position of the plaintiff in an insolvency; a Mareva injunction is not a form of pre-trial attachment, but a relief in personam which prohibits certain acts in relation to the assets in question.(footnotes omitted)

5.10 I decline the application of the plaintiffs for a mareva injunction and the other reliefs.

8. Orders

(a) Paragraph (a) of the plaintiff’s notice of motion dated 6th May,2014, is declined, in so far as it seeks an injunction to restrain the defendants from disposing, dealing with and/or

removing from the jurisdiction all assets and monies of the first and second defendants over a sum of \$ 45,000.

- (b) Paragraph (b) and (c) of the plaintiff's notice of motion dated 6th May,2014, is declined.
- (c) The plaintiffs shall pay the defendants costs in a sum of \$ 2000 summarily assessed within 14 days of this judgment.

14 October, 2014



A.L.B. Brito-Mutunayagam

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Judge