

In the High Court of Fiji at Suva
Civil Jurisdiction
Civil Action No.143 of 2017
Spencer AH Sam
First plaintiff
Russell AH Sam
Second plaintiff
Malcolm AH Sam
Third plaintiff
Hilda AH Sam
Fourth plaintiff
Trade Publicity Limited
Fifth plaintiff
Labour Marine Shipping Services Limited
Sixth plaintiff
And
Aubrey Low
Defendant

COUNSEL: Ms V. Tokavou for the plaintiffs
Ms P. Low with Ms E.Qetaki for the defendants
Date of hearing : 29th August, 2017
Date of Judgment: 27th September,2017

Ruling

1. I have before me two summons.
2. The first is a summons by the plaintiffs for an interim injunction to restrain the defendant from procuring the sale of CL5358, until final determination of this action. The first plaintiff, in her affidavit in support states that the plaintiffs and the defendant entered into Terms of Settlement in High Court Action No.426 of 2007(S), which provided that CL 5358 was to be sold within six months of 24 October,2016. On 21st April, 2017, the defendant's solicitors wrote to the High Court Registry stating that the Attorney needs another 6 months time to procure the sale. On 16th June, 2017, the Attorney continued to procure the sale by tender advertisement in the local newspaper The affidavit concludes that the Attorney is clearly in breach of the consent order and is deliberately procuring the sale without any approval.

3. The defendant, in its summons moves to strike out the originating summons filed by the plaintiff on the ground that it is an abuse of process of court. Jacqueline Hughes, the defendants' attorney in her affidavit in support states that the plaintiffs are seeking to vary the consent orders made in HBC no.426 of 2007.

The determination

The application to strike out the originating summons

4. Ms Low, counsel for the defendant submitted that the originating summons must be struck out under Or 18,r 18(1), as it does not disclose a reasonable cause of action. It is an abuse of the court process to vary a consent order by filing a separate action. A consent order is binding until set aside and acts as an estoppel. The written submissions filed on behalf of the defendant states that there is no reasonable cause of action, if the plaintiffs are unhappy with the sale of CL 5358 is slow by the defendant's Attorney. A consent judgment or order can be set aside on the ground of fraud or mistake by bringing a fresh action.
5. Ms Tokavou, counsel for the plaintiffs in reply said that the plaintiffs, in their originating summons seek that the terms of settlement with respect to the sale by the defendant's Attorney be rescinded, as the period of six months stipulated therein for the sale has expired. She submitted that a consent order can only be set aside by bringing a fresh action.
6. The Terms of Settlement in High Court Action No. 426 of 2007(S), provides as follows:
 1. *THE Parties hereby agree to the following terms of settlement:*
 - a. ...
 - b. *The Sixth Defendant(the sixth plaintiff in the instant case) to sell its property comprised in Crown Lease 5358... on the following conditions:*
 - (i) *The Sixth Defendant irrevocably appoints Mrs Jacqueline Hughes, Town Planner of Suva,as Attorney of the company ("Attorney") to:.....*
 - a. *Procure and complete the Sale*
 - b. *Sign, execute and complete all necessary documents agreements and instruments to complete the Sale.*
 - (ii)
 - (iii) ..
 - (iv) *The Sale to be procured **within 6 months of this date** and for the highest realizable value possible:*

7. The, plaintiffs, in paragraph 1.a. of their originating summons seeks to rescind paragraph 1(b)(iv) of the Terms of Settlement. In paragraph 1.b., the plaintiffs seek to appoint the second plaintiff to have absolute control instead of the defendant's Attorney.
8. Paragraph 1(b)(iv) of the Terms of Settlement required the defendant to procure the sale within 6 months. In my view, the relief claimed in paragraph 1.a. of the originating summons is otiose, as the time stipulated therein has lapsed.
9. As regards the second relief sought, a court has no power to vary a consent judgment.
10. Lord Diplock in *de Lasala v. de Lasala* [1979] 2 All ER 1146 stated :

Since a judge of the Supreme Court has no power to vary a consent order made previously in that court, the only means open to a party to set aside a consent order on the ground of fraud or mistake is to bring a fresh action for the purpose.
11. In Lord Justice Mummery in *Bennett v Bank of Scotland*, [2004] EWCA Civ 988 :

The essential question on abuse of process was whether there was a legitimate purpose to be served in bringing and pursuing the second set of proceedings. (emphasis added).
12. In my judgment, the originating summons is an exercise in futility. It does not disclose a cause of action and is struck out.

The summons for an interim injunction
13. The plaintiffs seek an interim injunction to restrain the defendant from procuring the sale of CL 5358.
14. The principles governing the grant of interlocutory injunctions are set out in the *American Cyanamide*.
15. In my view, there is no serious issue to be tried in the present case for the reasons stated above.

16. Lord Diplock in the *American Cyanamide* stated:

So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

17. I decline the application for interim relief.

18. **Orders**

- (a) The originating summons is struck out.
- (b) The application for an interim injunction is declined.
- (c) The plaintiffs shall pay the defendant costs summarily assessed in a sum of \$1000 within 14 days of this Ruling.



A.L.B. Brito-Mutunayagam
A.L.B. Brito-Mutunayagam
Judge

A.L.B. Brito-Mutunayagam
Judge
27th September, 2017