IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 144 OF 2018

BETWEEN : THEN INDIA SANMARGA IKYA SANGAM a duly incorporated company with special dispensation to not use "Limited" after its name and having its registered office at Vonovou Lane, Park Street, Nadi, Fiji.

PLAINTIFF/APPLICANT

A N D : NASINU LAND PURCHASE & HOUSING CO-OPERATIVE LIMITED a duly incorporated company and/or society duly registered under the Co-operatives Societies Act and having its registered office at 6 ½ miles, Nasinu, Suva.

DEFENDANT/RESPONDENT

Appearances : Mr R. Gordon with Mr W. Pillay for the plaintiff/applicant

Ms R. Devan for the defendant/respondent

Date of Hearing : 27 August 2018

Date of Ruling : 28 September 2018

RULING

[On interim injunction]

Introduction

[01] This is a summons filed by the plaintiff/applicant (*'the applicant'*) seeking a prohibitory interim injunction against the defendant/respondent (*'the*

respondent'). The application is supported by an affidavit of Karna Waddi Raju, the General Manager of the plaintiff sworn on 16 July 2018 (*'the evidence in support'*). The applicant has annexed some 13 documents marked as *'KWR1' to 'KWR13'*.

[02] Initially, the applicant sought *ex parte* injunction on the ground of urgency. The applicant explained why an *ex parte* injunction was necessary. On 20 July 2018, the court having satisfied that the land in question is about to be sold or transferred if an *ex parte* interim injunction is not granted restraining the respondent from dealing with the land, the application for injunction will be rendered nugatory.

[03] The *ex parte* orders were duly served upon the respondent. Subsequently, the respondent has filed a summons supported by an affidavit to set aside the *ex parte* injunctive orders.

[04] At the hearing, I heard the oral submissions put forward by the parties. Only the respondent has filed written submissions.

The Background

[05] On 3 October 2015, the applicant and the respondent entered into a sale and purchase agreement (*'SPA'*) whereby the defendant agreed to sell and the plaintiff agreed to purchase 10 acres less or more of the Principal Land (*'the Land'*) for the sum of $120,000.00 exclusive of VAT. The plaintiff had paid the purchase price of $120,000.00 in full, $12,000.00 upon execution of the SPA and $108,000.00 subsequently ('KWR7') proves payment of $108,000.00).

[06] The SPA has a default clause that if the defendant makes default in the performance of the agreement and such default continues for 21 days after the notice to the defendant, then the plaintiff may seek remedies: 1. Rescind the SPA, 2. May sue for specific performance or 3. Sue for damages. The plaintiff sues the defendant seeking among other things specific performance.

[07] The applicant applies for interim injunction restraining the respondent from dealing with the land in any manner until the final determination of the substantive matter. The respondent resists this application and applies for dissolution of the *ex parte* interim injunctive orders granted on 20 July 2018.

The Issue

[08] The issue is whether or not an interlocutory injunction should be granted restraining the respondent from dealing with subject land in any manner whatsoever until the final determination of the claim.

The Law

[09] The High Court Rules 1988, as amended ('*HCR*'), Order 29 deals with the grant of injunctions, which provides:

Application for injunction (O 29, R 1)

> *"1 (1) An application for the grant of an injunction may be made by any party to a cause or matter 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.*
>
> *(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.*
>
> *(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

The Governing Principles

[10] The applicant seeks interlocutory relief by way of prohibitory injunction. Since the applicant has applied for a prohibitory injunction, the principles as outlined by *Lord Diplock in American Cyanamid Co v Ethicon Ltd* [1975] AC 396 would be applicable in these proceedings. The principles applicable, according to *American Cyanamid,* to an application for prohibitory interlocutory relief are as follows:

a) Is there a serious question to be tried?
b) Are damages an adequate remedy?
c) Who does the balance of convenience favour?
d) Are there any special factors?

[11] *American Cyanamid* principles have been applied by the Courts in Fiji when considering interim injunction applications, for example: *Vivrass Development Ltd v Fiji National Provident Fund* [2001] FJLawRp 67; [2001] 1 FLR 260 (10 August 2001) and *Digicel (Fiji) Ltd v Fiji Rugby Union,* Civil Action No.: HBC 30 OF 2014S.

Discussion

[12] The applicant seeking the interim relief is the plaintiff. The plaintiff may apply for such a relief before or after the trial of the claim, whether or not a claim for the injunction was included in the plaintiff's writ (see O 29, R 1). In this instance, the plaintiff applies for an interim injunction before the trial, and after the issue of the writ.

[13] The *ex parte* injunctive relief was granted after the issue of the writ. When granting the *ex parte* orders, the court considered the evidence in support and having satisfied that the plaintiff has a prima facie case.

[14] The respondent did not make any allegation about applicant's duty to disclose all the material facts fully and frankly including the facts which might be unfavourable to the applicant. The fact that the respondent does complain of the full and frank disclosure is worthy of notice.

[15] At the time when the injunction application was heard, the respondent had filed its statement of defence, but nonetheless the applicant had not filed its reply to the statement of defence. Counsel for the applicant brought to the notice of the court that they still had time to file reply to the statement of defence.

[16] I would apply the *American Cyanamid* principles to the present application that is before me.

Serious question

[17] The first thing to be decided in an application for interim relief is whether there is a serious question to be determined at the trial.

[18] The applicant's claim arises out of a sale and purchase agreement ('*SPA*') entered into between the parties whereby the applicant agreed to purchase and the respondent agreed to sell 10 acres of land for the consideration sum of $120,000.00, in 2015 (2015). The relief sought includes specific performance among other things.

[19] Admittedly, the applicant has paid in full the agreed consideration sum- $120,000.00.

[20] The SPA has a condition that the applicant shall equally share the costs with Fiji Football Association, the respondent and other direct beneficiaries of the road in construction of the road up to the land purchased by the applicant and the applicant shall be entitled to be fully involved in the determination of the costs, tenders, etc. for the construction of the road.

[21] In terms of the 2015 agreement, the respondent shall: (a) undertake to have the land surveyed and take all steps for the issue of separate title in respect of the land, (b) carry out all the necessary surveys to enable the necessary title to be issued in respect of the land in order to execute in favour of the applicant a registrable transfer of the land, (c) pay all the costs until the issue of the title in respect of the land, (d) pay all survey fees in respect of the land due and payable,

(e) upon the execution of the agreement, take all necessary steps to subdivide the principal land to enable a separate title to be issued in the name of the applicant free from all encumbrances and (f) pay costs of the subdivision to have the land surveyed and take all steps for the issue of separate title in respect of the land.

[22] Ms Devan of counsel for the respondent has raised the following issues in the written submission:

Plaintiff's Pleadings Seriously Defective

The pleadings are deficient for the following reasons:

i. The plaintiff has by its statement of claim pleaded two sale and purchase agreements (dated 5 April 2002) and (3 October 2015).

ii. However, the plaintiff has failed to specify in its statement of claim in respect of which sale and purchase agreement, the final relief of Specific Performance is sought.

iii. The question arises which sale and purchase agreement is the Court ultimately required to enforce against the defendant?

iv. In so far as the defendant legal position is concerned, it avers that there is no longer any legally binding contract between the parties because both the parties sought to abandon the First and Second Agreement by negotiating to enter into a third agreement.

v. The plaintiff foremost is required by his pleadings to establish that he has an equitable or legal right to the subject property and he has failed to plead any such right. The consequence of this is, that the plaintiff has failed to establish that there is a serious issue to be tried. Further discussions on this are made below.

[23] On the issue of serious question, Ms Devan submits:

1) There is no cause of action against the defendant. The defendant's legal position is that the parties entered into a sale and purchase agreement first on the 5 April 2002 ("*2002 agreement*").

2) It was an integral term of the 2002 agreement that the plaintiff will pay $120,000.00 purchase price with a 10% deposit of $12,000.00 being paid upon execution of the agreement.

3) In accordance with clause 2 of the 2002 agreement, the plaintiff was required to deposit a balance sum of $108,000.00 into the trust account of Messrs Pillai Naidu with the $12,000.00 being released to the defendant.

4) Clause 9 of the 2002 agreement required the plaintiff to share costs of the road construction of the road leading to the land that was being purchased by the plaintiff. The costs were to be shared equally with Fiji Football Association.

5) The defendant pleads and as shown by *paragraph 11 of Karna Waddi Raju's* Affidavit in Support, the defendant had on the same date (i.e 5 April 2002) entered into a sale and purchase agreement with Fiji Football Association who were also purchasing 16 acres of adjoining land and had agreed to share road construction/development cost with the plaintiff.

6) The plaintiff's statement of claim fails to state what happened to the 2002 agreement. At paragraph 5, the plaintiff merely states that parties entered into another agreement/contract on 3 October 2015.

7) The defendant's case is that the plaintiff has conveniently failed to indicate in its pleadings that both parties agreed to enter into a fresh sale and purchase agreement because the plaintiff had:

   i. Failed to pay $108,000.00 into Pillai & Naidu's trust account.
   ii. Failed to put up funds for the shared costs of the road development

8) The defendant on the other hand had terminated its agreement with Fiji Football Association sometime in 2009, which meant that the plaintiff was no longer required to share road development costs with the Fiji Football Association.

9) In light of the above matters, both parties agreed to abandon the 2002 agreement by entering into a fresh sale and purchase agreement on 3 October 2015 (*"2015 agreement"*). This is after a period of 13 years.

10) When the 2015 agreement was executed, the parties had prior to the execution of the said agreement, entered into a memorandum of understanding which was appended to the 2015 agreement.

11) The appended memorandum of agreement clearly recorded the following:

a. that the Agreement (2002) between TISI and NLP be reviewed.
b. that TISI Sangam take responsibility to fully construct the road up to their boundary at their own costs including the service lines such as FEA, Water, Sewer and invest drains.
c. that a fixed time frame of three (months) be allocated to fully complete the road.
d. that TISI Sangam Fiji undertakes to meet the costs of the full development of the road up to the boundary of the Sangam property.

12) Under the 2015 agreement, cause 2, the plaintiff was required to pay a sum of $108,000.00 being the balance purchase price upon execution, which it paid on 3 October 2015.

13) However, despite clause 9 of the 2015 agreement stating the plaintiff would be fully involved in the road construction or pay the development cost for the same and despite concerted efforts from the defendant to progress the road works, the issue relating to the road construction was left pending for one reason or another by the plaintiff.

14) In early 2018, both parties for the third time decided to abandon the 2015 agreement and enter into a fresh sale and purchase agreement (refer annexure SN4 (i) and SN 4(ii) and KWR10 of *Karan Waddi Raju's Affidavit.*

The clear intention was the third agreement would replace the 2015 agreement.

[24] The respondent's submission itself raises a number of serious questions to be decided at the trial.

[25] It appears the 2015 agreement, which is the latest signed agreement between the parties in respect of the land in dispute is the binding agreement between the parties. Basically, the 2015 agreement reflects the same terms and conditions in the 2002 agreement. The applicant in the statement of claim states that there was an agreement entered between the parties respecting the same land in 2002. There cannot be two agreements in respect of the same land. It appears that the 2015 agreement replaces the 2002 agreement. There is no specific clause to state that the 2015 agreement replaces the 2002 agreement. In the absence of such clause, the defendant may raise an issue whether or not the 2015 agreement replaces the 2002 agreement in its entirety or both agreements must be read together in deciding the rights and obligations of the parties.

[26] The 2015 agreement in clause 9 states that the applicant would be fully involved in the road construction or pay the development cost for the same. The respondent alleges that despite the concerted efforts from the respondent to progress the road work, the issue relating to the road construction was left pending for one reason or another by the applicant. Further, the respondent states that there was a memorandum appended to the 2015 agreement. In terms of the Memorandum, the applicant takes responsibility to fully construct the road up to their boundary at their own costs including the service lines such as FEA, Water, Sewer and invest drains within 3 months.

[27] The question is whether or not the parties considered the memorandum to be part and parcel of the 2015 agreement and if so, whether the applicant is entitled to seek specific performance despite the breach of the memorandum appended to that agreement. This, in my view, raises another serious issue to be tried at the trial.

[28] The respondent has pleaded another unsigned agreement allegedly intended to be signed by the parties in 2018. Clearly, this is a serious question to be tried whether the respondent can rely on the unsigned proposed agreement to replace the 2015 agreement.

[29] The applicant's claim seeks specific performance of the 2015 agreement on the basis that the full purchase price has been paid and the applicant is still willing to contribute for the road construction but the respondent had failed to provide the break down for the costs involved in the road construction. To date, the respondent had failed to subdivide the land to identify the land (10 acres) covered by the 2015 agreement. In the circumstances, one cannot find the claim is frivolous or vexatious.

[30] Injunctions are only remedies, so can usually only be granted if the applicant has a substantive cause of action. As stated by Lord Diplock in *The Sikina* [1979] AC 210:

> *"A right to obtain an [interim] injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out an invasion, actual or threatened by him, of a legal or equitable right of the [claimant] for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an [interim] injunction is merely ancillary and incidental to the pre-existing cause of action."*

[31] For the above reasons, I am satisfied that there are serious questions to be tried at the trial and that the applicant has substantive cause of action against the respondent arising out of a breach of agreement.

[32] The parties have shown that there is a question to be tried. I go on to the second stage of inadequacy of damages.

Inadequacy of damages (to either party)

[33] Lord Diplock in *American Cyanamid* said:

'The court should go on to consider whether ... if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages ... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appear to be at that stage' (at 408B-C).

[34] If on the other hand, damages would not adequately compensate the plaintiff for the temporary damages, and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused: *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113.

[35] In my opinion, damages would not adequately compensate the applicant in the instant case. The applicant has been interested in purchasing the land from the respondent out of their principal land since 2002. The 2002 agreement was not performed for one reason or another. The 2002 agreement was renewed by the 2015 agreement. In 2018, another agreement has been negotiated in respect of the same land. Neither party had intended to repudiate the agreement. The applicant is only seeking an interim relief by way of prohibitory injunction. The respondent is in the process of selling their principal land. If an injunction is not granted, it is likely that the subject land would be sold to a third party. The court granted *ex parte* interim orders having satisfied with the undertaking as to damages given by the applicant. The applicant is in a financial position to give satisfactory undertaking as to damages. This was not challenged by the respondent. An award of damages pursuant to that undertaking would adequately compensate the respondent in the event of the respondent succeeding

at trial. The applicant on the other hand is expecting to purchase the land for about 16 years. In the circumstances, an award of compensation would not adequately compensate the applicant in the event of the applicant succeeding at trial.

Balance of convenience

[36] Lord Diplock in *American Cyanamid* highlighted that:

> *'It is 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' (at 408E).*

[37] The question of balance of convenience does not arise here as I have found that an award of damages would not adequately compensate the applicant in the event the applicant succeeding at trial.

Special factors

[38] There are not special factors to be considered in this claim. Neither party addressed the court on this point.

Conclusion

[39] For the reasons set out above, I think that I should grant an interim relief in favour of the applicant as sought in prayers (a), (b), (c) and (d) of the their application dated 17 July 2018. It appears to be just and appropriate to do so. This interim injunction shall be in operation until the final determination of the substantive claim. I would accordingly dismiss the respondent's application for setting aside the *ex parte* injunctive orders granted on 20 July 2018 with summarily assessed costs of $1,500.00.

The outcome

1. Interim injunction granted as sought in prayers (a), (b), (c) and (d) of the application dated 17 July 2018 until the final determination of the substantive claim.

2. The respondent shall pay summarily assessed costs of $1,500.00 to the applicant within 21 days.

.....28/9/18.....

M. H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka

28 September 2018

Solicitors:
For the plaintiff/applicant: M/s Gordon & Co, Barristers & Solicitors
For the defendant/respondent: M/s Neel Shivam Lawyers, Barristers & Solicitors