

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

**HBC 229 of 2019**

**BETWEEN** : **TOMASI DAUSOKO aka TOMASI DAUSOKO JUNIOR and**  
**ARISHMA DAUSOKO aka ARISHMA ASHIKA DEVI**  
**DAUSOKO** both of Drasa Avenue, Lautoka, Assistant Pharmacy  
Officer and Registered Nurse respectively

**PLAINTIFFS**

**A N D** : **BANK OF SOUTH PACIFIC LIMITED t/a BANK SOUTH**  
**PACIFIC** a Company incorporated in Papua New Guinea and  
registered as a foreign Company pursuant to the Companies Act having  
its principal office at Level 12, Suva Central Building, Corner of  
Renwick Road and Pratt Street, Suva in Fiji.

**1<sup>st</sup> DEFENDANT**

**A N D** : **HOUSING AUTHORITY** a body corporate duly constituted under  
the provisions of the Housing Act 267 and having its Head Office at  
Valelevu.

**2<sup>nd</sup> DEFENDANT**

**Appearance** : **Mr William Rosa for the plaintiffs**

**Hearing** : **Wednesday, 11<sup>th</sup> September 2019**

**Ruling** : **Thursday, 12<sup>th</sup> September 2019**

**R U L I N G**

**[A] INTRODUCTION**

(i) By an Ex-Parte Notice of Motion filed on 04-09-2019, together with the Statement of Claim attached to the Writ of Summons, the plaintiffs seek the following orders;

1. *An Order restraining the 1<sup>st</sup> Defendant and/or its servant/agents from any further dealing and/registration of transfer of property comprised all that leasehold land being Lot 51 on DP No. 5602 in the Tikina of Nadi in the Island of Viti Levu containing 405m<sup>2</sup> and described in Housing Authority Sub Lease No. 281837 together with all improvements thereon including residential illegal and legal buildings and all fixtures and fittings, pursuant to Sales & Purchase Agreement*

*dated 30<sup>th</sup> April, 2019, until the final determination of the substantive matter.*

2. *Any other Orders this Honorable Court may deem just.*
3. *Costs be in the cause of this Action.*

(ii) The application is supported by an Affidavit sworn by the first named plaintiff on 03-09-2019. The application is made pursuant to Order 29, r.1 of the High Court Rules and the inherent jurisdiction of the Court.

**[B] FACTUAL BACKGROUND**

In the Supporting Affidavit sworn on 03-09-2019, the first named plaintiff deposed;

1. *THAT I am the First named Plaintiff duly authorised by the second named Plaintiff being my wife ARISHMA ASHIKA DEVI DAUSOKO to make this Affidavit in Support of Ex-Parte Notice of Motion.*
2. *THAT depose to the facts herein as within my own knowledge and that acquired by me in the course of my duties and from the records held in our file pertaining to this matter.*
3. *THAT we have purchased a property properly described as Housing Authority Sub-lease No 281837 ALL that leasehold land being Lot 51 on DP No. 5602 in the Tikina of Nadi in the Island of Viti Levu containing 405m<sup>2</sup>, together with all improvements thereon including residential lean-to building and all fixtures and fittings therein with the 1<sup>st</sup> Defendant when it was advertised in our Local Dailies as Mortgage sale.  
(Annexed herewith is a copy of the HASL No. 281837 marked "TD1")*
4. *THAT the advertisement was very clear in its readiness, and in good faith without inspecting the property, we bid for the property, simply because the property was occupied and having access to the property was very difficult.  
(Annexed herewith is cutting of the Advertisement marked "TD2")*
5. *THAT the Mortgagee 1<sup>st</sup> Defendant wilfully put a misleading description of the building in an advertisement in the local newspaper, which outlined that the improvement includes:*
  - a. *An open plan lounge and dining;*
  - b. *Kitchen;*
  - c. *Combined toilet and bathroom area,*
  - d. *A rumpus room; and*

e. 4 bedroom

6. THAT after close observation and inspection of the inside of the house sometimes in June 2019, we discovered that the 1<sup>st</sup> Defendant had misled in their advertisement.
7. THAT there was no kitchen in the building and there was no 4 bedroom in the building.
8. THAT when we questioned the 1<sup>st</sup> Defendant and their Solicitors, they avers that it was an "as is where is basis."
9. THAT when our Solicitor made an Application with HOUSING AUTHORITY ACT CAP 267 APPLICATION FOR HOUSING AUTHORITY CONSENT TO TRANSFER our Solicitors made a few attempts to check on our application, Housing Authority Staff informed our Solicitor that they have made two [2] attempts to have access to the property for inspection but failed.
10. THAT when our Solicitor informed 1<sup>st</sup> Defendant via an email to make arrangements with the Occupants of the property to allow Housing Authority staff the 2<sup>nd</sup> Defendant access for inspection, 1<sup>st</sup> Defendant Staff namely Sharon Evening-Vunibaka called into 2<sup>nd</sup> Defendant's Lautoka office for a meeting concerning the Application to Consent to Transfer.
11. THAT on the same day Sharon Evening-Vunibaka visited 2<sup>nd</sup> Defendant's office, the 2<sup>nd</sup> Defendant without any inspection to the property granted the consent.  
(Annexed herewith is the Transfer Document where consent was granted marked "TD3")
12. THAT when we asked the 1<sup>st</sup> Defendant been the mortgagee of the said property to provide an approved plan, the 1<sup>st</sup> Defendant totally ignored the request and put us on notice that the same can be retrieved from other Statutory Departments after the Settlement is successfully completed.
13. THAT our effect to Nadi Rural Authority and Nadi Town Council was futile. Nadi Town Council informed my wife that they need and Authority from the Mortgagee in order from them to release the approved plan of the building.
14. THAT numerous request to issue a letter to authority to Nadi Town Council to release by the 1<sup>st</sup> Defendant via their Solicitors Young & Associates have been tiresome and futile.
15. THAT the acts of 1<sup>st</sup> Defendant has caused the Plaintiff's anguish, frustration and would lead great financial loss to us being a first time homebuyers.

16. THAT I have reasons to believe that the 1<sup>st</sup> Defendant coerced with 2<sup>nd</sup> Defendant to grant the Consent to Transfer in order to push through the Settlement speedily and cause a loss to us.
17. THAT as of right the 2<sup>nd</sup> Defendant should have done the right thing in doing the due diligence and informed the 1<sup>st</sup> Defendant of any irregularities on the property before signing and granting the Consent to Transfer.
18. THAT the 2<sup>nd</sup> Defendant acted in bad faith towards the us [the Plaintiff's] and we were verbally informed by the Servant and/or employees of the 2<sup>nd</sup> Defendant that after the Settlement is successfully completed, only than 2<sup>nd</sup> Defendant would come and do the due diligences and/or inspection and issue a notice on the illegal building structures on the property.
19. THAT the 2<sup>nd</sup> Defendant breached its duty of care when it granted the consent to Transfer on the Sale of the property.
20. THAT the 1<sup>st</sup> Defendant breached its duty of care as follows:
  - a) Advertised in the local daily newspaper false and misleading information about the descriptions of the building structure.
  - b) The 1<sup>st</sup> Defendant without due care approved a loan of \$170,000.00 to us without having engineers certificate of the property.
21. THAT the 2<sup>nd</sup> Defendant did confirm the following via an email as follows:
  - a) The first two [2] bedroom structure is legal;
  - b) The middle structure – Housing Authority cannot confirm if that is legal as their do not have the building structure;
  - c) The third tin structure is illegal
22. THAT we have reasons to believe that 1<sup>st</sup> Defendant is very much aware that there is illegal building structure and they have caused a misleading advertisement to be published in the local newspaper to cause a loss to the bidder of the Mortgage sales.
23. THAT we have reasons to believe that when all parties successfully complete the settlement, the 1<sup>st</sup> Defendant's would demand for engineer's certificate before the finance division of the 1<sup>st</sup> defendant would release finance to the Assets Managements of the 1<sup>st</sup> Defendant.

24. *THAT we have reasons to believe that the 1<sup>st</sup> Defendant have well calculated to cause unnecessary loss to us being a first time homebuyers by advertising misleading advertisement in the local Newspaper in regards to the property for sale.*
25. *THAT I therefore respectfully pray to this Honourable Court for an order in terms of the Notice of Motion filed in support hereof.*

[C] **LEGAL PRINCIPLES**

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing “Interlocutory Injunction”.
- (2) The plaintiff’s application is made pursuant to Order 29, rule 1 of the High Court Rules, 1988 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, counter claim or third party notice, as the case may be.*

*(2) Where the applicant is the plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in 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 of originating summons by which the cause or matter is not 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.”*

- (3) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of **“American Cyanamid Co v Ethicon Ltd”**<sup>1</sup> as follows;
  - (A) **Whether there is a serious question to be tried?**
  - (B) **Whether damages would be adequate remedy?**
  - (C) **Whether balance of convenience favour granting or refusing interlocutory injunction?**

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<sup>1</sup>(1975) (1) ALL.E.R.504

In that case **Lord Diplock** stated the object of the interlocutory injunction as follows at p.509;

*“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.”*

In Hubbard & Another v. Vosper & Another<sup>2</sup> Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

*“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”*

## **[D] DISCUSSION**

- (i) The plaintiffs have purchased the residential property comprised in the Housing Authority Sub Lease No. 281837 from the first defendant bank through mortgage sale for the sum of \$170,000.00 on the condition of **“as is where basis”**.
- (ii) The consent to the transfer was granted by the second defendant authority for the bank to proceed with the formalities. The plaintiffs and the first defendant executed the transfer documents on 17-06-2019.
- (iii) The transaction is not yet registered with the Registrar of Titles or Registrar of Deeds and the plaintiffs are yet to become the legal owner of the property. The plaintiffs are now seeking an interim ex-parte injunction to restrain the first defendant from dealing with the registration process of the transfer dealing.

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<sup>2</sup> [1972] EWCA Civ 9; (1972) 2 WLR389

- (iv) The plaintiffs say that they bid for the property since the mortgage sale advertisement was clear and they executed the transfer document without doing a site inspection to ascertain what is there on the ground because access to the property was very difficult as the gate was locked.
- (v) The plaintiffs say that sometimes in June 2019 they had a close observation and inspection of the house and found that the first defendant had made a fraudulent misrepresentation in the advertisement in the local newspaper. (reference is made to paragraphs (04) to (07) and (21) of the Affidavit in Support of the plaintiffs)

4. *THAT the advertisement was very clear in its readiness, and in good faith without inspecting the property, we bid for the property, simply because the property was occupied and having access to the property was very difficult. (annexed herewith is cutting of the Advertisement marked "TD2")*
5. *THAT the Mortgagee 1<sup>st</sup> Defendant wilfully put a misleading description of the building in an advertisement in the local newspaper, which outlined that the improvement includes:*
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  - c. *Combined toilet and bathroom area,*
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  - e. *4 bedroom*
6. *THAT after close observation and inspection of the inside of the house sometimes in June 2019, we discovered that the 1<sup>st</sup> Defendant had misled in their advertisement.*
7. *THAT there was no kitchen in the building and there was no 4 bedroom in the building.*
21. *THAT the 2<sup>nd</sup> Defendant did confirm the following via an email as follows:*
- (a) *The first two [2] bedroom structure is legal;*
  - (b) *The middle structure – Housing Authority cannot confirm if that is legal as their do not have the building structure;*
  - (c) *The third tin structure is illegal.*

**Whether there is a serious question to be tried?**

- (vi) The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an 'interlocutory injunction' is granted the plaintiff should satisfy the Court that there is a 'probability', a 'prima

facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise, the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious, in other words that the evidence before the Court discloses that there is a serious question to be tried.

The serious question to be tried in the case before me is whether the first defendant made a false representation regarding the structure that was there on the ground.

**Whether damages would be an adequate remedy?**

- (vii) If the plaintiffs are successful under the writ they can certainly claim damages which they are in fact doing under this action. Here I find damages are an adequate remedy and as the law is one does not obtain injunction to restrain actionable wrong for which damages are the proper remedy [per Flindley J in London & Blackwall Railway Co & Cross (1880) 31 Ch. D 354 at 369].


**Undertaking as to damages**

- (viii) The plaintiffs have failed to give an undertaking as to damages when they made the ex-parte application herein for an injunction. The requirement of the law regarding undertaking as to damages is crucial and the failure to give same at the appropriate time could prove to be fatal to the plaintiffs' application when Court considers ex-parte application.

[E] **ORDER**

The ex-parte notice of motion seeking an interim injunction is dismissed.



  
12/09/2019  
**Jude Nanayakkara**  
[Judge]

**At Lautoka**  
**Thursday, 12<sup>th</sup> September 2019**