IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 236 of 2014

BETWEEN

MOTIBHAI & COMPANY LIMITED having it registered office at Motibhai Building, 1 Industrial Road, Nadi Airport, Nadi, Fiji.

APPELLANT (ORIGINAL 2ND DEFENDANT)

AND

TRADEWINDS MARINE LIMITED a duly incorporated limited liability company having its registered office at Corner of Vetaia and Nukuata Streets, Lami, Suva, Fiji.

1ST RESPONDENT (ORIGINAL PLAINTIFF)

AND

TOKOMARU LIMITED a duly incorporated company having its registered office at c/- G, Lal & Co Level 10, FNPF Place, Victoria Parade, Suva, Fiji.

2ND RESPONDENT (ORIGINAL 1ST DEFNDANT)

AND

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED a duly incorporated limited liability company having its registered office in Melbourne, Australia and registered under part X of the Companies Act Cap 247 having its registered office at Suva, Fiji and carrying on business of Bankers in Fiji.

3RD RESPONDENT (ORIGINAL 3RD DEFENDANT)

AND

THE DIRECTOR OF LANDS of Suva, Fiji.

4TH RESPONDENT (ORIGINAL 4TH DEFENDANT)

AND

THE REGISTRAR OF TITLES of Suva, Fiji.

5TH RESPONDENT (ORIGINAL 5TH DEFENDANT)

AND

ATTORNEY-GENERAL as nominal Defendant of Suvavou House, Suva, Fiji

6TH RESPONDENT (ORIGINAL 6TH DEFENDANT)

Counsel : Mr. Nagin H. with Mr. Apted J. and Mr. Fatiaki S. for the Appellant.
Mr. Narayan A.K. for the 1st Respondent.
Ms. Drau R. for the 2nd Respondent.
Mr. Kumar E. for the 3rd Respondent.
Ms. Motufaga M. for the 4th, 5th & 6th Respondents.

Date of Hearing : 14th December 2020

Date of Judgment : 02nd February 2021

JUDGMENT

[1] The 1st respondent (the Plaintiff) instituted these proceedings seeking the following reliefs:

1. An order that the 5th defendant do correct the Register of State Lease No. 13734 and cancel the Partial Surrender No. 748256 purportedly registered on 10th August 2011.
2. The 5th defendant do correct the Register of State Lease No. 18542 by cancelling State Lease 18542.
3. The 1st to 5th defendants be restrained from entering any dealings and transactions State Lease No. 13734 or registering an instrument of whatsoever nature on State Lease 13734 or 18542 pending the registration of the interests or rights of the plaintiffs granted by this Honourable Court.
4. Damages.
5. Such further or other orders as this Honourable Court deems just and expedient.
6. Costs to be paid by the defendants jointly and or severally on a Solicitor/Client full indemnity basis.

[2] The 1st respondent is the registered proprietor of State Subleases 606616 being Unit GrG on SLP 30 and 60662 being Unit 1U on SLP 30 on Denarau Island, which are subleases granted out of State Sublease 16977 and the appellant was the registered proprietor of Sub Lease 16977 being Lot 1 on DP 9564 comprising area of 1.2626 Ha together with State Lease No. 13734 being Lot 4 on SO 3705 of Denarau Island.

[3] State Lease No. 16977 was developed by the appellant and the development was to include adequate car parking space for investors on the part of the appellant's State Lease No. 13794 which also accommodated various other services for the benefit of State Lease No. 16977.

[4] In the statement of claim it is also stated that the 1st respondent and the other investors purchased State Sub Leases 606616 and 106622 on the basis the above facilities were available to them. When the appellant intimated to the Body corporate (Port Denarau Centre Owners Incorporated) his intention to subdivide and sell State Lease 13794 the 1st respondent lodged the Caveat No. 737059'C' over the part of State Lease No. 13794.

[5] It is alleged that the appellant and the 4th respondent wrongly and knowing of the 1st respondents caveat No. 737059 'C' caused the State Lease over Lot 3 on DP 8338 to be lodged with the 5th respondent who wrongly and contrary plaintiff's Caveat caused to be issued and did in fact register State Lease No. 18542 without reference in any manner or form to the 1st respondent.

[6] It is averred in the affidavit in support that the development of the Retail Centre was marketed by the appellant to include adequate car parking spaces for the use of the investors and their patron and it was to be accommodated on part of the appellant's adjoining State Lease No. 13734.

[7] The 1st respondent on 10th August 2017 filed an inter-parte summons seeking the following orders:

(1) That the Caveat No. 839995 lodged by the plaintiff against Lot 1 on SO 6610 Denarau Island (part of) registered Crown Lease No. 18542 be extended beyond 21 days and to remain in force until the final hearing and determination of the substantive matter in this action.

(2) An injunction against the second defendant restraining whether by themselves or their servants or agents or otherwise whosoever from selling, alienation, damaging, removing fixtures or in any way dealing with Crown Lease No. 18542, the piece of land being Lot 1 on SO 6610 (part of) Denarau Island until the final hearing and determination of the substantive matter in this action.

(3) That the service and hearing of the application for extension and the injunctive order be abridged to one day in view of the time limits under the Land transfer Act.

[8] The learned Acting Master of the High Court in her judgment delivered on 12th August 2020 made the following orders:

> 48. The plaintiff's application fails under prayer (i) of its application.
>
> The interim order of 16 August 2017 extending Caveat No. 839995 is set aside forthwith.
>
> 49. An interlocutory injunction is granted in that the Second Defendant is restrained by themselves or their servants or agents is restrained by themselves or their servants or agents or otherwise whosoever from selling, alienating, damaging, removing fixtures or in any way dealing with Crown Lease No. 18542, the piece of land being Lot 1 on SO 6610 (part of) Denarau Island until the final hearing and determination of the Suva High Court civil action No. HBC 236 of 2014.
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> 50. Cost to be in the cause.

[10] The appellant being aggrieved by the above orders of the learned Acting Master of the High Court appealed the decision to this court on the following grounds:

> 1. The learned Acting Master erred in law and in fact in granting the interlocutory injunction when she had no jurisdiction to do so.
> 2. The learned Acting Master also erred in law and in fact in granting the injunction for the following reasons:-

(i) There was no need for the injunction as the appellant had executed a deed to maintain and protect the utility services including the car park.

(ii) There was no need for the injunction as the appellant had not breached its obligations under the said deed and was prepared to give an undertaking to the not to sell the property or in any way breach the obligations contained in the deed.

(iii) There was no need for the injunction that the 1st respondent was no in any way adversely affected or likely to be adversely affected.

(iv) There was no serious question to be tried.

(v) There was no evidence that the 1st was in a position to pay damages.

(vi) Damages was an adequate remedy for the 1st respondent.

(vii) The balance of convenience did not favour the granting of the injunction.

3. The learned Acting Master erred in law and in fact in not properly following the principles established in American Cyanamid & Co v Ethicon Ltd [1975] A.C. 396.

[11] From the above grounds of appeal it appears that the appellant has preferred this appeal only against the decision of the learned Acting Master on the application for injunction.

[12] The first ground of appeal is that the learned Acting Master did not have the jurisdiction to hear and determine the application for injunction. This objection was never raised before the learned Acting Master. This cannot be a ground of appeal to challenge the decision of the learned Acting Master since there is no finding on this issue. This objection should have been taken at the first instance before the learned Master. Be that as it may, the Chief Justice, pursuant to Order 59 rule 2(l) of the High Court (Amendment) Rules 2006, conferred jurisdiction upon the Master of the High Court to hear applications for injunctions.

[13] Order 59 rule 2(l) of the High Court Rules provides:

The Master shall have and exercise all the power, authority and jurisdiction which may be exercised by a judge in relation to the following causes or matters –

…

(l) Any other matter in respect of which jurisdiction is conferred upon the Master by or under any other written law or by the Chief Justice.

[14] The appellant in this regard relies on the decision in **Peckham v Ports Authority of Fiji** [1998] FJHC 127; Hbc0343j.98s (27 August 1998). In that case the Ports Authority of Fiji Act confers power on the Ports Authority to make regulations with the approval of the Minister. This decision has no application to Order 59 rule 2(l) of the High Court Rules. Under the High Court Rules the Chief Justice does not make regulations which will be considered as subsidiary legislations.

[15] The practice directions of the Chief Justice are not subsidiary legislations. From the above it is clear that the learned Acting Master of the High Court had the power to determine the application for an injunction.

[16] The 3rd ground of appeal is that the learned Acting Master has not properly followed the principles in American Cyanamid case.

[17] In **American Cyanamid Co. v Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396 this case Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as the leading source of the law on interim injunctions. They are:

(i) Whether there is a serious question to be tried at the hearing of the substantive matter;

(ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and

(iii) In whose favour the balance of convenience lie if the injunction is granted or refused.

Lord Diplock in his judgment at page 408 also said;

> … it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Kerr LJ in **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523 at 534 said:

> It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket …. The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

[18] From the above it is absolutely clear that the court is not bound to follow decision in American Cyanamid v Ethicon Ltd (*supra*) in granting or refusing an application for injunction and it will entirely depend on the discretion of the court. Injunction is an equitable remedy granted at the discretion of the court and the court can, of course, always be guided by the guide lines laid down in previous decisions.

[19] In this matter the learned Master has considered the application for interim injunction having regard to the American Cyanamid guide lines and she says there is an issue to be tried whether upon issuance of State Lease 18542 caveat No. 737059 "C" was to be endorsed on the state lease.

[20] The serious issue to be determined must be related to the reliefs sought in the substantive matter. The issue in this matter is whether the easements enjoyed by the 1st respondent should be protected. There is no dispute over that. The appellant has not denied the 1st respondent's right for easement over the land in question.

[21] The appellant, 2nd defendant and Port Denarau Centre Owners Incorporated (PDC) have signed a Deed of Covenant (JP 38) agreeing to secure the car park and other

amenities on the land in dispute. The plaintiff's position is that it is not a signatory to this document and this Deed of Covenant has not been registered.

[22] In the letter written by the Director of Town and Country Planning to the Secretary, Nadi Rural Local Authority on 10th March 2010 it is stated;

> PDRCC that any future development or a change of ownership of Lot 3 DP 8338 may result to loss carparking provision. DTCP advised that the land is designated as Commercial in the approved survey of DP 8338 therefore any commercial development will be a permitted use on the site. However, the development of the site will not remove carparking as any future development will be based on standard carparking requirements calculation in addition to the existing and required 119. The department is mindful of the current situation that its decision on any future development of the site will be made with prudence.

[23] The 1st respondent says that they responded to the above letter but did not receive any response from them. From the letter referred to above it is clear that the relevant authority has taken note of this issue and informed the Local Authority to secure the car park and if there is going to be any further development to widen the area for vehicle parking, as far back as in the year 2010.

[24] Any development activity on this property will have to be with the approval of the Local Authority. Since the Local Authority and the Director of Town and Country Planning have already decided that any development activity will not interfere with the vehicle parking area, no injunction is required to secure the vehicle parking area.

[25] The main purpose of granting an interlocutory injunction is to maintain the status quo until the final determination of the substantive matter.

In **Hubbard & Another v Vosper & Another [**1972] 2 Q.B. 84 Lord Denning 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 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. …. 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.

[26] In this matter there is nothing on record to say that the appellant was even making an attempt to do anything that would deprive the 1st respondent's rights over the property.

[27] For the reasons set out above the court is of the view that the learned Master did not have sufficient grounds to grant the injunction sought by the 1st respondent.

ORDERS

(1) The appeal of the appellant is allowed, the order granting the injunction is set aside and the application for injunction is refused.

(2) The 1st to 5th respondents are ordered to pay $3000.00 to the appellant as costs of this application within 30 days from the date of this judgment.

Lyone Seneviratne

JUDGE

02nd February 2021