

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 57 of 2023

BETWEEN

CASEY CAPITAL PTY LIMITED a duly incorporated company having its registered office at Suite 401 Level 4, Riverside Quay, South Bank, Vic 3006, Australia and also a foreign company registered in Fiji under section 58 of the Companies Act 2015, having the name and address of its local agent being Raina Patel at Suite 1, Level 3, Jet Point Complex, Martintar, Nadi, Fiji.

PLAINTIFF

AND

BEACHCOMBER ISLAND RESORT PTE LIMITED a limited liability company having its registered office at 52 Narara Parade, Lautoka, Fiji.

DEFENDANT

Counsel : Ms. Lal R. with Ms. Raga M for the Plaintiff
Mr. Fa S. for the Defendant

Date of Hearing : 31st October 2023

Date of Ruling : 24th January 2024

RULING

- [1] The defendant is the registered owner of Native Lease No. 28912 of Suveve (Part of) Lots 1 - 20 on SO 5362 in the Province of Nadroga and the Tikina of Malolo having approximately 4.4650 hectares (the Property).
- [2] On 22nd August 2022 the plaintiff and the defendant entered into a sale and purchase agreement and on 30th January 2023 they executed a deed of variation.
- [3] The plaintiff instated this action seeking the following orders:
- a) For an order for specific performance of the agreed terms or on the alternative seek the reduction of the purchase price.
 - b) Post judgment interest at the rate of 8% per annum from the date of judgment until the payment pursuant to the Imperial Judgment Act 1898 and Order 6 rule 2(1) of the White Book Volume 1, 1997 Ed.
 - c) Cost on indemnity basis.
 - d) Further or other reliefs as the court thinks fit.
- [4] On 15th March 2023 the plaintiff filed a Notice of Motion seeking the following orders:

- (a) An order for the time for service of the plaintiff's inter-partes motion be abridged to two (2) days.
- (b) An order restraining the defendant by itself its servants and/or agents from dealing with Native Lease with all the land on Native Lease No. 28912 of Suveve (Part of) Lots 1 - 20 on SO 5362 in the Province of Nadroga and the Tikina of Malolo having approximately 4.4650 hectares in any manner whatsoever that is adverse to the interests of the plaintiff until the hearing and determination of the substantive matter of this action.
- (c) An order restraining the defendant by itself its servants and/or agents from removing and disposing the items of Funky Fish Beach and Surf Resort (the Resort) until the hearing and determination of the substantive matter in this action.
- (d) Any other order which the court may deem just and necessary in the circumstances.

- [5] Injunction is an equitable remedy granted at the discretion of the court. The power which the court possesses to grant injunctions should be cautiously exercised only on clear and satisfactory grounds. An application for injunction is an appeal to an extraordinary power of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise.
- [6] It is also important to bear in mind that injunctive relief being a discretionary remedy the party who seeks the court to exercise its discretion in his favour must come to court with clean hands and full facts. Suppression of material facts will disentitle the party seeking an injunction to such relief.
- [7] 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.

[8] Interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief. A party who has not sought any substantive relief has no right in law to seek an interim injunction, as it cannot be a relief by itself but is only a mechanism to assist and protect final relief.

[9] **American Cyanamid Co. v Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396

The appellant, American Cyanamid Co., an American company, owned a patent covering certain sterile absorbable surgical sutures. The respondent, Ethicon Limited, also an American Company, manufactured in the United States and were about to launch on the British market a suture which the appellant claimed infringed their patent. The respondent contested its validity on diverse grounds and also contended that it did not cover their product. In an action for an injunction the appellant applied for an interlocutory injunction which was granted by the judge at first instance with the usual undertaking in damages by the appellant. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out and the appellant appealed.

In 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.

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.

In the case of **Series 5 Software Ltd v Clerk and others** [1996] 1 All ER 853 the court after considering the decision in American Cyanamid and various other authorities on the subject held that;

In deciding whether to grant interlocutory relief, the court should bear the following matters in mind:

- (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

- (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.
- (3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt resolve complex issues of disputed facts or law.
- (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

[10] In the sale and purchase agreement entered into between the parties the plaintiff has agreed buy only then property described above. In the Item 7 of the agreement the property is described as, "**Native Lease No. 28912 of Suveve (Part of) Lots 1 - 20 on SO 5362 in the Province of Nadroga and the Tikina of Malolo having approximately 4.4650 hectares (Whole)**". In the said agreement there is no reference to, "**Funky Fish Beach and Surf Resort**".

[11] However, the parties have subsequently executed a deed of variation and clause 2.1 of the said deed reads as follows:

The parties have mutually agreed that Casey Capital is to acquire, in addition to the property, the Going Concern under the sale agreement.

[12] The plaintiff alleges that the defendant had been attempting to sell the property to a third party and in paragraph 56(i) of the affidavit in support the affirmant has quoted a following text message;

"Great news, I have another of our resort hotel buyers interested in funky fish. Can Atish email me the numbers like he did for beach comber? (This is a NEW overseas buyer/investor"

[13] In the same paragraph he states further that he annexes the SMS conversation with Mr Wade and Mr Pritchard marked as **MJC27**.

[14] MJC 27 is not a text message but an email between Brendon and Susan Pritchard asking if Funky Fish is still for sale. This does not show that the defendant had any intention to sell the property to a third party. Other than this there is no other material before this court to arrive at a conclusion that the defendant is in fact attempting to sell the property to a third party. The courts do not grant interim injunctions based on assumptions. It needs some evidence showing that the defendant is making arrangements to dispose of the property which would be to the detriment of the plaintiff.

ORDERS

1. The injunctions sought in the in the summons filed on 15th March 2023 are refused.
2. There will be no order for costs.



Lyone Seneviratne



JUDGE

24th January 2024