RAM PATI A

v.

RAJ KAMAL, RAJ BALI AND RAJESH

[SUPREME COURT— Cullinan, J. Lautoka 27 March 1987] B

Civil Jurisdiction

Landlord & Tenant—Crown Land—Application by landlord for vacation possession and restraining defendants from entering/cultivating the land—defendants' father recently deceased in occupation of land and cultivating it for 30 years—application pending to Agricultural Tribunal—subletting claims disputed—whether provisions relating to Native Land can apply to Crown land—land for which Agricultural Tribunal can make declaration of tenancy—principals as to interlocutory injunctions —mandatory injunctions—mandatory injunctions rare at that stage—damages not adequate remedy for defendant—balance of convenience—defendants' injunction to restrain interference with crop or receiving crop proceeds—interlocutory injunctions refused. C D

G. P. Shankar for the Plaintiff
M. T. Khan for the Defendants

Ram Pati (plaintiff) administratrix of the estate of Shiu Rattan deceased, formerly the tenant of Crown Land L.D. Ref. 4/4/901, Farm No. 3669 sought remedies in a statement of claim including that Raj Kamal, Raj Bal and Rajesh (sons of Shiu Raj) (defendants) were then in unlawful occupation and cultivation of the said land, despite demands to vacate, there being no consent of the Director of Lands to the said occupation. An order was sought for vacant possession and an injunction against further entry on or cultivation. Thereafter a Summons was issued seeking the same relief. E F

Defendants by affidavit asserted they were beneficiaries of the estate of their late father who on 18 June 1981 had filed an application to the Agricultural Tribunal (Tribunal) seeking relief. After his death (7 July 1981) his two executors, one of whom was the defendant's brother, took up the application. Defendants conceded the plaintiff was the tenant of the land but claimed their late father had been in occupation cultivating the land for 30 years or more with plaintiff's consent and approval: further that their father had "uplifted" the cane proceeds of the land. They further deposed they had received advice that certain rights had accrued to their father under the Agricultural Landlord and Tenant Act (Cap. 270) (ALTA) and they were farming the land accordingly. Plaintiff's affidavit in reply, denied any permission by the plaintiff to the late father or that any consent by the Director of Lands had been obtained. The form of the application to the Tribunal for "relief against unlawful tenancy" suggested no consent had been obtained from the Director of Lands. The long delay in having the matter heard by the Tribunal was explained by "difficulties" plaintiff had experienced with one of the Trustees whose removal as a Trustee was then being pursued in the Supreme Court. The learned trial Judge G H

assumed the lease in question was a protected lease and that the provisions of section 11 of the Crown Lands Act Cap. 122 applied. He regarded the application as "pending". Plaintiff's counsel referred to ALTA s.45(1) forbidding subletting. In reply defendants' counsel contended that provision applied only to sublettings after 1966: nor was there evidence of sub-letting.

Plaintiff's counsel submitted that s.12 of the Native Land Trust Act (Cap. 134) was to be subject to the provisions of ALTA: but there was no such provision in respect of the Crown Lands Act. He referred to ALTA s.18(3) and s.59(3). The former provided that on a finding that if any tenant committed any breach of this Act or any law, the Tribunal might declare a purported tenancy void, order assignment or make any suitable determination. S.18(3) stated—

> "18.—(3) Any application to a tribunal for a declaration, for compensation or for the ordering of the making of an assignment or other order or determination under subsection (2) may be made notwithstanding the provisions of subsection (3) of section 59 but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the subdivisio of Land Act or which would otherwise be unlawful."

S. 18(3), said the learned Judge, negated s. 59(3). Referance was made to *Dharam Lingam Reddy v. Pon Samy and Ors,* and *Azmat Ali v. Mohammed Jalil,* said by counsel for the plaintiff to be of no assistance, as they concerned Native land, Defendant's counsel cited the judgement of Spring. J. A. viz—

> "A tenancy presumed to exist under ALTA by virtue of section 4(1) of the Act may offend against the provisions of the Native Land Trust Act or the Crown Lands Act in that the consent of the Native Land Trust Board or (where required) the Director of Crown lands respectively has not been obtained to a tenancy presumed to exist under ALTA: in such a case the tenancy is unlawful because it offends against one or other of the above statutes. Likewise section 45 of ALTA prohibits the subletting of the whole part of an agricultural holding."

Plaintiff's counsel referred further to ALTA s.18(3). The opening words of which—

> ".....postulate a landlord or tenant in breach of the Act or any law."

See also the extract from the judgment there of Spring J. A. quoted. Nor was anything said in the court of appeal in *Azmat Ali v. Mohammed Jalil and the Native Land Trust Board* qualifying the dicta in Dharam Lingam Reddy . See also the quotation from Mishra J.A. in Dharam Lingam thus—

> "For instance, it would not be obliged to give effect to that statutory right, if the application is tainted with fraud, collusion or an attempt to frustrate the intent of ALTA, the Native Land Trust Act, the Crown Lands Act or some other law.

When after a hearing the tribunal, the ultimate judge of reasonableness, does make a declaration, the Parliament in our view, must be taken to have intended that such a declaration of a statutory right be binding upon everyone including the Crown, NLTB, or any other holder of title." A

The Trial Judge indicated that even though the decisions in *Dharam Lingam Reddy and Azam Ali* concerned Native Land, the consideration of the issues in all land was necessary to those decisions, and the dicta highly pursuasive. Even though the Court of appeal was not there concerned whether s. 59 of ALTA did not specifically mention the Crown Lands Act, the Court was of the opinion that the Tribunal may make a declaration of tenancy in certain circumstances where the consent of the Director of Lands had not been obtained. B

A consideration of the dicta reinforced the argument that there was "a serious issue to be tried" (***American Cyanamid Co. v. Ethicon***). C

It was noted that plaintiff's counsel at an adjourned hearing, had indicated to the Court that the application for vacant possessions was not being pursued any more: and (present) counsel for the plaintiff sought only the injunction.

Held: the Court observed that an order for possession could not be granted upon an interlocutory application. *Manchester Corporation & Connolly & Ors.* per Lord Diplock who traced certain statutory provisions which apply to Fiji by the Supreme Court Act (Cap. 13) *(Rogers v. Pacific Hotels and Development Limited infra).* D

The injunction sought was to prevent a trespass or apprehended trespass: yet the "trespasser" was already in occupation. Accepting, for that an injunction could be granted it would have to be mandatory. E

A mandatory injunction was an exceptional form of relief (See *Morris v. Redland Bricks Ltd.* infra), though the dicta referred to such an injunction after trial. Mandatory injunctions on interlocutory proceedings will only be granted in "special circumstances" (Halsbury's Laws of England 4th Edition Vol. 24 para. 948). There were "no special circumstances" here. The evidence anyway was incomplete because there was a conflict on affidavits but there had been no cross-examination on affidavits as to any issue. It could not be said that the plaintiff had no prospect of success. Damages as a remedy had to be considered. They would not provide an adequate remedy for the defendant but would (having regard to the 30 years of possession already) provide for the loss of plaintiff, if any, as a result of defendants' possession between the current hearing and the trial. Defendants meanwhile were free to pursue their application to the Tribunal. F G

Plaintiff's application for injunction dismissed.

Defendant's application for injunction to restrain the plaintiffs from interfering with cultivation and to restrain the Fiji Sugar Corporation from paying money to plaintiff or obtaining cane proceeds could only be brought by Summons or Motion. H

Defendants' application for interlocutory injunctions dismissed.

Cases referred to:

(1) *Dharam Lingam Reddy v. Pon Samy & Ors* 28 F. L. R. 69
A (2) *Azmat Ali v. Mohammed Jalil* 28 F. L. R. 31
(3) *Azmat Ali v. Mohammed Jalil & Native Land Trust Board* 32 F. L. R. 30 (Sub nom. Re Azmat Ali)
(4) *American Cyanamid Co. v. Ethicon* (1975) 1 All E. R. 504.
(5) *Manchester Corporation v. Connolly & Ors.* (1970) 1 All E. R. 961
(6) *Rogers v. Pacific Hotels and Development Limited.* C.A. No. 1132 of 1985.
B (7) *Mareva Compania Naviera S. A. v. International Bulk Carriers S.A.* (1975) 2 Lloyd's Rep 829
(8) *Morris v. Redland Bricks Ltd.* (1970) A.C. 652.
(9) *Fellowes & Anor. v. Fisher* (1975) 2 *All E.R. 829*
(10) *Philip Morris (N.Z.) Ltd v. Liggett & Myers Tobacco Co. (N.Z.) Ltd. & Anor.* (1977) 2 N.Z.L.R. 35
C (11) *N.W. L., Ltd v. Woods* (1979) 3 All E.R. 614
(12) *Maharaj & Ors. v. Akbar & Anor:* Civ. Action No. 1020/85

Cullinan J.:

Judgment

D The plaintiff is the administratrix of the estate of Shiu Rattan who was the tenant of Crown Land L. D. Ref. 4/4/901, Farm No. 3669 Yalodro Sector. The statement of claim in the Plaintiff's writ states in part:

"3. THAT the defendants are in an unlawful occupation and cultivation of the said land and such occupation and cultivation is against the will and consent of the plaintiff and no consent of the Director of Lands has been
E obtained for such unlawful occupation and cultivation.

4. THAT the plaintiff has demanded on various occasions that the defendants do vacate the said land unlawfully occupied by the defendants but the defendants have neglected and/or refused to do so."

The writ then seeks an order for vacant possession and an injunction restraining the defendants, their servants or agents from entering or cultivating the said land.
F Shortly after filing the writ, the plaintiff then issued a summons applying for

"an Order that the defendants do give the plaintiff vacant possession of the land and grant an injunction restraining the defendants their servants or agents from entering or cultivating the said land."

The summons was expressed to be made "pursuant to Order 29 rule 1 of the Rules of the Supreme Court". The matter came on for hearing but was adjourned, as
G neither the writ, nor the summons and supporting affidavit has been served at that stage. Upon service the defendants entered appearance and filed a defence. Thereafter the plaintiff re-issued the above summons.

The defendants have filed an affidavit stating that they are the beneficiaries of their late father's residuary estate. Their father had filed an application to an Agricultural Tribunal on 18th June, 1981 seeking relief in the matter. After his death
H on 7th July, 1981 his two executors, one of whom is the defendants' brother, took up the said application.

The defendants have conceded that the plaintiff is the tenant of the lands in question, but depose that their late father Shiu Raj had been in occupation of and cultivated the lands "for the last thirty years and more" with the consent and approval of the plaintiff, and that their father had "uplifted the cane proceeds of the said land". The defendants deposed that they had received advice that certain rights had accrued to their late father under the Agricultural Landlord and Tenant Act Cap. 270 ("ALTA") "and we therefore farm the land accordingly", and that they are presently living on the land together with their widowed mother and other brothers.

The plaintiff has filed in affidavit in which she denied that the late Shiu Raj obtained any consent to occupation from her, or to the best of her knowledge, from her late husband. She deposes that the defendants are trespassers, and further, to the best of her knowledge, that the consent of the Director of Lands had not been obtained in the matter. Although the defendants' affidavit is silent on this latter aspect, the copy of the application to the Agricultural Tribunal exhibited to the affidavit indicates that such is the case, as the application seeks inter alia "relief against unlawful tenancy". In view of such aspect and the plaintiff's evidence in the matter, I presume that the lease in question is a protected lease and that the provisions of section 13 of the Crown Lands Act Cap. 132 apply.

The defendants' affidavit in opposition seeks inter alia a stay of these proceedings pending the outcome of the application before the Agricultural Tribunal. A preliminary aspect therefore is whether or not the application before the Tribunal is being pursued. The learned Counsel for the Plaintiff Mr Shankar submits that there is no explanation as to why the matter has not been concluded. One of the defendants however has deposed that they are having difficulties with their brother, one of the trustees of their late father's estate, who apparently was not pursuing the application before the Tribunal, and indeed that they had instituted proceedings in the Supreme Court to have him removed as trustee. The learned Counsel for the defendants Mr Khan informed the Court that since its inception, the application had come before the Tribunal eleven times, and on the last occasion the matter had been adjourned sine die pending the outcome of the other proceedings before this Court to remove the trustee. I can only regard the application before the Tribunal therefore as pending.

Mr Shankar refers to the provisions of section 45(1) of ALTA. But those provisions, which forbid the subletting of the whole or any part of an agricultural holding, only affect, as Mr Khan points out, a subletting effected after the commencement of the Act in 1966. The defendants have deposed, without contest, to occupation for 30 years or more. In any event there is no evidence of any subletting as such before me.

Mr Shankar submits that section 59(2) of ALTA expressly provides inter alia that the provisions of section 12 of the Native Land Trust Act Cap. 134, which requires the consent of the Native Land Trust Board ("N.L.T.B.") to any dealing by a lessee with native land, shall be subject to the provisions of ALTA: he submits that there is no such provision however in respect of any of the provisions of the Crown Land Act. Mr Shankar then points to the provisions of section 18(3) and 59(3) of ALTA: the provisions of section 18(2) are also relevant. Those provisions read as follows:

> "18.—(2) Where a tribunal considers that any landlord or tenant is in breach of this Act or of any law, the tribunal may declare the tenancy or a purported tenancy granted by such landlord or to such tenant as aforesaid, null and

A void and may order such amount of compensation (not being compensation payable under the provisions of Part V) paid, as it shall think fit, by the landlord or by the tenant, as the case may be, and may order all or part of the agricultural land the subject of an unlawful tenancy to be assigned to any tenant or may make any determination or order that a tribunal may make under the provisions of this Act.

B (3) Any application to a tribunal for a declaration, for compensation or for the ordering of the making of an assignment or other order or determination under subsection (2) may be made notwithstanding the provisions of subsection (3) of section 59 but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the Subdivision of Land Act or which would otherwise be unlawful."

C "59.—(3) Nothing in this Act shall be construed or interpreted as validating or permitting an application to the tribunal in respect of a contract of tenancy which was or is made in contravention of any law."

The reference to the Subdivision of Land Act need not concern us. For our purpose, it will be seen that section 18(3) in effect negates the provisions of section 59(3). Mr Shankar submits in particular that the decisions in the following cases decided D by the Fiji Court of Appeal, namely *Dharam Lingam Reddy v. Pon Samy & Ors.* (1) and *Azmat Ali v. Mohammed Jalil* (2), are not of any assistance in the matter, as those cases concerned native land. But that, as Mr Khan in effect observes, is to ignore the statements made by the Court of Appeal in the *Dharam Lingam Reddy* (1) case. For example at pp.13/14 Spring, J. A. in delivering the judgment of the Court had this to say:

E A tenancy presumed to exist under ALTA by virtue of section 4(1) of the Act may offend against the provisions of the Native Land Trust Act or the Crown Lands Act in that the consent of the Native Land Trust Board or (where required) the Director of Crown Lands respectively has not been obtained to a tenancy presumed to exist under ALTA: in such a case the tenancy is unlawful because if offends against one or other of the above statutes. Likewise section 45 of ALTA (supra) prohibits the subletting of the whole or part of an agricultural F holding."

Again, Mr Shankar has referred to subsection (3) of section 18, but not to subsection (2), the opening words of which, as Spring, J. A. observed in the *Ali v. Jalil* (2) case at p.15:

"... postulate a landlord or tenant in breach of the Act or of any law."

G Spring, J. A. went on to observe at p.16:

"Section 18(2) is intended, in our opinion, to protect persons who innocently become tenants by virtue of ALTA in circumstances which are unlawful in that the consent of the Native Land Trust Board and (where requisite) the Director of Crown Lands is lacking."

H There followed last year the decision of the Fiji Court of Appeal in the case of *Azmat Ali v. Mohammed Jalil & Native Land Trust Board* (3), the central issues of which case, need not concern us. Nothing was said in that case, from what I can see, which qualifies the particular dicta in the *Dharam Lingam Reddy* (1) case, which I have reproduced above. Indeed, Mishra, J. A. in delivering the judgment of the Court, in

speaking of the tenant's right under section 4 of ALTA and of the Tribunal's power under section 23(3) of ALTA to give effect to that right "where it considers it just and reasonable to do so", observed as follows at pp. 11/12: A

> "For instance, it would not be obliged to give effect to that statutory right, if the application is tainted with fraud, collusion or an attempt to frustrate the intent of ALTA, the Native Land Trust Act, the Crown Lands Act or some other law.
>
> When after a hearing the tribunal, the ultimate judge of reasonableness, does make a declaration the Parliament, in our view, must be taken to have intended that such a declaration of a statutory right be binding upon everyone including the Crown, NLTB, or any other holder of title." B

There are further dicta at p.12 to the effect that not alone can the Tribunal make a declaration of tenancy where the statutory consent had not been obtained by the lessee, (the Tribunal can make such declaration without itself seeking) such consent, and that in the case of Native or Crown Land. C

While the decisions of the Court of Appeal in the *Dharam Lingam Reddy* (1) case and the *Ali v. Jalil* (2) case concerned native land, it can be said that the consideration of the issues in respect of all land was necessary to those decisions, and I would be slow to say that as far as Crown Land is concerned, such decisions were obiter: even if they were obiter, I must respectfully observe that the relevant dicta are of the highest persuasive authority. Even though the Court of Appeal in those case was not concerned with the aspect that section 59 of ALTA does not make specific mention of the Crown Land Act, nonetheless the Court was of the opinion that the Tribunal may nonetheless make a declaration of tenancy in certain circumstances where the consent of the Director of Lands has not been obtained. D

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In any event, the argument if anything goes to establish that, in the words of Lord Diplock in the leading case of *American Cyanamid Co. v. Ethicon* (4), to which Mr Shankar refers, at p.510, "there is a serious question to be tried". Before dealing with the application for an injunction, I observe that the summons seeks first of all the substantive relief sought in the writ, namely an order for possession, which order, and the injunction sought, is not expressed to be "until trial of this action or further order". F

Mr Khan in his written submissions states that the plaintiff's Counsel (other than Mr Shankar) before the Court at an adjourned hearing "indicated to the Court that the application for vacant possession is not pursued any more and that it was being withdrawn". That hearing was during the course of many other chamber applications on motion day, and such withdrawal was not recorded. I observe however, from Mr Shankar's written submissions that they pursue only the aspect of an injunction; In any event, it was held by the Court of Appeal in *Manchester Corporation v. Connolly & Ors.* (5) (see e.g. pp.964/966 per Lord Diplock) that an order for possession cannot be granted upon interlocutory application: Lord Diplock there considered inter alia the provisions of section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, which are based on those of section 25(8) of the Supreme Court of Judicature Act, 1873, which latter provisions apply to Fiji by virtue of the provisions of section 22(2) of the Supreme Court Act Cap. 13 (see *Rogers v. Pacific Hotels & Development Ltd.* (6) at p.34). G H

A As to the injunction sought. I observe that the 1873 provisions enable the Court to grant an interlocutory injunction before the hearing

> "to prevent any threatened or apprehended waste or trespass . . . if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession . . ."

B I find it difficult to appreciate how a trespass could be but "threatened or apprehended" where the trespasser is already in possession. In any event, section 25(8) empowers the Court to grant an injunction

> "by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made."

C Those provisions have been given a wide interpretation in England: see the dicta of Lord Denning M. R. in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* (7) at p.510. There is clearly jurisdiction in the Court to grant the injunction sought therefore. I observe however that as the defendants are living on the land, any injunction granted must initially at least be mandatory in nature, in requiring the defendants to remove themselves and their family and goods off the land. A mandatory injunction is a very exceptional form of relief. As Lord Upjohn observed in the case of *Morris v. Redland Bricks Ltd.* (8) at p.665, it will only be granted inter alia where

D

> "the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future . . . It is a juridiction to be exercised sparingly and with caution but in the proper case unhesitatingly."

But those dicta concerned the granting of a permanent mandatory injunction after a trial. Here what is sought,, initially at least, is an interlocutory mandatory injunction. I observe that such E injunction is in effect an interlocutory order for possession, which, on the authority of the Court of appeal, cannot be granted. That is indicative of the plaintiff's prospect of success on this application. Further, even regarding the application as an interlocutory application for a mandatory injunction, the plaintiff's difficulties do not dissolve, as is evident from the following contents of para. 948 of Vol 24 of *Halsbury's Laws of England* 4 Ed.:

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> "*Mandatory injunctions on interlocutory applications.* A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant G hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

There is a host of authority cited in Halsbury in support of those observations. I cannot see that the above exceptions to the "special circumstances" rule can possibly be applied to this case. Neither can I see that any such "special circumstan- H ces" exist in the affidavits before me. Nonetheless as the injunction sought is couched in restrictive, prohibitory or negative form, and in view of fact that in its operation it would ultimately assume such nature or effect, I proceed to also consider the application in the light of the authorities on interlocutory restrictive injunctions.

Mr Shankar refers to the authority of the *American Cyanamid* (4) case. *Fellowes & Anor v. Fisher* (9) at pp. 840/841, *Philip Morris (N.Z) Ltd v. Ligger & Myers Tobacco Co. (N.Z.) Ltd. & Anor.* (10) at pp. 36/40 and *N.W.L. Ltd. v. Woods* (11) at pp. 625/626. I had occasion to consider those cases in the case of *Maharaj and Ors. v. Akbar and Anor* (12). I adopt what I said there at pp. 9/11. With regard to the relevant dicta in the latter three cases cited by Mr Shankar, I do not consider that they apply to the present case, because I do not see that in the words of Lord Diplock in *N.W.L Ltd v. Woods* (11) at p. 625.

> "the grant or refusal of an injunction at (this) stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial....."

I adhere closely therefore to the principles enunciated by Lord Diplock in the *American Cyanamid* (4) case. In that case at p.509 Lord Diplock observed that

> "In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination."

A fortiori, those dicta apply to the present case, where there is a conflict of evidence in the affidavits before me as to the aspect of consent to occupation of the land. Again, as Lord Diplock observed at p.510:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

I cannot say that the material available to the Court at this stage "fails to disclose that the plaintiff has any real prospect of succeeding in (her) claim for a permanent injunction at the trial", and I go on therefore to first consider the adequacy or otherwise of the respective remedies in damages.

As the defendants and their father before them have been in possession of the land for over 30 years, I cannot see that the plaintiff would not be adequately compensated by way of damages for the loss she might sustain as a result of the defendants' possession between now and the time of the trial, if she were successful at the trial. Indeed, when it comes to compensation, the defendants allege that since their father's death in 1981 they have not received the cane proceeds from their cultivation of the lands from the Fiji Sugar Corporation. The plaintiff does not deny this, but deposes instead that the sugar cane contract in respect of the subject lands stands in her name, and indeed that the second named defendant has wrongfully received one bag of sugar sent by the Fiji Sugar Corporation for delivery to her. In any event, without deciding the latter issue, in view of the fact that the plaintiff has not denied possession and cultivation of the land for over 30 years, I am satisfied that the three defendants would be in a position to compensate the plaintiff in the matter of damages. I certainly consider that they would, as three farmers, be in a better position to pay damages, then would the plaintiff, a widow.

In any event, and this is the crux of the matter, I do not see that damages could possibly provide an adequate remedy for the defendants, if they were successful at the trial, and if they were not, after 30 years of occupation by their family, to be evicted from the land, where they live with their widowed mother and other brothers, that is, up until the time of the trial. The question of the balance of convenience only arises where there is doubt as to the adequacy of the respective remedies in damages. I do not see there is any doubt in this matter, as I consider that damages would be an adequate remedy for the plaintiff, but could not be an adequate remedy for the defendants. I do not see therefore that the question of the balance of convenience even arises.

Even if it were to arise, as Lord Diplock observed in the *American Cyanamid* (4) case at p.511,

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a cause of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise, would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

As I have said before, the defendants and their family have been in occupation and in cultivation of the land for 30 years. Even if the question of the balance of convenience were to arise therefore, I would have no hesitation in holding that such balance lies with the defendants. The plaintiff's application for an interlocutory injunction is therefore dismissed.

As I said earlier, the defendants in their affidavit in opposition seek a stay of these proceedings, pending the outcome of the application before the Agricultural Tribunal. In view of the dismissal of the plaintiff's summons I do not see that any such stay is necessary. That aspect can always be dealt with if and when the final stage of trial is reached. Meanwhile the defendants are free to pursue the application before the Tribunal.

The defendants in their affidavit also seek the following relief:

> " (i) An Order for Injunction restraining the Plaintiff and/or her servants and/or her agents from interfering with our cultivation and occupation of the land.
>
> (ii) an Order for Injunction restraining the Fiji Sugar Corporation Limited from paying out monies to the Plaintiff or in the alternative an Order for Injunction restraining the Plaintiff from obtaining the cane proceeds of cane farm number 3669 until the determination of the Action in the Agricultural Tribunal."

Order 29 rule 1 provides that an application for an injunction may be made by any party to a cause or matter before or at the trial, "whether or not a claim for the injunction was included in the party's writ, originating summons, counterclaim or third party notice, as the case may be". The defendants have not included such claim in their defence, but that does not affect the situation. The claim is made however in an affidavit. Such a relief may be sought in an affidavit, rather than a summons, where the application is made ex-parte. Rule 2 provides that:

"Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid such application must be made by motion or summons." A

As the learned authors of the Supreme Court Practice 1967 Vol. 1 at para. 29/1/18 observe:

"The language of the Rule does not authorise *ex parte* applications by the defendant." B

In any event, the application can in no way be said to be ex parte at this stage, and the only way that the defendants can bring such application before the Court is by way of summons or motion. Accordingly the defendants' application for an interlocutory injunction is also dismissed.

Applications dismissed. C