

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

Civil Action No. HBC 30 of 2013

BETWEEN : **FRANCIS COLLIN KUMAR** and **KATHRYN JANE KUMAR** of Lot 95 Maui Bay Estate, Korolevu, Baravi, both Company Directors.

1ST & 2ND PLAINTIFFS

A N D : **CRAIG and EVETTE DE LA MARE** of Lot 15 Maui Bay East Road, Maui Bay Estates, Korolevu, Baravi, both Company Directors respectively.

1ST & 2ND DEFENDANTS

Appearances : Mr R. Singh for Plaintiffs
Mr Divnesh Sharma for Respondents

Date of Hearing : 07 April 2017

Date of Ruling : 21 June 2017

R U L I N G

Introduction

[01] This ruling relates to an interlocutory summons for enforcement of undertaking given when obtaining an *ex parte* interim injunction.

[02] By an interlocutory summons dated 2 August 2016 supported by an Affidavit ("the application") and filed on 26 July 2016, the Plaintiffs seek the following orders:

- a) The undertaking as to damages given by the Plaintiffs in their affidavit sworn on the 7th February 2013 and filed herein on the 28th February 2013 in support of an injunction against the Defendants be enforced.

- b) This Honourable Court enquire and assess and inquire as to the measure of damages of such damages payable to the Defendants by the Plaintiffs.
- c) An order that the Plaintiffs pay the Defendants such damages as assessed by this Honourable Court.
- d) Costs of this application.

[03] The application is made pursuant to Order 29 Rules 1 and 7 of the High Court Rules 1988 (“the HCR”).

[04] The application is opposed by the Plaintiffs and filed an Affidavit in Response.

[05] At the hearing of the application, both parties orally advanced their respective submissions. Additionally, they also filed comprehensive written submissions.

Background

[06] The plaintiffs initiated proceedings against the defendants seeking: declaration that the defendants are not entitled to enter/remain on the plaintiffs’ land, declaration that the defendants are not entitled to enter and in anyway whatsoever interfere with the plaintiffs’ quiet enjoyment of the land, injunctive orders to restrain the defendants from so doing, general damages and costs. The action was initiated by a writ of summons filed on 28 February 2013. On the same day an *ex parte* notice of motion for an interlocutory injunction was also filed. On 1 March 2013, the court considering the *ex parte* notice of motion granted interim injunction against the defendants. Subsequently, the court vacated the *ex parte* interim injunction granted restraining the defendants on the application made by the defendants on 1 March 2013.

[07] Upon obtaining the interim injunction on *ex parte* basis, the plaintiffs failed to take progressive action to bring the proceedings to termination.

The action was dormant for long time without action being taken by the plaintiffs. As a result, the defendants filed an application pursuant to Order 18 Rule 18 of the HCR to have the action struck out for abuse of the process of the court. The court, after hearing the application to strike out, on 26 October 2015 struck out the action on the ground of abuse of the process of the court with summarily assessed costs of \$2,500.00.

[08] The defendants now file an application and seek enforcement of the undertaking given by the plaintiffs when obtaining the *ex parte* interim injunction restraining the defendants. The plaintiffs oppose the application.

The nature of the interim injunction obtained against the defendants

[09] The Plaintiffs had obtained the following orders against the Defendants on an *ex-parte* basis;

1. *An injunction to restrain the 1st and 2nd Defendants whether by themselves or by their servants or agents or otherwise howsoever from entering and/or remaining on the following land:*
 - i. *Certificate of Title 2872 on DP9022 the physical address being Lot 14 Maui Bay Beach Front Private Road, Maui Bay.*
 - ii. *Certificate of Title 2872 on DP9240 the physical address being Lot 25 Maui Bay Beach Front Private Road Clubhouse End, Maui Bay.*
 - iii. *Certificate of Title 36225 on DP9243 the physical address being Lot 95 Maui Bay West Road, Maui Bay.*
 - iv. *Certificate of Title 36884 on DP9402 the physical address being Lot 175 Rainbow Drive, Maui Bay.*

- v. Certificate of Title 36183 on DP9979 the physical address being Lot 1 Adjacent to Maui Bay Clubhouse, Maui Bay.
 - vi. Certificate of Title 36183 on DP9979 the physical address being Lot 2 Adjacent to Maui Bay Clubhouse, Maui Bay.
2. An injunction to restrain the 1st and 2nd Defendants whether by themselves or by their servants or agents or otherwise howsoever from entering and/or in any way whatsoever interfering with the Plaintiff's quiet enjoyment of the land in:
- i. Certificate of Title 2872 on DP9022 the physical address being Lot 14 Maui Bay Beach Front Private Road, Maui Bay.
 - ii. Certificate of Title 2872 on DP 9240 the physical address being Lot 25 Maui bay Beach Front Private Road Clubhouse End, Maui Bay.
 - iii. Certificate of Title 36225 on DP9243 the physical address being Lot 95 Maui Bay West Road, Maui Bay.
 - iv. Certificate of Title 36884 on DP 9402 the physical address being Lot 175 Rainbow Drive, Maui Bay.
 - v. Certificate of Title 36183 on DP 9979 the physical address being Lot 1 Adjacent to Maui Bay Clubhouse, Maui Bay.
 - vi. Certificate of 36183 on DP 9979 the physical address being Lot 2 Adjacent to Maui Bay Clubhouse, Maui Bay.
3. An injunction to restrain the 1st and 2nd defendants whether by themselves or by their servants or agents or otherwise howsoever from approaching and/or remaining within a distance of 20 meters of the 1st and 2nd Plaintiffs persons."

The principles applicable on enforcement of undertaking as to damages

[10] **Bean on Injunctions** 11th ed, 2002, Sweet & Maxwell at page 112 paragraph 6-06 provides;

“Where an interim injunction is granted, but is subsequently discharged, the defendant may well have suffered damage by reason of having had to comply the injunction in the meantime. He may then seek to enforce the undertaking as to damages which the claimant will have been required to give at the earlier hearing (see paras 3-03-3-19). In order to enforce the undertaking, the damage sustained must be assessed by means of an inquiry as to damages generally before a master or district judge:

*“Two questions arise whenever there is an application by a defendant to enforce the cross undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. Discretion is usually exercised by the trial judge since he was bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant suffered any damage by reason of the granting of the injunction”, (Per Lloyd L.J. in *Financiera Avendia SA v Shiblaq*, *The Times*, January 14, 1991, cited in *Dadourian Group International Inc. v Simms* [2009] 1 Lloyd’s Rep. 602 at [184])”.*

[11] The **Supreme Court Practice 1999** Vol 1 page 576, paragraph 29/L/30 provides;

“Application to enforce – The undertaking in damages is given to the Court and not to the party enjoined. However, if it should be held at the trial that the plaintiff had not been entitled by interlocutory injunction to restrain the defendant from doing what he was threatening to do or if it is established before trial that the injunction out not to have been granted in the first instance, the party enjoined may apply to the court for the undertaking to be enforced.

*When an application to enforce an undertaking as to damages is made there were two separate points to consider: first, as a matter of discretion, should the Court order that the undertaking been enforced?, secondly, if so, what loss had the defendant suffered in terms of money, was it been caused by the order and was it too remote? (*Balkanbank v Taher* (No. 2) (1995) 1 W.L.R. 1056, CA). A judge may leave both questions to be*

determined at the same time, or, more probably, in an enquiry as to damages, or he may decide the first question himself. If he answers it in the sense that the undertaking should be enforced, he may then leave it to some other holder or judicial office to ensure into causation, remoteness and quantum, an order made on an application for an inquiry into damages should spell out clearly what if any, residual discretion is left to be exercised later and it should, for example, be possible to tell on the fact of the order whether the plaintiff is to pay the amount ascertained on the inquiry (Balkanbank v Taher [1994] 4 All ER 239 at 260, per Clarke J)".
(Underlining provided)

[12] At paragraph 29/L/32 the **White Book** provides that;

"Where the Court determines that an undertaking should be enforced the next step is an assessment of the damages payable, (as to the measure of damages, see para 29/L/35, below). Damages can only be obtained by an immediate assessment or by an order for inquiry; an independent action will not lie (Fletcher Sutcliffe Wild Ltd v Burch [1982] F.S.R 64)."

[13] As to enquiry as to damages, at paragraph 29/L/31 the **White Book** provides:

"Any inquiry as to damages should not be ordered unless there is at least some reasonably arguable case that the injunction has caused the complaining party some loss or damage for which compensation ought to be paid".

The Submissions

Defendants

[14] Mr Singh, counsel appearing for the Defendants submits that the undertaking should be enforced. The undertaking is given to the Court for grant of the interim injunction and in this instance the same was granted on an *ex-parte* basis. It was later discharged. He further submits that the interim injunction restricted the freedom of movement of the Defendants.

Plaintiffs

[15] On the other hand, Mr Sharma, counsel appearing for the Plaintiffs contends that the Plaintiffs gave the Court an undertaking as to damages. In the event that it was found at the trial that the Plaintiffs had breached

his undertaking to Court as to damages then the remedy may have been to move the Court for contempt or seek to enforce the undertaking at the time the injunction was vacated. He also contends that the undertaking as to damages was given in the interlocutory application and there is no breach of undertaking to the Court.

Discussion

[16] If the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will generally be entitled to damages for any loss he has sustained.

[17] In almost every case where an interlocutory injunction is to be granted, requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified.

[18] In this case, the Plaintiffs obtained an interlocutory injunction on *ex parte* basis against the Defendants and their servants and agents from entering and/or remaining on certain six properties (see para 9 above); and from approaching and/or remaining within a distance of 20 meters of the Plaintiffs, but subsequently failed to obtain a perpetual order at trial. The Plaintiffs' case did not go to trial. Their case, following an application made by the Defendants, was prematurely struck out on the ground of abuse of the process of the court.

[19] The affidavit in support of an injunction application should deal with the plaintiff's ability to honour the undertaking in damages. The Plaintiffs in their affidavit in support of the interim injunction depose at para 39 that:

"39. THAT I believe that the 1st and 2nd Defendants will suffer no damages if the Orders I seek are granted. However, I give the usual undertaking as to damages and to evidence my

financial capability I refer to annexure marked "B" which shows that I am the registered proprietor of two free properties".

- [20] The Defendants seek to enforce the undertaking as to damages which the Plaintiffs gave at the earlier interlocutory hearing.
- [21] In order to enforce the undertaking, the damage sustained must be assessed by means of an inquiry as to damages, generally before a master. At the inquiry the onus is on the defendant to prove both the fact of damage and its causation (See *Financiera Avenida SA v Shiblaq* (1988) *The Times*, 21 November).
- [22] An inquiry as to damages may be refused if it is likely to prove fruitless (*McDonald's Hamburgers Ltd v Burgerking UK Ltd* [1987] FSR 112) or if there has been great delay in making the application (*Smith v Day* (1882) 21Ch 421).
- [23] The most obvious suitable time for the defendant to apply for an inquiry as to damage is at the trial. Nonetheless, there may be cases that never come to trial.
- [24] The Defendants have made their application to enforce the undertaking after the Plaintiffs' case was struck out. The plaintiffs' claim was struck out on 26 October 2016. The application for enforcement of the undertaking is made on 26 July 2016. The Plaintiffs argue that the application is a bit late in the day to now raise this issue in July 2016.
- [26] The court may refuse the application for enforcement of the undertaking as to damage if there has been great delay in making the application. There is no specific time limit within which the application is to be filed. The delay in this case, in my opinion, is not great. The Defendants have made their application within reasonable time after the matter was struck out by the court on 26 October 2016.

[27] The Defendants also submits that there is breach of Order 3 rule 5 of the High Court Rules as amended by the High Court (Amendment) Rules, 2005 (“HCR”). The action, they submit, lay dormant from 25 October 2015 until the filing of the appointment of Solicitors on 28 April 2016. This inactivity was for a period in excess of 6 months. Since no Notice of Intention of Proceed was served by the Defendants after the expiry of 6 months from 25 October 2015 the Defendants could not proceed with the filing of a Summons on 26 July 2016.

[28] Rule 5 of Order 3 provides:

“Notice of intention to proceed after 6 months delay (O.3, r.5)

5. Where six month or more has elapsed since the last proceedings in a cause or matter, a party intending to proceed must give not less than one month’s notice of that intention to every other party.

An application on which no order was made is not a proceeding for the purpose of this rule.

[29] A claim in respect of an undertaking in damages should not be pleaded by way of counterclaim. It cannot be dealt with before the court has decided whether or not the interlocutory injunction should continue permanently and before the court has exercised its discretion as to whether or not to order the payment of damages on the undertaking. There is no tort in respect of which the defendant can sue independently of seeking the aid of the court to enforce the undertaking (See *Fletcher Sutcliffe Wild Ltd v Burch* [1982] FSR 64; *Digital Equipment Corporation v Darkcrest Ltd* [1984] Ch 512).

[30] The undertaking as to damages is given to the court by the Plaintiffs when they obtain *ex parte* injunction against the Defendants. The Plaintiffs’ claim was struck out on the ground of abuse of the process of the court. The Defendants now seek aid of the court to enforce the undertaking. It is more or less like enforcement of judgment or order of the court. In this

sense the requirement of rule 5 that Notice of Intention to Proceed is to be given after six months delay since the last proceeding in a cause or matter has, in my view, no application to an application made to enforce the undertaking in damages.

[31] The freedom of movements of the Defendants and their employees was considerably restricted as a result of the interim injunction. They had to come to court seeking permission even to attend the meeting at Club House. When granting permission (by order dated 17 April 2013) to the Defendants to attend the Club House Meeting, the court said:

“2. Court is convinced of the necessity for the 1st Defendant and the 2nd Defendant to be in attendance at the meeting at Club House convened by the Director of Environment for 18 April 2013 between 12.00 pm to 2.00pm.

3. The 1st Defendant and the 2nd Defendant are free to attend the meeting referred to above on 18 April 2013 and any other official meetings in the future notwithstanding the Order of Interim Injunction against them dated 01 march 2013 of this Court.”

[32] The Defendants submit that their right to freedom of movement was stifled. They specifically state:

“The effect of the order was extremely embarrassing and humiliating and stressful on the defendants. The Defendants have been harassed by the injunction. They were restricted to move in their own community and residential areas. The Court will note in the record how the Defendants have had to make an interlocutory application to obtain permission from the Court to attend to their clubhouse for a particular meeting due to the injunction being in force at that time.”

[33] Notably, when striking out the Plaintiffs’ claim pursuant to an application made by the Defendants the court [I] at para 54 of the ruling dated 26 October 2015 stated:

“[54] The plaintiffs filed the statement of claim and obtained an interim injunction ex parte against the defendants and loss interest in the matter. The court later dissolved the injunction on the application made by the defendants. It seems to me that the plaintiffs brought the action with the ulterior purpose of oppressing the defendants and thus they had misused the process of the court. Their claim is therefore liable to be struck out on the grounds of abuse of process.”

[34] The Plaintiffs did not appeal the ruling that struck out their claim as abuse of the process of the court.

[34] I accept the Defendants’ submission that the Defendants including their employees have been put through inconvenience and stress and embarrassment that their right to freedom of movement was stifled as a result of the interim injunction obtained *ex parte*. It is submitted that for all of which the Defendants should be compensated by payment of damages.

Conclusion

[35] The Plaintiffs brought action against the Defendants seeking certain declaration and perpetual injunction. They obtained an *ex parte* interim injunction against the Defendants and their servants and/agent restraining from entering and/or remaining on certain lands and from approaching and/or remaining within a distance of 20 meters of the Plaintiffs’ persons.

[36] Their claim never went to trial. They failed to obtain a perpetual order against the Defendants. Their claim was struck out as being abuse of the process of the court. It is evident that the Plaintiffs had obtained an *ex parte* interim injunction without probable ground. At the striking out hearing, the court also found that the action had been brought with the ulterior purpose of oppressing the Defendants.

[37] Although the interim injunction was subsequently dissolved, the Defendants had meanwhile been restrained unjustly. The injunction obtained by the Plaintiffs cannot be justified. I, therefore, find that the Defendants have suffered damages by reason of having had to comply with the injunction in the meantime and are entitled to damages for any loss they have sustained. I accordingly hold that the undertaking as to damages given by the Plaintiffs at the earlier injunction hearing ought to be enforced. I would leave it to the Master of High Court to enquire into quantum of damages due to the Defendants as compensation.

Costs

[38] As a successful party, the Defendants are entitled to cost of this application. Having considered all, I summarily assessed costs at \$600.00.

Final Outcome

- 1) The Defendants are entitled to enforce the undertaking given as to damages given by the Plaintiffs for an *ex parte* interim injunction.
- 2) The Defendants are entitled to damages for any loss they have suffered by reason of having had to comply with the interim injunction.
- 3) There will be an enquiry before the Master into quantum of damages due to the Defendants as compensation.
- 4) The Plaintiffs will pay summarily assessed costs of \$600.00 to the Defendants.

M.H. Mohamed Ajmeer
21/6/17

.....
M.H. Mohamed Ajmeer
JUDGE

At Lautoka

21 June 2017

