

IN THE HIGH COURT OF FIJI
AT LAUTOKA [CIVIL JURISDICTION]

HBC No. 198 of 2015

BETWEEN : **RAJESHWAR PRASAD** of Rarawai Ba, Fleet Manager

PLAINTIFF

AND : **SURESHWAR PRASAD** of Rarawai Ba, Welder as the
administrator in the **ESTATE OF RAM DEO** of Rarawai, Ba

FIRST DEFENDANT

FIJI SUGAR CORPORATION

SECOND DEFENDANT (NOMINAL)

Appearance

For the plaintiff : Ms M Tavakuru

For the 1st defendant : Mr A Ravindra Singh

Date of Hearing : 19 February 2016

Date of Ruling : 09 March 2016

R U L I N G

Introduction

[01] This ruling concerns with an interim injunction.

[02] On 13 November 2015 the plaintiff filed an ex parte summons which was later converted into inter partes summons ('the application') seeking the following injunctive orders.

1. *An injunction restraining the 1st Defendant whether by themselves, their servants or agents or together wise howsoever from interfering with the Plaintiffs right to use, enjoy or otherwise commercially exploit his share in the property contained in Crown lease No. 15839 Pt of Rarawai and Vunisamaloa Formerly CT 7822 (farm 1698) situated at Rarawai (part of), LD 4/1/1742A an area of 2.9011 hectares with all improvements thereon.*
2. *That the 2nd Defendant do withhold all cane proceeds upon cane farm No 1698 Rarawai Sector until further order of this honourable Court.*
3. *An order that all future cane proceeds upon cane farm No 1698 be paid unto the Honourable Court until a further order of this honourable Court.*
4. *That the 1st Defendant be restrained whether by himself, his servants or agents or howsoever from uplifting any monies from Westpac Banking Corporation, and the F.S.C at Ba bring cane monies from cane farm No. 1698 Rarawai Sector.*
5. *That the 1st Defendant provide full accounts of the Westpac Banking Corporation account in the estate of Ram Deo No. 280017340 and accounts of the cane proceeds in farm No 1798 from the year 2009 till year ending 2015.*
6. *That the 1st Defendant do pay costs.*
7. *Any further orders the Court may deem fit.*

[03] The application was issued and served on the 1st defendant ('the defendant'). The hearing of the application was to be taken on 19 November 2015. That day the defendant appeared in person, but he did not file any objection against the injunction being granted against him. Nor did he orally object to the injunction being issued. The court after hearing Mr V. Sharma, counsel for the plaintiff granted injunctive orders

sought in prayer (1), (4) and (5) of the application and adjourned the matter for mention to fix hearing on 18 January 2016. On that day the defendant again appeared in person. However, counsel appeared for the plaintiff mentioned that he has no objection the defendant filing his objection by 3.00pm today (18 January 2016). The court then directed the defendant to file his objection by 3.00pm on 18 January 2016, the plaintiff to file his affidavit in reply and the matter was set down for hearing on 19 February 2016. The defendant in compliance with that direction filed the objection through his solicitors against the orders sought by way of injunction application.

[04] On 19 February 2016 the matter proceeded with the hearing. Both parties filed written submissions. They also advanced oral argument. The court reserved its ruling for 22 February 2016. Unfortunately, the court did not sit on 22 February 2016 due to Tropical Cyclone Winston that hit Fiji severely, for the court caused the matter to be relisted for ruling on 19 February 2016.

Factual Matrix

[05] The facts of the case are, in summary terms, as follows.

[06] Rajeshwar Prasad, the plaintiff brought these proceedings against his brother Sureshwar Prasad as administrator of the Estate of Ram Deo, the defendant for the removal of the defendant as the administrator of the estate inter alia. Ram Deo appointed his wife Sheila Wati to be the Trustee over his estate of his Will dated 21 March 1995 ('the will'). Sheila Wati wished to retire as trustee and to appoint the plaintiff and the defendant as joint trustees and on 3 March 2007 executed New Deed of Trustees which was not registered.

[07] Sheila Wati died on 18 October 2009 intestate and left the estate of her husband unadministered. The defendant was appointed the administrator of the estate on 9 August 2012.

[08] According to the Will both brothers (the plaintiff and the defendant) are entitled to equal share of the property.

[09] The plaintiff obtained limited interim injunctions to restraining the defendant from interfering with the plaintiff's right to use and enjoy his share in the property, from uplifting any monies from Westpac Bank and the Fiji Sugar Corporation and to provide full accounts of the Westpac Bank account in the estate of Ram Deo.

The Law

[10] The relevant law relating to issue of interim injunction may be found in Order 29, rule 1 (1) of the High Court Rules 1988, as amended which provides:-

'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, counterclaim or third party notice, as the case may be.'

The Governing Principles

[11] 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** (1975) AC. 396 as follows:

- (1) is there a serious question/issue to be tried;
- (2) are damages an adequate remedy;
- (3) if not, where does balance of convenience lie.

Analysis

- [12] This is an application by the plaintiff for the grant of injunction before the trial against the defendant. The plaintiff is entitled to make such an application before the trial pursuant to O.29, r.1, HCR.
- [13] Before the hearing of the injunction application the court granted a limited interim injunction in favour of the plaintiff to be valid until final determination of the application.
- [14] The issue before the court in these proceedings is that whether the plaintiff is entitled to injunctions that he seek in his application.
- [15] In determining the issue I propose to apply the principles enunciated in *American Cynamind*.
- Is there a serious issue or question to be tried?**
- [16] The primary relief that plaintiff asks is that an order for the removal of the defendant as the administrator of the property. The defendant became the administrator of the property by virtue of the Letters of Administration issued to him on 09 August 2012.
- [17] The plaintiff in his affidavit in support states that, the defendant is collecting all the cane proceeds from the Estate property since 2009, he has sole access to the Estate Bank account since then and has not provided for particulars of accounts. He further states that if an injunction is not granted he will continue to suffer by the hands of the defendant, see paras 12 & 13 of the affidavit in support.
- [18] In affidavit in opposition the defendant states that, as the plaintiff failed to cultivate his share he (the defendant) had to cultivate the whole estate land as it had over stayed cane. Since the plaintiff was not working on his share since 2012, the land rental was deducted from his (defendant's) cane proceeds. The defendant also states that the plaintiff without his

consent (the defendant's) as the administrator and the Director of Lands (the head lessor) invited a Kokala and her family to reside on the farm house and also connected electricity and water metre.

- [19] In affidavit in reply the plaintiff states that, the interim injunctions remain until final determination of the matter. It is only after the interim injunction was granted he was able to enjoy his share of the cane farm.
- [20] The defendant does not dispute that the plaintiff is entitled to half share of the estate property.
- [21] The plaintiff as a beneficiary of the estate property claims that the defendant interferes with his right and not allowing him to use and enjoy the right. The plaintiff complains that the defendant as the administrator has been prolonging and/or refusing to transfer the plaintiff's share to the plaintiff. This results in the breach of trust. The defendant as the administrator of the estate property cannot delay or refuse the distribution of the estate property. In this instant case the defendant should transfer the half share of the estate property to the plaintiff. The question at the trial proper would be whether the defendant breached his duty as the administrator of the estate property. There will be another issue at the trial whether the defendant failed and/or refusing to provide particulars of the estate accounts.
- [22] On the other hand, the defendant claims that the plaintiff had not cultivated his share of the estate cane in 2012 and had not worked on the farm ever since.
- [23] Both parties have given conflicting evidence on affidavit as to facts. It is not my function at this stage to try to resolve conflicts of evidence on affidavit. But for the present purpose, I am satisfied that there is serious issues to be tried at the trial.

[24] In *American Cyanamid* at page 510 Lord Diplock observed that:

“It is no part of the court’s function at his 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”

[25] As the parties have shown that there is a serious question to be tried, the case goes on to the second stage, i.e. inadequacy of damages.

Inadequacy of damage (to either side)

[26] In *American Cyanamid* Lord Diplock stated that:

‘The court should go on to consider whether ... if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages ... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appear to be at that stage’ (at 408B-C).

[27] Counsel for the defendant, Mr Aman Singh submits that, the plaintiff has half share of the estate property and yet he has not cultivated his share of the farm since 2012. He also submits that the plaintiff has not shown sufficient assets to meet the claim for damages.

[28] In essence, the plaintiff claims half share of the estate property which has not been denied by the defendant. There is nothing before the court which suggests the market value of the property. By the defendant’s admission it seems that the plaintiff’s claim seems to be stronger.

[29] As Lord Diplock observed in *American Cyanamid* the court should consider whether, if the plaintiff were to succeed in establishing his claim for

permanent injunction at the trial, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of trial.

[30] In the instant case the plaintiff seeks injunctive orders to preventing the defendant from interfering with the plaintiff's right and to compel the defendant to provide particulars of estate accounts. In the circumstances damages would be adequate remedy for the plaintiff.

Undertaking as to damage not sufficient

[31] There has been no sufficient undertaking by the plaintiff to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial.

[30] For undertaking as to damages, the plaintiff states that he has the half share of the estate property which is the subject matter of the case. This clearly shows that the plaintiff has no other properties than the subject property to honour his undertaking as to damages.

[31] A party is not entitled to rely on the subject matter of the action for undertaking as to damages. I am not satisfied with the undertaking given by the plaintiff as to damages.

[32] In the case of **Natural Waters of Viti Ltd v Crystal Clear Mineral (Fiji) Ltd** [2004] FJCA 59, Fiji Court of Appeal on how undertaking as to damages should be given said that, *the plaintiffs must proffer sufficient evidence of his ability to satisfy the undertaking. When giving undertaking, the plaintiffs must say what their assets are today.*

[33] The defendant also has not given any cross undertaking as to damages.

[34] The plaintiff primarily seeks for injunction to restrain the defendant from interfering with the plaintiff's right to use and enjoy his share of the estate property.

[35] In the case of ***Pride of Derby and Derbyshire Angling Association Ltd v British Cleanse Ltd*** [1953] Ch 149 it was held:

'Where the defendant has wrongfully interfered with the plaintiff's right as an owner of the property, and intends to continue that interference, the plaintiff is prima facie is entitled to an injunction'

[36] In the case at hand the defendant has stopped the wrongdoing. The defendant is no longer interfering with the plaintiff's right as one of the beneficiaries of the estate property. This was confirmed by the parties during the hearing. At the hearing the defendant also undertook to provide particulars of estate account since he became the administrator of the estate. If any discrepancy or misuse found in the handling of the estate account, the plaintiff may be compensated for that discrepancy or misuse. Damages would adequately compensate the plaintiff in the circumstances of the case.

The balance of convenience

[37] This is the third stage of the investigation whether or not to issue an injunction.

[38] An injunction will inevitably involve some disadvantage to one or the other side which damages cannot compensate.

[39] Of the balance of convenience, Lord Diplock at 408E stated that:

'It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.'

[40] Since I have decided damages can compensate the plaintiff for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial, I need not further discuss the question of balance of convenience.

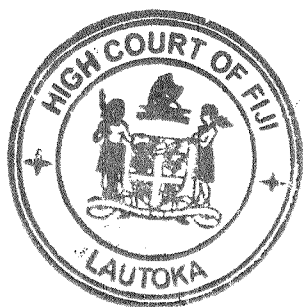
Conclusion

[41] The plaintiff fails to establish that he would suffer uncompensatable disadvantage if the injunction sought were not granted. The plaintiff claims half share in the estate property which is not disputed by the defendant. The defendant does not interfere with the plaintiff's right as one of the beneficiaries of the estate property. He has stopped the wrongdoing. Even if the plaintiff succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have suffered as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. For these reasons, I would order dissolving all the injunctive orders granted in favour of the plaintiff on 19 November 2015 except for order (1) that an injunction restraining the 1st defendant from interfering with the plaintiff's right to use, enjoy or otherwise commercially exploit his right in the property. The cost shall be in the cause.

Final outcome

- (i) Injunctive orders granted in favour of the plaintiff on 19 November 2015 are dissolved except for order 1.

- (ii) There will be injunction against the defendant as prayed for in the prayer (1) of the application filed on 13 November 2015. This injunction will be in force until final determination of the claim.
- (iii) Costs shall be in the cause.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

JUDGE

At Lautoka

This 9th day of March 2016

Solicitors:

For plaintiff: Vijay Naidu & Associates

For defendant: Aman Ravidra-Singh Lawyers, Barristers & Solicitors