IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0060 OF 2004
(High Court Civil Action No. HBC 367 of 2003L)

BETWEEN:

ROXY MOTORPARTS LIMITED

(in liquidation)

First Appellant

AND:

RAMEND PRASAD CHARAN

(f/n Ram Charan)

Second Appellant

AND:

HABIB BANK LIMITED

Respondent

Coram: Henry, JA
Scott, JA
McPherson, JA

Date of Hearing: Thursday, 7 July 2005

Counsel: Dr. M.S. Sahu Khan for the Appellants
Ms. B. Narayan for the Respondent

Date of Judgment: Friday, 15 July 2005

JUDGMENT OF THE COURT

INTRODUCTION

[1] On 29 October 2003 the High Court at Lautoka (Byrne J) upon the ex parte application of the Plaintiffs ordered that a caveat lodged by the Appellants against dealing in the two properties known as Lots 1 and 2 of Section 9 Samabula

Government Indian settlement and comprised in Crown leases 903 and 1106 remain on the register. It also granted an injunction restraining the Respondent (the Bank) from exercising its power of sale as mortgagee of the properties.

[2] The following March the Bank's solicitors filed a notice of motion in the High Court seeking removal of the caveat and dissolution of the injunction. On 30 August Singh J granted the Bank's application. On 1 September the Appellants successfully applied to Singh J for a stay pending appeal. Once again the application was made *ex parte*. This is an appeal from the Orders made on 30 August 2004.

PROCEDURAL MATTERS

[3] Before turning to the substance of the appeal we think it appropriate to remind the profession of certain important procedural considerations which appear to have been overlooked or disregarded in the present case.

[4] In Fiji Public Service Association v. Krishna Sami Reddy (ABU 61/03) this Court referred to Order 29 rule 1 (2) of the High Court Rules and quoted words of Megarry J in Bates v. Lord Hailsham [1972] 1 WLR 1373; [1972] 3 All ER 1019 who said:

"ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion."

[5] It is clear from the rules that the same principle applies to applications for stay pending appeal. Save in exceptional circumstances such applications should be made *inter partes* (see also the White Book 1988 paragraph 59/13/4).

[6] The present case involves a mortgagor in liquidation and one of its directors attempting to restrain exercise by the mortgagee Bank of its powers of sale. In Westpac Banking Corporation Limited v. Adi Mahesh Prasad (ABU 0027 of 1997S) this Court stated:

> "On 18 December 1996 the Respondent filed an *ex parte* summons seeking an order restraining the bank from exercising its power of sale or any other

powers under the mortgage and restraining it also from selling or transferring the land, the subject of the mortgage.

The summons was returnable on 19 December 1996. It was not served on the bank which was given no notice of the application. The hearing of the application for *ex parte* relief was held in Chambers. No reasons appeared to have been given for it. That course is not unusual provided the matter is brought back into the list within as short a time as possible after the making of such an order. The terms of the order were that the bank be restrained from exercising the power of sale or any other powers under the mortgage and from selling or transferring the land in question. It was also ordered that the application be called on 31 January 1997, that is some six weeks after the making of the order.

It should be said at this point that this was not a case for the making of an *ex parte* order. The application for an injunction should have been made on notice to the bank. The application was dealt with on 19 December, four days before tenders closed. Notice of the Application should have been required to be given even though it would have had to be short. Instead, the case proceeded *ex parte* so that the bank was not served with notice of it and was not given any opportunity of making any submissions in relation to it. Authorities to be referred to show that it is an extremely serious step to interfere with the exercise of mortgagee's power of sale. The authorities show that it is quite unusual to grant an interlocutory injunction, let alone an *ex parte* injunction, to restrain the power except in very special circumstances. The original order should not have been made without notice to the bank.

We emphasise what we have said so that it may be taken into account in future matters. We add that, if in any case, whether it be a case involving a restraint on a mortgagee's power of sale or a different kind of case, the Court sees fit to grant an *ex parte* injunction, the matter should be adjourned for no longer than a day or so. A period of six weeks which was the period in this case was far too long. During the period of the adjournment the Defendant

should be served with notice of the Order and copies of the application and affidavits relied on before the judge who granted the leave. This will have to be done quickly and expeditiously and may afford both parties insufficient time properly to prepare their cases as to whether the injunction should be continued. The court may have to consider granting a further adjournment to enable this to be done but at least the Defendant will have had an opportunity of being heard. This enables it, if it be so advised, to make any submissions as to why the injunction granted *ex parte* should not be continued. When the matter comes back into the list it will not be for the Defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the Plaintiff has the task of persuading the Court that the circumstances of the case are such as to require the injunction to be continued."

[7] When an injunction is sought *ex parte* it is the duty of the Applicant to bring to the attention of the Court all facts and matters material to the determination of the application (R v Kensington Income Tax Commissioners ex parte Polignac [1917] 1 KB 486, 504). In view of the fact that the properties in the present case were held on a protected crown lease it is clear that Section 13 of the Crown Lands Act (Cap. 132) applied. The consequence was that any dealing with the land without the previous consent of the Director of Lands was unlawful null and void and the lodgment of any caveat against dealing in the property without the prior consent of the Director of Lands was also prohibited.

[8] It is clear from the papers before us that the Appellants had ample opportunity to give the Bank notice of their intention to apply for relief. Therefore the application should have been made *inter partes*. In our view the supporting affidavit should also have adverted to the consents obtained from the Director of Lands. The application for stay pending appeal should also have been brought *inter partes*. Such flagrant disregard for proper practices and procedures is not at all looked on with favour by this Court.

THE SUBSTANTIVE APPLICATION IN THE HIGH COURT

[9] Two affidavits were filed by the Appellants. The first Appellant mortgagor did not deny the debt but however submitted that the Bank had breached provisions of Sections 77 to 79 of the Property Law Act (Cap. 130). The second Appellant's case was that about two years after the notice was served on the first Appellant, the second Appellant and the Bank reached a binding agreement for the sale of the properties by the Bank to the second Appellant for the sum of $241,000. The second Appellant deposed that the Bank then renegued. He further deposed that, relying on the agreement, he had not purchased other (unspecified) properties which were available and, by not doing so, had acted to his detriment. Put simply, Dr. Sahu Khan's submission on behalf of the second Appellant was that he was "beneficially interested because of the agreement with the [Bank]" and that he had, by virtue of the Bank's promise to sell the properties to him, upon which he had acted to his detriment, established a proprietary estoppel.

[10] Unfortunately, the record did not contain a copy of the Bank's submissions in the High Court however it is apparent from the Bank's affidavit in answer that, so far as the first Appellant was concerned, it relied on the unsatisfied demand notice as constituting a perfect and sufficient justification for proceeding to exercise its powers of sale. As to the second Appellant, while accepting that it had indeed been involved in negotiations for a possible sale of the properties to him, its case was that no concluded agreement had in fact been reached. Accordingly, the second Appellant had acquired no beneficial or caveatable interest in the properties.

[11] In his ruling the judge wrote:

> "The issue in this case boils down to this. If I hold on affidavits as presented that an agreement for sale and purchase between the second [appellant] and the [respondent] existed then the second [appellant] is entitled to continuation of the injunction and the caveat. If I conclude that there was no such completed contract then the [respondent] should succeed and the issue of

estoppel and striking out do not arise. The injunction would then be dissolved and the mortgagee's sale would proceed. To examine the issue of existence or non existence of the agreement, an examination of correspondence between the parties is necessary".

[12] While we do not disagree with the judge's formulation of the issue before him we think that when the Court is considering whether to grant, continue or dissolve an interlocutory injunction it is important to remember that a plaintiff is only entitled to interlocutory relief where the Court is satisfied (i) that he has established a good arguable claim to the right he is seeking to protect (ii) that there is a serious question to be tried and (iii) that on the balance of convenience relief should be granted (see American Cynamid Co. v. Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 and Klissers Farmhouse Bakeries v. Harvest Bakeries Ltd [1985] 2 NZLR 129).

[13] The judge found no evidence to support the first Appellant's claim that sections 77 to 79 of the Property Law Act had been breached. In view of the fact that the debt was admitted and the Bank clearly had the means to meet any claim for damages that the first Appellant might be able to prove, he found no reason to maintain the injunction against the Bank at the instance of the first Appellant.

[14] So far as the second Appellant was concerned the judge examined the papers before him and reached the conclusion that all they revealed was that "there were some discussions but no final promise". In the absence of a concluded agreement there could be no proprietary estoppel and neither could the second Appellant have a caveatable interest.

THE APPEAL

[15] Dr. Sahu Khan again relied on his submissions filed in the High Court. He also helpfully identified a number of central questions which together gave rise to the eleven grounds of appeal. The first question was whether the Bank was entitled to exercise its powers of sale. Dr. Sahu Khan suggested that in view of the two years

which had elapsed since the Bank's notice of demand it could not proceed to sell the properties without giving a further notice, the first notice having either lapsed or been waived. In our opinion the fact that the Bank was involved in apparently protracted negotiations with the second Appellant and other possible purchasers supports the view that the Bank was throughout determined to proceed with sale in the absence of redemption by the first Appellant. We find nothing to suggest either that the notice had lapsed or that compliance with it had been waived. We agree with the judge that there was no other evidence of failure to comply with sections 77 to 79 of the Property Law Act.

[16] Dr. Sahu Khan next suggested that the Bank had breached section 73 of the Property Law Act by failing to transfer the property to the first Appellant's nominee namely the second Appellant for the sum of $241,000. The short answer to this submission is that the first Appellant was unable to repay the amount that it owed the Bank and therefore was unable to redeem.

[17] Dr. Sahu Khan then suggested that the Bank had failed to discharge its duty to the first Appellant by not securing to secure the highest price available for the property. This submission faces the obvious difficulty that the second Appellant is seeking to enforce what he says is a binding sale and purchase agreement at a price lower than had been agreed between the Bank and a third party. The fact that the property may have increased in value after the agreement was reached with the third party does not assist the first Appellant.

[18] So far as the second Appellant was concerned, Dr. Sahu Khan again submitted that the Bank had agreed to sell the properties to him $241,000 and that therefore by relying on that promise and forbearing to act he had acquired a proprietary estoppel. In our view, the High Court was correct to hold that an estoppel could only arise if there had been a promise to sell the properties to the second Appellant. As has been seen, the judge, having perused the papers, concluded that they did not appear to disclose the existence of a binding contract. We agree. We would add that the only

evidence of detriment advanced by the second Appellant was his unsubstantiated claim not to have purchased certain unidentified properties.

[19] In both his submissions Dr. Sahu Khan dwelt at length on what he stated were the many substantial and complicated issues of fact and law between the parties including an allegation by the second Appellant that the Bank had acted fraudulently. He suggested that the resolution of these issues on affidavit evidence was wholly inappropriate and therefore the matter should proceed to trial with the injunction and caveat remaining in place. While we agree that complicated issues of fact including allegations of fraud should not be finally resolved on affidavit evidence alone, in our view Dr. Sahu Khan's approach was misconceived.

[20] Examination of the authorities cited by Dr. Sahu Khan in support of his proposition reveals that each is dealing either with an application for summary judgment or an application to strike out. In paragraph 11 of his submissions to the High Court Dr. Sahu Khan wrote:

> "The application of the [Bank] is basically an attempt to strike out the action because if the caveat is removed and/or the injunction is dissolved then the [Bank] will be able to sell the property in question and the [Appellants] action will become meaningless."

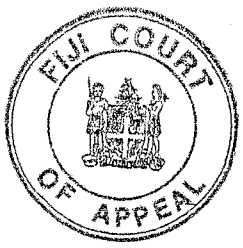
[21] In our view the principles governing and the consequences of applications for summary judgment or striking out are quite different from those applying to the continuation of an interlocutory injunction. Where an application for summary judgment succeeds the Defendant is wholly debarred from defending all or part of the plaintiff's claim. When an action is struck out the plaintiff is wholly debarred from prosecuting it. An interlocutory injunction, on the other hand, is merely an interim remedy which the Court has the discretion to order in certain well defined circumstances. Unlike summary orders, the refusal of an injunction or the refusal of its continuation does not put an end to the litigation.

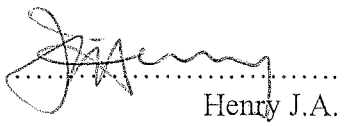
[22] As is evident from the High Court's ruling the Appellants' application for the injunction to continue failed because the judge did not think that on the materials presented to him the Appellants had disclosed a good arguable claim to the rights they sought to protect. It was therefore unnecessary to decide where the balance of convenience lay. Contrary to Dr. Sahu Khan's submission the refusal to extend that injunction will not render the Appellants' legal proceedings "meaningless". Their claim for damages against the Bank remains undisturbed.

[23] The grant or refusal of an interlocutory injunction is discretionary and unless the primary judge has been wrong in principle this Court will seldom interfere. We can detect no error in the judge's approach and therefore the appeal must fail.

RESULT

1. Appeal dismissed.
2. The injunction granted on 28 October 2003 is discharged forthwith.
3. Caveat No. 526154 is to be removed from the register forthwith.
4. The Respondent is to have its costs which we assess at $2,000.





Henry J.A.

Scott J.A.

McPherson, JA

Solicitors
Messrs. Sahu Khan & Sahu Khan for the Appellants
Messrs. Lateef & Lateef for the Respondent