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

CIVIL APPEAL NO. ABU0049 OF 2004S
(High Court Civil Action No. 442 of 2003)

BETWEEN: BDO SPICERS AUCKLAND TRUSTEE COMPANY LIMITED

Appellant

AND: LAKO MAI ISLAND RESORT LIMITED

First Respondent

AND: INTERVAL HOLIDAYS (FIJI) LIMITED

Second Respondent

AND: LAKO MAI RESORT DEVELOPMENT LIMITED

Third Respondent

Coram: Ward, P
Barker, JA
Kapi, JA

Hearing: Monday, 28 February 2005, Suva

Counsel: Mr N. Barnes for the Appellant
Mr R. Naidu for the Respondents

Date of Judgment: Friday, 4 March 2005

JUDGMENT OF THE COURT

Introduction

[1] This appeal is from a judgment of Scott, J, delivered in the High Court on 27 February 2004. The learned Judge declined the appellant's application for a Mareva injunction against the now second and third respondents, Interval Holidays (Fiji) Ltd. ('Interval') and Lako Mai Resort Development Ltd. (Lako Mai Development).

Since it had failed in earlier applications to gain an injunction against the Native Land Trust Board (NLTB) and Touchdown Promotions Ltd. (Touchdown), it discontinued its proceedings against NLTB. Touchdown and NLTB should no longer be shown as respondents in this appeal. Touchdown's interests cannot be affected by the appeal.

[2] The Mareva injunction application was specifically directed against the sum of $1.9 million held in the trust account of Jamnadas and Associates, Solicitors Suva "for the credit of the third and fourth defendants....." (i.e. Interval and Lako Mai Development).

[3] When security for costs for the current appeal was due to be fixed by the Registrar under Rule 17(1)(b) of the Court of Appeal Rules, counsel for the appellant failed to appear. Consequently, the Registrar ruled that the appeal was deemed to have been abandoned under Rule 17(2). The respondents' solicitor then proceeded to disburse some of the funds in the trust account on the basis that the appeal was deemed to have been abandoned.

[4] There was some debate before this Court over whether a fresh notice of appeal had been filed in time under Rule 17(2). In the event, Ward P, in Chambers, on the application of the appellant, later ruled that the appeal could proceed. There was also an order made by the Chief Justice in the High Court on 5 March 2004 extending a holding injunction against disbursement of the funds, issued by Scott J. on 6 February 2004. The injunction is to last until the determination of this appeal.

[5] The propriety of the respondents' solicitors' actions in disbursing the moneys so promptly after the occurrence of what may have been an oversight by the appellant's solicitors, is not to be determined in this appeal. The Court was advised that contempt of Court proceedings were issued against the respondent's solicitors in the High Court but that those proceedings were unsuccessful. There is an appeal against that decision on its way to this Court.

[6] This Court was not impressed by the failure of the respondents' solicitors to provide to the Court and to the Appellant's solicitors, particulars of the disbursement of the $1.9 million held in their trust account or how much money was still in the account. Counsel appearing had been given no instructions on these matters, as he should have been. At the Court's insistence, information was reluctantly provided that the sum of $536,386.59 was still held. No particulars of the disbursement of the balance were supplied, other than counsel's statement that some creditors had been paid.

[7] The Court was also informed that the Inland Revenue had obtained some kind of charge over the fund. It is not clear whether other creditors had been preferred when funds had been disbursed and, if so, why. Nor was the Court informed of Interval's and Lako Mai's respective entitlements to the funds. Although the fund has been majorily depleted, for whatever reason, there is still over half-a-million dollars in the trust account which is susceptible to a Mareva injunction, assuming that the Inland Revenue's charge does take priority. The Court notes, in this regard, that a notice of claim from the Inland Revenue, annexed to an affidavit of Mr Yeatts, is not directed against either of the present relevant respondents. Although it was not mentioned in argument before this Court, Tompkins JA, at para. 47 of his judgment (referred in paragraph 8,) noted that Lako Mai Development appeared to be insolvent and that there were several winding-up petitions outstanding regarding it. That fact alone makes scrutiny of any payments out of the fund all the more necessary, in case there may have been some preferential payments made contrary to company law.

Facts

[8] The facts surrounding the appellant's claim are summarized in two judgments, both concerned with the appellant's unsuccessful claim for an injunction against Touchdown and other then respondents, including the present respondents. These are the reasons for judgment of Scott, J in the High Court dated 4 December 2003,

and the judgment of Tompkins, JA (sitting as a single Judge of this Court) of 28 November 2003. Scott J had given an oral judgment dismissing the application on 31 October 2003. The unsuccessful injunction application, aimed at all the then respondents, basically sought to restrain an deed of settlement being entered into which had the effect of transferring the relevant land to Touchdown. The complicated facts surrounding the Lako Mai Resort timeshares need not be repeated here, given the exigencies of time under which this Court is operating. Only the bare essentials need to be mentioned.

[9] The appellant is the statutory supervisor of a scheme whereby numerous investors- mainly from New Zealand – paid some $15 million for timeshare (or interval holiday) rights in a resort development to be built on Lako Mai Island by companies controlled by a Mr Frank Yeates. The land was leased by the NLTB to the present first respondent for 99 years from 1 January 1990 and then subleased for 53 years from 1 October 1995 to the present third respondent. According to paragraph 7 of Tompkins JA's judgment, NLTB consented to the sublease which specifically permitted the third respondent to issue time share licences to occupy bures at the resort.

[10] On 13 January 1998,the interest of the current first respondent under the head lease was assigned to the current second respondent which issued timeshare licences to another company, not a party be the proceedings, Lako Mai Resort (New Zealand) Limited. This company entered into a deed of participation with the appellant and the third respondent. Included was a covenant by the third respondent.

> ***"The covenantor undertakes that it will not do or omit to do anything which will adversely affect the rights of the owners under the scheme."***

The appellant is the statutory supervisor of the timeshare scheme appointed under New Zealand legislation.

[11] On 30 December 2002, NLTB re-entered the resort as head lessor and terminated the head lease because of numerous breaches by various responsible entities.

[12] On 23 October 2003, a deed of settlement was entered into by all the various Lako Mai Companies, Mr Yeates, NLTB and Touchdown. In short, all claims were settled. NLTB granted Touchdown a new lease. Touchdown made several payments, including $2.25 million to the 'Lako Mai Group.' There is no entity with this name, although clearly the various companies and Mr Yeates were intended to come within this expression. The appellant was not a party to this deed.

[13] This deed of settlement was varied by a memorandum of counsel dated 30 October, 2003 which provided that the sum of $2,250,000 paid to the 'Lako Mai Group' under the deed of settlement be disbursed as to $350,000 to the solicitors for the Lako Mai Group in payment of their fees and the remaining $1,900,000 to be paid into the trust account of those solicitors for the credit of the second and third respondents. The money was not to be disbursed for 14 days from the date of payment. Payment was made in terms of the memorandum.

[14] On 23 October, 2003, the appellant filed in the High Court at Suva a writ of summons and statement of claim naming the present respondents, NLTB and Touchdown as defendants. Pleading a breach of the deed of participation by the fourth respondent and inducing breach of contract and unlawful interference with contractual relations by all the respondents, it sought injunctions restraining the respondents from entering into any agreement which would adversely affect the owners' interests. More particularly, it sought an injunction requiring the fourth (now third) respondent to take all steps necessary to preserve the rights of the owners under the timeshare scheme including taking action for relief against forfeiture.

[15] On the same day, it filed an ***ex parte*** summons seeking an interim injunction in terms similar to the interim injunction it later sought from the High Court. Later that

day, counsel for the Appellant appeared before Scott J who granted an interim injunction to expire on 30 October, 2003 and ordered an ***inter partes*** hearing on that day. On the following day, he dismissed the application. Both Scott J. and Tompkins JA, considered that a good arguable case had not been made out for the injunction sought and that the balance of convenience did not favour the appellant (then Plaintiff). Tompkins JA agreed with Scott J.

[16] Between the delivery of the judgment of Tompkins JA and the filing of the application for a Mareva injunction, the Plaintiff substantially amended its Statement of Claim. Whereas the original Statement of Claim sought only to prevent the completion of the Deed of Settlement, the amended Statement of Claim, recognising that the Deed of Settlement had actually been completed, sought damages against the defendants for entering into it. It was said that, as a result of the settlement, the timeshare owners had entirely lost their investment.

[17] The essential facts disclosed in the affidavits in the Mareva application are summarised in Scott J's judgment as follows:

> ***"There was a further significant development; On 12 February Mr Smith advised me that the Plaintiff would be discontinuing against the First Defendant (NLTB). A Notice of Discontinuance was filed on 16 February. I have retained the former descriptions of remaining parties for the sake of convenience.***
>
> ***The two principal affidavits filed in connection with this application were:***
>
> ***(i) James Lawry McQueen (annexed to the affidavit of James Sloan) in support, 6 February 2004; and***
>
> ***(ii) Frank Allan Yeates (annexed to the affidavit of Dilip K. Jamnadas) in opposition, 11 February 2004.***
>
> ***Mr McQueen's evidence was that Frank Allan Yeates owns and controls the various companies which received the bulk of the approximately $15 million paid by the time share owners for occupation rights at the Lako Mai Resort. Mr McQueen says that as a result of the failures of the Third and Fourth Defendants to discharge their contractual obligations under the 1997 agreement the rights of occupation and the $15 million have been***

lost. As a result of the Deed of Settlement there is now $1,900,000 in the trust account of Jamnadas and Associates. As the representative of the time share owners the Plaintiff has commenced the action in an effort to recover some of the monies lost. Mr. McQueen says that Mr Yeates has been associated with numerous failed companies and has demonstrated that he has the inability to manage companies without serious risk to creditors. For that reason he has been banned in New Zealand from holding the office of Director (Exhibit JLM 14). Given Mr Yeates' antecedents there is a real risk that the $1.9 million will have been dissipated by the time the Plaintiff obtains judgment against the Third and Fourth Defendants.

Mr Yeates' affidavit in answer is, as I find, a model of dissemblance. He avoids mentioning that he has been banned from holding office as a director. He does not deny but neither does he accept that companies controlled by him have received very large sums of money from those whom the Plaintiff represents. Despite the clear wording of the Deed of Settlement as varied by the Memorandum, a copy of which is on the case file, he plainly wrongly maintains that the sum held by Jamnadas and Associates is being held to the credit of the "Lako Mai Group", whatever that may be, rather than the credit of the Third and Fourth Defendants. He suggests that the Third and Fourth Defendants are faced with a "huge tax assessment in the sum of approximately $2 million" but then exhibits (Exhibit FAY 1) a VAT assessment directed to a company, Lako Mai Resort Management Limited which is not even a party to this action. In paragraphs 3.1 to 3.16 of his affidavit he blames the time share owners' losses on the time sharers' Club Committee. He says that the Third and Fourth Defendants did all that they could to protect the time share owners' interests. With respect, I find that claim and the blame directed at the Club Committee to be wholly spurious."

High Court Judgment

[18] Scott J noted that the new statement of claim with its substantial amendments **"do not advertise a Plaintiff sure of his case."** He characterised the facts as obscure and uncertain and found as unexplained the precise relationship amongst all the various Yeates companies. He doubted whether there had been NLTB approval to the sub-lease because an affidavit from a NLTB official dated 29 October 2003 stated that NLTB had no knowledge of other companies' involvement until 2003. The Judge pointed to a conflict between the amended pleading of claim and the NLTB information.

[19] The learned Judge concluded his judgment as stated in para. 20 below. He had earlier rejected the affidavit of Mr Yeates who is banned from being a company director in New Zealand and who has been declared persona non grata in Fiji. The Judge noted the respondents' assertion (which lies ill in the mouth of the promoter of this scheme) that the timeshare owners probably had no valid contracts because of non-compliance with the NLTB legislation, a possibility mentioned by the Judge in his earlier judgment.

[20] The Judge held:

> *"Having considered the materials before me and the arguments advanced by Counsel I find myself rather more impressed by what appears to be Mr Yeates' misfeasance than I am by the strength of the actual case now being brought against the Third and Fourth Defendants by the Plaintiff. It will be remembered that the law governing the Deed of Participation was stated to be the law of New Zealand, not the law of Fiji (paragraph 13). It will also be remembered that the offeror was Lako Mai Resort (New Zealand) which is not a party to these proceedings. Of the $15 million paid, approximately $9 million went to Accent Holidays Limited which is also a stranger to this action. I am inclined to doubt whether the covenantor, the Fourth Defendant, had any legal interest in the resort at all.*
>
> *The fact that a large amount of money has been lost and that a fairly large amount of money is securely held does not of course justify the granting of a Mareva Injunction. Any Court would want to assist the time share owners but sympathy alone does not provide grounds for injunctive relief to be granted.*
>
> *In my view the application must be dismissed, however in view of the uncertain facts and bearing in mind that the matter has already been to the Court of Appeal once I will stay the lifting of the Interim Injunction for a period of seven days."*

Pleading and Arguments

[21] The Amended Statement of Claim is not a masterpiece of legal drafting. The Court empathises with the Judge's criticisms. It alleges against the now third respondent

that, by not obeying the terms of the lease to the extent that NLTB re-entered and by entering into the Deed of Settlement, the third respondent broke its covenant **"not to do or omit to do any thing which adversely affect the rights of the owners under the scheme."** If the interest in the land on which the timeshare licences depended became no longer vested in the third respondent because of its failure to comply with the terms of its lease, then it was doing or omitting to do something which adversely affected the rights of the timeshare owners. A ***fortiori***, it was a party to a scheme which transferred the land to a third party, Touchdown, thus not only affecting adversely, but terminating forever, the timeshare owners' rights.

[22] The further causes of action against the current second and third respondents allege inducing breach of contract and interference with contractual relations between the appellant and the third respondent. It is said that these causes of action arose when the respondents entered into the Deed of Settlement with Touchdown and NLTB. The statement of claim is very light on specifics. Counsel for the appellant in submissions claimed that the third respondent was induced by the second respondent and other parties to the Deed to breach its contract with the appellant by offering to surrender the lease and sublease. There is no evidence as to what actually occurred, only inferences.

[23] The allegations for inducing breach of contract are equally obscure in the absence of any knowledge of the parties' conduct at the time of entering into the Deed.

[24] Scott J did not specifically align his findings to the causes of action pleaded in the amended Statement of Claim. Rather, he looked at the appellant's application globally and found that it disclosed an insufficient cause of action such as to justify a Mareva injunction. Clearly, the Judge considered that there been no sufficient cause of action made out on any of the three allegations. He held that the application satisfied the requirement of risk of dissipation of the money. His finding in this respect was not challenged by counsel, understandably in the Court's view.

Decision

[25] The Court is aware of the principles of not interfering with a Judge's exercise of discretion and of the threshold that a successful applicant for a Mareva injunction must cross. The authorities in support of these on propositions are well-known and do not need to be repeated.

[26] On those bases, the Court considers that there has not been made out a case strong enough to justify a Mareva injunction on the causes of action based on inducing breach of contract and interfering with contractual relations. The evidence as to what happened is unclear. Each separate but related company involved could well have acted in concert, since they were apparently all under Mr Yeates' control. The Court considers that the Judge should have looked at each cause of action separately, rather than globally and ruled on whether a case to answer had been made out for each cause of action.

[27] The situation regarding the third respondent is different. As a convenantor with the appellant under a Deed, there must be a strong case that it acted to the detriment of the appellant in

(a) breaching numerous covenants with NLTB, so much so as to cause re-entry and

(b) signing the Deed which allowed a third party to take over the resort in which those represented by the appellant thought they had an interest.

[28] Consequently, there is a case against this respondent, sufficient to grant a Mareva injunction against the interest of the third respondent in the moneys held.

The Court does not know whether the interests of the second and third respondents are joint and several, since no information was provided to the Court. Consequently, the whole fund must be charged in the absence of any clear definition of the interests of the second and third respondents. The fact that Lako Mai may not have had any legal interest in the resort is immaterial. It is bound by its covenant. Like Scott J, this Court does not see that the allegations by Mr Yeates against the committee of timeshare owners provide reason for refusing a Mareva injunction.

Legal Considerations

[29] Scott J. touched on possible problems in the path of the appellant caused by the inexorable provisions of the NLTB legislation. Of course, if NLTB consent had not been given to the transfer of the sublease, that transaction would be illegal. However, that matter is far from clear and there would have to be a hearing to determined it. The Judge was quite right to observe the question raised by the affidavit of the NLTB official.

[30] Whether the timeshare arrangements fall foul of s.12 of the Native Land Trust Act is unclear. Again, that would need to be the subject of a full argument. Such a proposition is strange coming from the very developer who sold $15 million worth of timeshare entitlements to numerous investors. If correct, it would again demonstrate the desirability for Fiji of legislation such as the New Zealand Illegal Contracts Act 1970. Such an Act could ameliorate the injustice so often caused by the rigidity of the common law on illegality.

[31] There is much to be said for the submission of counsel for the appellant that the granting of a timeshare licence for a week at a time is no different from anyone booking at a resort for a week. Both transactions give a person a licence to occupy

a room or bure exclusively and to enjoy the public areas of the resort. Cases such as ***Kulamma v. Manadan*** [1968] AC 1062 show a realistic approach to the application of the Native Land Trust Board legislation.

[32] The Court acknowledges that there could be difficulties in the way of the appellant if the technical illegality defences were to succeed. However, the Court considers it inappropriate to rule on them in this appeal. The 'serious question to be tried' against the third respondent has been made out. The likelihood of dissipation, as explained by Scott J. was not challenged. The rapid disbursement of the funds as soon as it was thought that the appeal had been deemed abandoned, strengthens the appellant's position in this regard.

[33] The Court notes that the deed under which the third respondent gave a covenant in favour of the appellant is governed by New Zealand law. No challenge to jurisdiction nor plea of *forum non conveniens* was made to the Fiji Courts. It is not unusual for the Courts of one jurisdiction to be seized of contracts governed by the law of another jurisdiction. In any event, it is highly unlikely that the covenant in question would be treated any differently under New Zealand law as compared to Fiji law.

Decision

[34] The Court is satisfied for the reasons outlined above, that pending a further order of the High Court, a Mareva injunction should issue against the interest of the third respondent, Lako Mai Resort Development Limited, in the funds held to the benefit of the second and third respondents in the trust account of Jamnadas and Associates pursuant to a variation of the Deed of Settlement effectuated by memorandum of counsel dated. To this extent the appeal is allowed.

[35] This injunction will cover the sum of $536,586.59 currently held and any other money which may be ordered to be returned to the fund by a Court, should there be any determination that any money had been disbursed wrongly.

[36] The right of the appellant to a charge over the funds is subject to any superior rights over the fund as may be determined by the High Court. This Court has in mind ***bona fide*** claims of creditors, the Inland Revenue charge etc. Normally, the Court allows payment of normal trade creditors out of the fund charged in a Mareva injunction. However, the situation here is so confused by the various factors discussed, that the safeguard of a Court order is justified. There was said to have been a claim for another large sum for solicitors fees (no less than $870,000) to be taken out of the fund, in addition to the $350,000 already paid to the solicitors under counsel's memorandum varying the deed. If there are other creditors, it may be questionable whether claims for legal fees are entitled to preferential payment when the company charged with those fees is insolvent.

[37] The injunction is to enure pending any order of cancellation or variation issued by the High Court. This Court envisages an application of the kind mentioned in the proceeding paragraph or one based on a properly proved allegation of the respective rights of the second and third respondents.

Costs

[38] The appellant has had modest success and is entitled to costs fixed as $1,000 plus disbursements payable by the third respondent.

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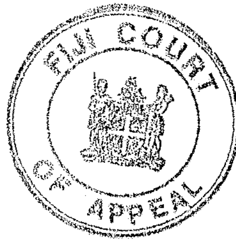
Ward, P

Barker, JA



Kapi, JA

Solicitors:

Munro Leys, Suva for the Appellant
Messrs. Jamnadas Clarke and Associates, Suva for the Respondents

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