IN THE COURT OF APPEAL

APPELLATE JURISDICTION

Civil Appeal No. ABU 0001 of 2013
ON APPEAL from the High Court of Fiji at Suva In Civil Action No. HBC 197 of 2012

BETWEEN : **PREM KRISHNA GOUNDAR** of Nasese, Suva in the Republic of Fiji, Self-employed

APPELLANT

AND : **FIESTY LIMITED** a limited liability company having its registered office at Suva in the Republic of the Fiji Islands

FIRST RESPONDENT

AND : **MINISTRY OF LANDS & MINERAL RESOURCES**

SECOND RESPONDENT

AND : **THE ATTORNEY GENERAL OF FIJI**

THIRD RESPONDENT

Coram : **Suresh Chandra JA**
Brito-Muthunayagam JA
Amaratunga JA

Counsel : **Mr. G. O'Driscoll for the Appellant**
Mr. D. Sharma and Ms Choo N for First Respondent
Mr. D. Nair and Ms. Sharma T for 2nd and 3rd Respondents

Date of Hearing: **28 November, 2013**

Date of Judgment: **5 March, 2014**

J U D G M E N T

Suresh Chandra JA

I agree with the reasons and conclusions.

Brito-Muthunayagam JA

I agree with the conclusion.

Amaratunga JA

1. This appeal is against the decision of High Court where after the hearing of the application for injunction the court had not only refused the injunction but also dismissed the entire action. The Plaintiff- Appellant (the Plaintiff) appealed against the decision of the refusal to grant injunction as well as dismissal of the action. At the hearing Mr. O'Driscoll, counsel for the Appellant only canvassed the appeal grounds regarding the dismissal of the entire action, and did not address the decision to refuse the injunction. It may be presumed that though the appeal against the said decision to refuse the injunction was included in the grounds for appeal it was abandoned at the time of the hearing. So, it seemed that the main issue in this court is that, was it proper for the High Court Judge to dismiss the entire action, at the conclusion of the hearing of the application for an injunction. Though counsel for the 1st Respondent-1st Defendant(the 1st Defendant) initially desired to defend the said part of decision relating to striking out the writ of summons, after some time conceded that he was unable to defend the decision of the Judge to strike out the writ of summons. At the hearing of the interlocutory application relating to injunction there was no summons filed by any of the parties to the dismissal of the entire action, hence presumably the court did not hear the parties on the said issue. In the circumstances the refusal to grant the injunction should be affirmed, though I do not agree with the reasoning of the court below on that, and equally the part of the decision that struck out the writ of summon needs to be quashed, and the writ of summons needs to be reinstated. Though I agree with the decision of the court below in refusing the injunction, I do not agree with the reasoning and specially the over emphasis

on the suppression of material facts in an *inter partes* motion seeking the injunction and I will deal with the reasoning of the refusal for injunction later.

Striking out of Writ of Summons

2. This appeal is against the decision of Justice Kotigalage delivered on30th November, 2012. The Plaintiff filed writ of summons on 17th July, 2012 against the Defendants and simultaneously filed an *ex parte* notice of motion supported by an affidavit seeking injunctive relief against the Defendant, but the court had made the motion *inter partes* and allowed the Defendants to file their affidavits in opposition and also statements of defence were filed. The *inter partes* summons seeking the injunctive relief was heard on 23rd August, 2012 and the decision was delivered on 30th November, 2012.

3. In the said decision the High Court Judge concluded as follow

> *'(a) Plaintiff failed to establish a case to obtain orders sought in interpartes filed on 17th July2012;*
>
> *(b) The Plaintiff's claim is frivolous and vexatious (paragraph 13(e), 14, 15, 16, 17, 18 and 19 of the order;*
>
> *(c) The Plaintiff failed to comply with Order41 Rule 9(2) of the High Court Rules and the said Affidavit was not signed by the deponent and as such there is no legally valid affidavit for consideration by this Court(paragraph 13(c) and (d) of this Order;*
>
> *(d) The Plaintiff had failed to obtain the consent from the Directory of Lands under Section 13(1) of the State Lands Ordinance and further the Director of Lands had not been made a party to this action initiated by writ of summons (para 20,21 and 22 of this Order).*
>
> *Accordingly, I make the following Orders that:*
>
> *(i) The Inter pates Motion filed on 17th July 2012 be dismissed;*
> *(ii) The Writ of Summons filed on 17th July 2012 be dismissed;*
> *(iii) The Plaintiff is ordered not to obstruct the development work carried out by the 1st Defendant on the Land Described in the annexure marked PG3 to the Affidavit dated 3rd August 2012.*
> *(iv) The Plaintiff should pay summarily assessed costs of $ 3,000 to the 1st Defendant and further $1,500 to the 3rd Defendant and the*

payment of the said costs should be made within 14 days from the date of this Order.'

4. Having made the above conclusions, the High Court Judge dismissed the *inter partes* motion dated 17th July, 2012 and refused the injunction and dismissed the writ of summons at the same time but there seemed to be no reference to dismissal or striking out of the writ of summons in the reasoning or conclusions. Being aggrieved by the said decision the Plaintiff appealed to this court and the Grounds of Appeal are as follows:

'1. ***THAT*** *the Learned Trial Judge erred in law and in fact in not taking into consideration the legal principles in an application for an injunctive relief when dismissing the Appellant's Inter Parte Motion filed on 17th day of July 2012 in Suva High Court Civil Action No. HBC 197 of 2012.*

2. ***THAT*** *Learned Trial Judge erred in law and in fact in dismissing the Appellant's Writ of Summons filed on 17th day of July 2012 in Suva High Court Civil Action No. 197 of 2012 summarily when the Learned Trial Judge ought to have heard the evidence in a trial proper rather than relying on Affidavit evidence.*

3. ***THE*** *Learned Trial Judge erred in law and in fact in holding that the Appellant had made a material non-disclosure when the Learned Trial Judge failed to take into consideration the material non-disclosure by the Respondents in dismissing the Appellant's application for injunctive relief.*

4. ***THE*** *Learned Trial Judge erred in law and in fact in not holding that the payment of rents by the Appellant to the second Respondent created an estoppel and as such the Respondents were estopped from vacating the Appellant.*

5. ***THE*** *Learned Trial Judge erred in law and in fact in not taking into consideration the evidence adduced by the Appellant whereby he was assured a tenancy by the second Respondent that he would get a portion of land after the subdivision and hence it was an implied agreement that the Appellant would get a tenancy from the second Respondent.*

6. ***THE*** *Learned Trial Judge erred in law and in fact in not taking into consideration all the material facts that the Appellant had submitted before the Court and hence there was a substantial miscarriage of justice.*

7. ***THAT*** *the Learned Trial Judge erred in law and in fact in dismissing the Appellant's cause of action based on contradictory Affidavits filed by the parties*

when the Learned Trial Judge ought to have adjourned the matter for a full hearing.

8. ***THAT*** *the Appellant reserves the right to add further grounds of appeal upon receipt of Court Record.'*

5. The Plaintiff occupied a portion of state land in terms of a 'Tenancy at Will (TAW)' granted by the Assistant Director of Lands. The said TAW inter alia had a condition which stated that said TAW should not operate to create tenancy in respect of the said land, and the Plaintiff may be required to vacate the land on receipt of notice to that effect. The Plaintiff was asked to vacate the premises stated in the TAW by a letter dated **22/06/2010**, in terms of the said condition contained in the TAW.

6. Prior to the said letter to vacate the premises the 1st Defendant was granted an 'Approval Notice of Lease' for a larger land inclusive of the land occupied by the Plaintiff under the said TAW for a period of 5 years commencing **from 1.01.2009**.

7. The Plaintiff filed a writ of summons seeking damages for trespass and negligence against the 1st and 2nd Defendants respectively and also sought injunctive relief against the said Defendants.

8. Since counsel for the Appellant did not canvass the determination to refuse the injunction, I will first deal with grounds 2 and 7 of the appeal grounds. I could not find a discussion of striking out of the writ of summons in the said judgment dated 30th November, 2012. In the circumstances there are no clear grounds for such striking out of the writ of summons. There was no summons filed by Defendants to strike out the writ of summons in terms of Order 18 rule 18 of the High Court Rules. So, it is presumed that parties were not heard on the issue of striking out of writ of summons. It is trite law that even a weak case needs the time of the court and only a hopeless and a case that is doomed to fail will be struck out after an *inter partes* hearing and reasons for such striking out should also be found in the decision of the court below. There was evidence before court that the Assistant Director of Lands had granted a TAW to the Plaintiff and

before cancelling it, a larger land comprising of this land subjected to TAW was included in 'Approved Notice for Lease" to the 1st Defendant on **1.1.2009**. The eviction notice to the Plaintiff was given about 18 months later on 2.6.2010. Though these facts were available from the undisputed material submitted by the Defendants these were not considered in the decision and the writ of summons was struck off on the basis that the claim was frivolous and vexatious, in paragraph 28 of the decision of the High Court Judge.

9. There are no reasons as to why the claim was frivolous, though there were reasons as to why the application for injunction was frivolous. A frivolous application for injunction may not *ipso facto* make the claim contained in the writ of summons frivolous and vexatious. This distinction was not considered in the court below. So, I do not agree with the said finding that the claim was frivolous and vexatious upon the undisputed materials before the court submitted by the Defendants. In any event I do not have to venture into such an issue at this moment, since the Plaintiff was not required to file even a statement of claim when he sought an injunction at the institution of the action, and the question of striking out of writ of summons would not have arisen at all, and venturing in to such a course is not warranted.

10. Any deficiency in the pleading can be cured by amendments to it at such initial stages without causing much difficulty to other parties. The decision of the court below does not indicate the High Court Order which it relied in the strike out of writ of summons. In terms of Order 18 rule 18(1)(a) when the pleading does not disclose a reasonable cause of action, this should be brought to the notice of the party and if the party is unable to cure it after a hearing of that issue and or after proper directions, the action can be struck out as a final resort. In the statements of defence, it was stated that the Plaintiff's claim lacked merit and also stated that since the Plaintiff failed to obtain consent of the Director of Lands the action is an abuse of process. The issues of merit in action cannot be decided at the interim injunction hearing, and it has to be determined at the trial and cannot be a

reason to strike out. None of the Defendants sought to strike out the action for any of the reasons contained in Order 18 rule 18 of the High Court Rules at the said hearing.

11. Both Defendants have not stated that the statement of claim is frivolous or vexatious or it does not reveal a reasonable cause of action. There is nothing on record which indicates that the issue of striking out of writ of summons was before the court and the parties were heard on that. There were no submissions made on striking out of writ of summons, *a fortiori* there are no reasons and or discussion in the judgment regarding such striking out.

12. Though there are no reasons for striking out of the writ of summons one possible reason may be the application of Section 13(1) of the Crown Lands Act (Cap132). Section 13(1) states as follows:

> *"13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-*
>
> *"This lease is a protected lease under the provisions of the Crown Lands Act" (hereinafter called a protected lease) it shall not be lawful for the* ***lessee thereof*** *to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such* ***lease be dealt with by any court of law or under the process of any court of law,*** *nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*
>
> *Any* ***sale, transfer, sublease, assignment, mortgage or other alienation*** *or* ***dealing effected without such consent shall be null and void****.*
>
> *(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.*
>
> *(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal.*

Every such appeal shall be in writing and shall be lodged with the Director of Lands.

(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent. (Inserted by 21 of 1959, s. 2)

(5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee"(emphasis mine)

13. The entire Section 13(1) should be taken as one and the proviso to the said 13(1) qualifies what type of dealings needed the consent of the Director of Lands. The proviso to the Section 13(1) makes non compliance (i.e the consent) null and void. It should be presumed all the instances that are made null and void are the prohibitive 'dealings' that needed the consent of the Director of Land. If not the proviso would be meaningless. The requirement to obtain consent is not regarding any 'dealing', but it is specifically limited to:

(a) 'alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same'.

(b) 'Dealing' effected to a lease.

14. The above analysis is more reinforced by the proviso to the said Section 13(1) which states that 'Any **sale, transfer, sublease, assignment, mortgage or other alienation** or **dealing effected** **without such consent shall be null and void.'** Sale, transfer …..etc all belong to one category of 'dealings' and that is parting with rights emanated from the land itself which confer a right to possession in a state land. The Director of Lands is granted sole authority to 'deal' with state lands as such any sale, transfer, sublease, assignment, mortgage or other alienation or 'dealing' of that nature. Applying the *ejusdem generis* rule in the interpretation, the word 'dealing' needs to be confined to the same category and not for all dealings. The category of things that are stated belong to parting with rights of the land namely the right to possess, and action for damages

against 2nd Defendant cannot be included in the said category that needs the consent of the Director of Land.

15. The present action filed by the Plaintiff only seeks damages from the Defendants and the alleged causes of action are laid down in the statement of claim filed on 16th of July, 2012. The present action does not 'deal' with a lease at all since there is no lease granted to any party and only an 'approval of lease' is annexed to the affidavit in reply filed by the 1st Defendant (annexed PG3). In any event the Plaintiff in the writ of summons does not seek to 'deal' even with such 'approval for lease' and is not seeking cancellation of it or seeking any such possessory rights being established in this action, that can be considered as a 'deal' in terms of Section 13(1) of Crown Lands Act (Cap 132). The Plaintiff is seeking damages for trespass against the 1st Defendant and also negligence against the 2nd Defendant.

16. The purpose of the Section 13 is not to preclude the courts from exercising its general jurisdiction over all the State Lands and or State officials. If so it could have been stated more directly and clearly. The consent of the Director of Lands is needed primarily to the lessee for 'dealing' of the leased state land, but if the court is required to 'deal' with the lease, in terms of the said Section 13 (1), then the consent of the Director of Lands is needed as the land policy of the state is implemented through Director of Lands , and if it is not a 'dealing' the institution of action can be done without consent of the Director of Lands, specially when the action is filed by a person other than the lessee seeking only damages from the Permanent Secretary and against a private party (1st Defendant). In state lands the residual rights always remain with the state irrespective of the type of lease or grant of some specific rights granted by the Director of Lands. The rationale in obtaining consent of the Director of Lands before institution of an action, is that a party (2nd Defendant) is precluded from 'dealing' with the state land without the concurrence of the Director of Lands who is the ultimate authority regarding the 'dealings' of the state land who holds residual rights which are not specifically granted to other parties.

17. The claims against the Defendants are for damages based on trespass and negligence and this cannot be considered as 'a dealing' relating to a lease. This is an action relating to the conduct and or actions of the Defendants. In my judgment the alleged causes of action against the defendants are not a 'dealing' that needs consent of the Director of Lands.

18. In ***Prasad v Chand*** [2001] 1 FLR 164 Gates J(as his Lordship then was) held in an action for ejectment filed by the lessee, in terms of Section 169 of the Land Transfer Act, that 'The ejectment of an occupier who holds no lease is therefore not a dealing with a lease.' By the same token, a damages action filed by such an occupier under a TAW, which was cancelled subsequently, cannot be considered as a 'dealing' with the lease.

19. In any event from the evidence before the High Court Judge there was evidence of TAW granted to the Plaintiff by the 2nd Defendant without a specific period of time being mentioned, which means that it should be valid until the contrary is communicated, and before cancelling TAW a larger land which comprised the land area in the TAW was included in the 'Approval Notice of Lease' granted to the 1st Defendant for 5 years commencing from **1st January, 2009.** The notice to vacate the premises was issued to the Plaintiff only on **22.6.2010.** It should be noted at least from 1.01.2009 till 22.06.2010 the land subjected to TAW was included in the 'Approval Notice of Lease granted' to the 1st Defendant for more than 18 months. Both TAW and 'Approval Notice of Lease' are instruments that grant a right to possession (see clause 4 of Approval Notice of Lease PG 3). From the evidence produced by the 1st Defendant it was an oversight on their part. In 'PG14' annexed to the affidavit in reply of the 1st Defendant, the Permanent Secretary for Lands on 31.08.2010 states as follows;

> *'It is regrettably noted that issue of a Development Lease to your Company in January, 2009 is an <u>oversight</u> on our part as it has erroneously included an existing Tenancy At Will , for Residential Purposes, to Mr. Prem Krishna Goundar,…. ….. effective from 1st January 2008.' (emphasis is mine)*

These are admitted facts before the court below and I do not wish to comment more, and suffice to state that that claim for damages on the available evidence was not frivolous and vexatious as stated in the decision of the court below.

20. At the hearing of the application for injunction the evidence was in the affidavit form and from the available evidence one cannot come to a conclusion as to the merits of the Plaintiff's causes of action, hence the striking out of writ of summons upon the evidence contained in the affidavits relating to injunction is bad in law and should be quashed and the writ of summons should be reinstated.

Injunction

21. The grounds of appeal nos 1,3,4,5 and 6 are dealing with the determination of the High Court Judge regarding the injunction. I would deal with those grounds together briefly, for completion. Though I agree that the injunction should be refused, I do not agree with the reasoning of the court below. In the conclusion, the learned Judge of the court below held that 'the Plaintiff failed to comply with the Order 41 rule 9(2) of the High Court Rules and the said **Affidavit was not signed by the deponent** and as such there is no legally valid affidavit for consideration by the court.' Even though the affidavit in support had failed to comply with Order 41 rule 9(2) the affidavit was signed by the deponent and it was duly attested by a commissioner for oaths. So the finding of the Judge as to the absence of signature of the deponent, is incorrect.

Suppression of Material Facts

22. In paragraph 19 of the decision dated 30th November, 2012 in the court below it was stated:

> 'It is further observed in the Statement of Claim filed by the Plaintiff in paragraph 6 it was stated:
>
> **"6. The 2nd Defendant whilst issuing the above lease had failed to realize that they had issued the portion of the lot that has been given to the Plaintiff and the same has resided on the property from 1967 until today."**

> The same position was averred by the Plaintiff in the affidavit of support. **In fact this statement is a false statement which was evident by the letter Annexure LR1** to the affidavit of the 2nd and 3rd Defendants (which letter was issued by the Acting Director of Lands on 13th March 2008).
>
> It is clearly stated in para (e) of the said letter that Tenancy at Will, issued to Lakshmi Chand was cancelled and effective date of the Tenancy at Will of the Plaintiff was 1st January 2008. Plaintiff had not replied the affidavit of 2nd and 3rd Defendants neither adduced any documentary evidence to establish he had been occupying the land from 1967. To add further Plaintiff had accepted the terms and conditions of the letter dated 5th March 2008. LR4 annexed to the Affidavit filed by the 2nd and 3rd Defendants clearly shows the buildings in the land were erected by the previous lessees and the Plaintiff cannot claim the buildings were erected by him.
>
> The Plaintiff had not come to this court with clean hands. Non disclosures of LR1 itself is suffice to dismiss the Orders sought in the Notice of Motion.
>
> The Plaintiff had deliberately suppressed this letter and merely stated he was residing in the land from 1967. This fraudulent and vexatious statement by the Plaintiff who suppressed the material facts to mislead the court.
>
> **The Plaintiff had not come to this court with clean hands. Non disclosures of LR1 itself is suffice to dismiss the Orders sought in the Notice of Motion'** (emphasis is mine)

23. I do not agree with the said analysis and findings regarding the said 'LR1' issued in 2008 and it was the document that granted TAW to the Plaintiff. In the said letter it was stated that a previous TAW granted to Lakshmi Chand was cancelled. This does not necessarily mean that the Plaintiff started his occupation or possession of the land subject to TAW in 2008, and till then said Lakshmi, the previous person who held the TAW, was in occupation of the land and she had done all the developments to the land including any buildings on it. As such the reasoning and analysis of said 'LR1' in the court below as stated in the above quoted paragraph, is wrong. The Possession, which is a factual matter, may be before or even after 2008, and the conclusion as to such fact cannot be entirely relying on a document when the conflicting evidence was before court. The

permission by the Assistant Director of Lands was legally granted to the Plaintiff in 2008, and whether the Plaintiff lived in that premises before 2008, without such legal permission cannot be decided from that letter 'LR1', which the court below relied for the said conclusion to refuse the Plaintiff's evidence contained in the affidavit that he had lived in the premises since 1967. The cancellation of earlier TAW, to Lakshmi Chand does not prove that she lived in the said land till 2008 and no one else lived and made any developments to the premises, prior to 2008.

24. What the plaintiff had stated in his affidavit was that he lived in the said premises as opposed to any legal occupation through a TAW from 1967. It is possible to live on a land as a licensee or otherwise while the TAW was in favour of said Lakshmi who held the TAW till 2008. In the affidavit in reply of the 2nd Defendant there were allegations that third parties were occupying the land as licencees of the Plaintiff, when the TAW was in favour of him, even after 2008. So, it is wrong to conclude that the Plaintiff had made a false statement, based only upon the affidavit of the Plaintiff and 'LR1' (annexed to the affidavit in reply of the 2nd Defendant) and upon conflicting materials before the court at the hearing of an injunction. The document 'LR1', which the learned judge relied heavily, does not prove conclusively that the Plaintiff was not living in that property prior to 2008 or had not made any improvements to it prior to 2008, hence I do not agree with the conclusion that the Plaintiff was making a false statement and that is a matter for the trial judge to make at the final determination after allowing parties to adduce further evidence.

25. At paragraph 26 of the decision, the High Court Judge, held that there was no necessity to consider the principles (governing the grant of injunctions) since the 'Plaintiff failed to submit any material for consideration and in fact he had abused the process of court by non disclosure of the material facts, suppressed the documents and attempted to mislead the court.' According to the said paragraph the reason for refusal of the injunction is non disclosure of material facts.

26. In the court below it was held that non disclosure of 'LR1' itself would suffice to dismiss the orders sought in the motion. (see paragraph 19 of the decision of the High Court Judge) I do not agree with this over emphasis on the said document in an *inter partes* motion. Though any *ex parte* order obtained through suppression of material fact *ipso facto* can be dissolved, it cannot be applied *in toto* for *inter partes* summons, as in this case. The *ex parte* motion filed by the Plaintiff, seeking injunction was made *inter partes* by the court and the hearing was based on the *inter partes* summons. The court had the opportunity of hearing both parties after they submitted the affidavits in reply. In the circumstances the non disclosure of said 'LR1' is not sufficient to dismiss the motion seeking injunction, though such non disclosure can be considered as a special factor for consideration in the determination as to conduct of the Plaintiff.

27. In ***Ghafoor and Others v Cliff and Others*** [2006] 2 All ER 1079 at 1091, David Richards J held:

> *'Secondly, the claimants submit that Mr. Cliff's affidavit in support of the application contained serious misrepresentations and failed to make full and frank disclosure of relevant facts. These are serious criticisms in any case, but the importance of accurate evidence is particularly acute on an application without notice, and the duty of disclosure on such an application has been stressed by the courts on many occasions (see, for example,* ***Fitzgerald v Williams, O'Regan v Williams*** *[1996] 2 All ER 171 at 177, [1996] QB 657 at 667-668 per Bingham MR).* ***The principles are well established and well known on applications without notice for*** *injunctions and other interim relief, but* ***they are fundamental to the proper functioning of the court's process on any application without notice.*** *It is of course the very fact that the application is made without notice to other interested parties which makes these principles so important. Other parties do not have the opportunity to correct or supplement the evidence which has been put before the court' (emphasis is mine)*

28. In ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc*** (Lavens, third party) [1988] 3 All ER 178 at 181-182 Glidewell LJ held,

> *'The authorities to which counsel for Mr. Lavens refers us start with* ***R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac*** *[1917] 1 KB 486, a decision of this court. That case involved an ex parte application for an order of prohibition, not for an injunction. However,*

the judgments contain dicta which relate to ex parte applications generally.'

Warrington LJ said (at 509):

> *'It is perfectly well settled that a person who makes an ex parte application to the Court--that is to say, in the absence of the person who will be affected by that which the Court is asked to do--is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.'*

Scrutton LJ said (at 514):

> *'... it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts ... the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.'*

Bank Mellat v Nikpour [1985] FSR 87 was a decision of this court relating to a Mareva injunction. On an inter partes application a judge discharged the injunction on the ground that there had not been a full and proper disclosure of the facts by the plaintiffs. On appeal the plaintiffs argued that, if there had been a non-disclosure, it had been innocent. The court dismissed the appeal, holding in effect that even innocent non- disclosure was fatal. Lord Denning MR said (at 89):

> *'When an ex parte application is made for a Mareva injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the court that a Mareva injunction can properly be granted ... '*

Donaldson LJ said (at 90):

> *'This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition we all know it is trite law ... '*

He then quoted the passage from the judgment of Warrington LJ in ***Ex p Princess de Polignac*** which I have quoted above and continued (at 91- 92):

> *'... the court will be astute to ensure that a plaintiff who obtains an injunction without full disclosure--or any ex parte order without full disclosure--is deprived of any advantage he may have derived by that breach of duty ... The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Piller order, one of the law's two "nuclear" weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked.'*

Slade L J agreed."

29. The above authorities are where *ex parte* orders had been obtained prior to *inter parte* applications to dissolve such an order. If an *ex parte* order for injunction was obtained, it can be dissolved for material non disclosure without considering merits of the application for injunction, the rationale for such a draconian rule is fully described in the cases cited above, but I was unable to find such a strict rule being applied in *inter partes* hearing seeking an injunction. As such I would not place such a heavy burden on non disclosure of 'LR1' to strike out the application for injunction.

30. Even if the court dismisses an application for injunction without considering merits, the party is not precluded from making a fresh application after full disclosure of all relevant materials and this was held in the judgment of Glidewell LJ ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc*** [1988] 3 All ER 178 at 182-183 it was held;

'In ***Eastglen International Corp v Monpare SA*** *(1987) 137 NLJ 56 the first solicitor for the plaintiffs on an application for a Mareva injunction swore an affidavit which clearly omitted a most material fact. When the defendants applied to discharge the injunction, the plaintiffs went to other solicitors, who discontinued the first action and started a fresh action, coupled with a fresh application for a Mareva injunction backed by an affidavit which made clear the failure to disclose in the first action. On an application to discharge the second injunction because of the non-disclosure in relation to the first injunction, it being accepted that the failure was wholly due to the solicitor, Gatehouse J said that if an omission is innocent and the undisclosed fact is not of central importance, the court may well decline to discharge the injunction (see (1986) 136 NLJ 1087). However, this was obiter because in the particular case he did discharge the injunction. On appeal Sir John Donaldson MR said (137 NLJ 56):*

'I stand by everything that I said in the Bank Mellat case about the importance of full and frank disclosure, and I would support any policy of the courts which was designed to buttress that by declining to give anybody any advantage from a failure to comply with that obligation. I would go further and say that it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit. This is the most important duty of all in the context of ex parte applications.

Nevertheless, in relation to the second injunction, because the default was wholly that of the first solicitor, the court (Ralph Gibson and Nicholls LJJ agreeing) allowed the appeal and continued the second injunction.' *(emphasis added)*

31. While stressing the importance of disclosure of all materials before the court, in an *ex-parte* application, the over emphasis on that to refuse an *inter partes* motion seeking injunction is not supported by the case authorities cited above. From the above authorities it is possible for the applicant to bring a fresh application with full disclosure if the court had refused the application for injunction solely on the non disclosure of material facts. If so I cannot see the rationale in the dismissal of the motion seeking injunction in the *inter partes* hearing solely based on the non-disclosure document 'LR1'. So, I reject the said reasoning contained in the paragraphs 19 and 26 of the decision of the court below.

32. The application for injunction needs to be refused *in limine*, as there is no permanent injunctive relief sought in the claim. The only claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In ***American Cyanamid Co v Ethicon Ltd*** [1975] 1 All ER 504 at 510 Lord Diplock held;

> *'...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any* ***real prospect of succeeding in his claim for a permanent injunction at the trial,*** *the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
>
> *As to that, the governing principle is that the court should first 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 the trial' (emphasis is mine)*

33. How can a Plaintiff seek interlocutory injunctive relief without seeking a permanent injunction is a fundamental issue that had been overlooked in the court below, but this was central to the application for any injunction and since there was no permanent injunction sought this application for interim injunction should have been rejected *in limine*.

34. Without prejudice to the above the TAW granted to the Plaintiff came to an end by serving a notice to vacate the premises on 22.6.2010, and there was no leeway for an injunction. From the evidence presented at the hearing of the injunction by the 2nd Defendant, even before the eviction the Plaintiff had violated the conditions of the TAW by renting the premises to 3rd parties (i.e. affidavit in reply of the 2nd Defendant). In the answering affidavit the Plaintiff did not address these issues and he was silent on these vital issues relating to violations of the conditions of TAW. I do not wish to make any conclusion on those facts, at this juncture.

35. In any event since the TAW was cancelled even before this application for injunction was made to the court, there was no basis for any injunctive relief by the Plaintiff to the

said land and any possessory right the Plaintiff had obtained from the TAW was taken away from him after the cancellation of the said TAW.

36. I do not agree with the contention that payment of rents under TAW created an estoppel since the terms of the conditions of the TAW were clearly contrary to such a right being established. Though this issue was not considered in the court below, but included in the grounds of appeal. The conditions contained in the TAW are against creation of such right.

37. So, in conclusion I affirm the decision of the court below that the application for interim injunction should be refused. In my judgment it should be dismissed *in limine,* as there was no claim for permanent injunction. Even an amendment to include such relief would not help for other reasons given in this judgment. I do not agree with the decision of the court below for striking out of the writ of summons and the writ of summons needs to be reinstated. Considering the circumstances of the case and since this appeal is partially allowed, I do not wish to award any costs.

38. In the circumstances the appeal is granted partially, so that the writ of summons is reinstated and the matter should take the normal cause. The refusal of the injunction is affirmed, for the reasons stated above in this judgment.

FINAL ORDERS

a. *The writ of summons filed by the Plaintiff is reinstated, and the writ action should take normal cause thereafter.*

b. *The decision to strike out the inter partes motion seeking injunction is affirmed.*

c. *No costs.*

……

Hon. Mr. Justice S. Chandra

JUSTICE OF APPEAL

……

Hon. Mr. Justice B. Muthunayagam

JUSTICE OF APPEAL

……

Hon. Mr. Justice G. Amaratunga

JUSTICE OF APPEAL