

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 171 of 2008

BETWEEN : KARL ZOELLER AND EVA ZOELLER

Plaintiffs

A N D : BRUCE KENNETH BRAMHILL AND JILL CHRISTINE
BRAMHILL

1st Defendant

A N D : PETER KNIGHT AND PAUL MCDONNELL

2nd Defendant

Counsel : Mr. G. O'Driscoll for the Plaintiff
: Ms. B. Nanius for the Defendants.

Date of Hearing : 31st July, 2014

Date of Judgment : 1st September, 2014

DECISION

1. Application before me is for the following orders:

- (i) For an injunction restraining the first and second defendants from disposing, dealing with and/or removing from the jurisdiction of the High Court of Fiji all assets and monies owned and/or subject to the care custody and control of the first and second defendants.***
- (ii) That the first defendants do forthwith each disclose by affidavit the full value of their personal and joint assets within the jurisdiction of the***

High Court of Fiji identifying with full particulars assets, their whereabouts and whether the same are held in their name(s) or by nominees or otherwise on their behalf together or separate with the sums standing in such accounts as disclosed to be made by the first defendants and served on the plaintiff within fourteen (14) days of service of this order or as directed by the Court.

2. The application was pursuant to Order 29 Rule 1 and Order 43 Rule 1 of the High Court Rules.

Background

3. The background to the case in a nutshell is the plaintiff who is residing out of Fiji had entered into a contract with the first defendant for construction of a house. The plaintiff had deposited a sum of \$145, 200.00, in the trust account of the second defendant and the monies were released to the first defendant on instructions of the plaintiff. The plaintiff is alleged to have given the defendant a sum of \$96,800.00 and subsequently when the construction had come to a certain point the plaintiffs have rescinded the contract.
4. The plaintiff had sued the first defendant for restitution of the sum and the second defendant to release the said balance sum held in his trust account. The defendant too has filed a counter claim for the variations done.
5. It was submitted that the defendant had subsequently sold the property and it was also submitted that the High Court had given an earlier order holding that the agreement is void *ab initio*.
6. In the first order the plaintiff is seeking an injunction in the nature of a Mareva Injunction to freeze the assets of the 1, 2 defendants.
7. The summons for injunction was made interpartes and adjourned to 18.06.14. On 18th the 2nd defendant gave an undertaking stating that there is \$ 48,400 in his trust account

and that he will not be disposing it without a court order. Accordingly with that undertaking plaintiff informed he will not be proceeding against the second defendant and confined the injunction application against the first defendant.

8. The parties had filed their affidavits in support, in opposition and the reply and also tendered written submissions.
9. It is also pertinent to note that this case has been instituted in 2008. The first defendant has filed a statement of defence with a counter claim in 2008.
10. Thereafter several interlocutory applications have been filed by the plaintiff and in 2013 the plaintiff has filed an application to amend the original writ of summons filed in 2008 and a summons for joinder of new parties. In this back ground in 2014 the plaintiff has also filed a summon for injunction which is now taken up for hearing by this court.
11. As observed by the court the summons for injunction is in the nature of mareva injunction and orders are sought before the commencement of the hearing of the substantive matter.
12. It is pertinent to note that even though the court granted the second order sought in this, the plaintiff has not filed any list of assets the defendant holds in Fiji. The defendant has submitted that their assets in Fiji are only a Westpac Bank Account containing \$19.22.
13. The defendant submitted the following objections among other things to the application:

1. The Plaintiffs Summons filed 5 June 2014 ("Summons") seeking, inter alia, that a Mareva injunction be granted against the First defendants should be refused because, in addition to the failure to make full and frank disclosure, the Plaintiffs:

- a. Have not established that there is a danger of removal of assets from the jurisdiction or dissipation of assets needed to meet any judgment that the Plaintiffs might likely obtain;*
- b. This application is an abuse of process in the circumstances considering the history of this action; and*
- c. The First Defendants have not disclosed that they do not have assets in this jurisdiction other than the nominal sum of FJD\$19.22 in a Westpac Bank Account, and therefore a Mareva injunction would serve no purpose.*

The Determination

14. The principles pertaining to a mareva injunction was laid down in the case of **Mareva companyi a Naviera SA- v- International Bulk Carriers SA (175) 2 Llyods Reports 509, 1980 1AER 213 (CA).**
15. There are two conditions, a plaintiff has to establish in this kind of an injunction application.

*Firstly the applicant proves its case to the required minimum standard
secondly there be a danger by reason of defendant absconding,
removing its assets from the jurisdiction or dissipating them in order to
negate the judgment been executed.*
16. As the mareva injunction in this case is sought before the commencement of the trial proper and it seeks to freeze the assets of the defendant, this court observes that the minimum standard the plaintiff should establish of a prima facie case is higher than what is contemplated in the **American Cyanamid v Ethican Ltd [1975] UKHL 1; (1975) 1All ER 504.**

17. This standard was discussed by Mastil J, In **Ninemia Maritime Corporation v Trave Schiffartsgesellschaft [1983] 2 Lloyds Reports 600 [1984] 1 ALLER 398:**

"The strength of the plaintiff's case is relevant in two distinct respects – (i) the plaintiff must have a case of certain strength, before the question of granting Mareva relief can arise at all. I will call this "threshold". (ii) even where the plaintiff shows that he has a case which reaches the threshold, the balance of his case is to be weighted in the balance with other facts relevant to the exercise of the discretion."

18. The two requirements to obtain a mareva injunction was further clarified by **Byrne J in Chion v Wang (1982) FJHC 160.** When he held:

"Any application for Mareva Injunction must show that as far as the merits of his proposed actions are concerned he has a good arguable case.

The defendant has assets within the jurisdiction and there is a real risk if not restrained he will remove the assets from the jurisdiction or dissipate them within it."

19. At this stage it is also pertinent to note that as submitted the plaintiff as well as the defendants are residing out of Fiji.
20. The plaintiff by affidavit evidences has submitted that based on the agreement partial payment of money to the defendant was made. However subsequently the courts have held that the said agreement was void. At the hearing there was no dispute between the parties that the said property is now been disposed.
21. The plaintiff has cited **Sakeshita v Concave Investment Ltd (1999) 45 FLR 13** and pleads that when the agreement is rescinded the plaintiff is entitled to restitution of his money claim. At this stage it is pertinent to note that the court also is mindful of the

fact that the plaintiff has made an application to amend the writ of summons which is still pending and which will cast a shadow on his prima facie case.

22. As laid down in **Chion –v-Wang** (*supra*) for the plaintiff to succeed in this injunction application he has to establish the second limb of the requirements of a Mareva injunction, which I think is most important at this stage.
23. As per **Chion –v- Wong** (*supra*) the plaintiff has to establish that the defendant has assets in this jurisdiction and that there is an imminent danger of the said assets being moved out of a jurisdiction.
24. As per the affidavit submitted the plaintiff has failed to submit any assets belonging to the defendant in Fiji. The only evidence submitted at this preliminary stage of proceedings pertaining to the defendant's assets is by the defendant himself who claims that the only asset he has in Fiji is a Westpac Bank Account containing \$19.22.
25. When the plaintiff is seeking to freeze the assets of the defendant pleading on a mere assumption that whatever the assets that may be in the island is not sufficient. A court will not grant an order that cannot be enforced, or futile. The burden is with the plaintiff to establish that there are sufficient assets to preserve. Even though the plaintiff has sought for injunctive orders to restrain the dispossession of assets the plaintiff has failed to identify the assets that he wishes the court to place under injunctive orders. In **Natadola Bay Resort Ltd –v- Chetty** [2009] FJHC 371; HBC 202.2009 it was held:

"The plaintiff in his supporting affidavit is vague in relation to the assets that may be available to the defendant. A simple assertion that the defendant is likely to place assets (that are not identified) beyond the plaintiff's reach is not sufficient."

26. The defendant has specifically pleaded that he has no assets than the account at Westpac Bank containing \$19.22. He has denied owning any other assets in the jurisdictions. The plaintiff has failed to contradict this assertion and in his submission

submitted they were unaware of the assets of defendant. When the plaintiff seeks an injunction it is incumbent on him to establish the assets of the defendant within the jurisdiction of the court and to identify the asset which he is seeking to injunct.

In the absence of such the plaintiff fails to establish the second limb that there is an imminent danger of assets being removed from the jurisdiction or dissipating them to negate the judgment.

27. The plaintiff has submitted that in 2013 the High Court of Fiji had held that the agreement between the plaintiff and the first defendant to be void. The defendant has submitted that to mitigate losses the defendant has sold the said property before this application had been filed. The defendant has also objected to this application on the basis of delay. This action has been filed in 2008. The whole purpose of seeking injunction relief is to prevent the defendant from removing or dissipating the assets. In such an application speed is of paramount importance as held in **Third Chandra's Shipping v Unimarine (1979) 2 All ER 972:**

"In it speed is of essence. If there is a delay or if advance warning is given the assets may well be removed before the injunctions can bite."

Once the assets are removed seeking an injunction in the nature of mareva would be futile. In this case the plaintiff has woken from his deep slumber and has sought for injunctive relief after a lapse of nearly 6 years from instituting the action.

28. The Plaintiff has failed to establish any urgency that was not there at the commencement of the case which is prevalent now. The defendant has also objected to the application as there is no sufficient undertaking as to damages. The defendant has submitted the plaintiff too is living outside the jurisdiction of Fiji Courts. The plaintiff has submitted that they will give an undertaking as to damages and had submitted that there is a sum held in the trust account of the second defendant, which can be utilized as the undertaking as to damages. The defendant in reply has submitted that the undertaking is insufficient in view of the fact that there is a counter claim by the defendants. In view of the fact that there is a counterclaim by the defendant and

considering the circumstance of this case this court is of the view that in an application for an injunction in the nature of a mareva injunction, the plaintiff should specifically give an acceptable undertaking as to damages specially when both parties reside out of the jurisdiction of Fiji.

29. The plaintiff has failed to establish to this court as at the time of this application the exact assets the defendant has nor the assets the plaintiff seeks to enjoin.
30. After a delay of nearly 6 years the plaintiff has failed to satisfy this court as to the urgency or the imminent threat of the defendant removing his assets from this jurisdiction or dissipation of assets to frustrate a judgment. The plaintiff has failed to satisfy court or establish the requirements to obtain the injunctive relief sought.

Conclusion

- [i] *For the above stated reasons the plaintiffs orders sought under paragraph (I) of the notice of motion dated 16.6.2014 pertaining the injunction relief is dismissed.*
- [ii] *The cost in this application would be cost in the cause.*



Mayadunne Corea

Mayadunne Corea

JUDGE

01.09.2014