

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 261 of 2015

BETWEEN : **EMMETT KENT MORGAN**
FIRST PLAINTIFF

AND : **BALAGA BAY FARMS (FIJI) LIMITED**
SECOND PLAINTIFF

AND : **RAVINDRA KUMAR LAL**
FIRST DEFENDANT

AND : **ITAUKEI LAND TRUST BOARD**
SECOND DEFENDENT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr P. Lomaloma for the Plaintiffs
Mr A. Sen for the First Defendant
Ms L. Komaitai for the Second Defendant

DATE OF RULING : 31 August 2016

RULING

(Application for Interlocutory Injunction)

1.0 INTRODUCTION

1.1 On 28 July 2015, Plaintiffs (hereinafter referred to as **“Applicants”**) filed Writ of Summons and Statement of Claim against the First Defendant (hereinafter referred to as **“First Respondent”**) and the Second Defendant (hereinafter referred to as the **“Second Respondent”**).

1.2 On the same day, Applicants filed Notice of Ex-parte Motion seeking following Orders:-

- “1. *For an order restraining the ITaukei Land Trust Board from issuing a lease over the land known as Naravuka S/D Stage 2 in the Tikina of Wailevu West, Province of Cakaudrove containing an area of 65.2724 Hectares (the “land”) to the First Defendant until further orders of this Court.*
2. *For an injunction restraining the First Defendant by himself or through his servants or agents from killing, selling or removing or in any way dealing with any sheep currently on the said land until further orders of this Court.*
3. *For an injunction restraining the First Defendant by himself or through his servants or agents from removing any machinery, buildings, building materials, fencing or other improvements from the said land until further orders of this Court.*
4. *For an order prohibiting the First Defendant by himself or through his servants and or agents from setting foot on the said land.*
5. *For an order that the First Plaintiff take over and manage the farm on the said land until further orders of this Court.*
6. *For an order that the ANZ Bank, freezing the Plaintiff’s Bank Account number 05497494 at the Savusavu Branch of the ANZ Bank until further orders of this Court.*
7. *For an order that the ANZ Bank provide this Honourable Court with a Bank statement of the First Defendant’s bank account No. 05497494 at the Savusavu Branch of the ANZ Bank from 26 February 2013 until now.*
8. *For an order that the First Defendant provide to the Court within 3 days an affidavit listing all his assets.*

9. *For an order that the First Defendant be restrained from transferring, selling, disposing, destroying or otherwise dealing with any asset bought with funds sent to him by the Plaintiff directly or through Balaga Bay Farms (Fiji) Ltd.”*

(“the Application”)

- 1.3 On 30 July 2015, being returnable date of the Application this Court granted interim injunction in respect to prayers 1, 2, 3, 6, 7, 8 and 9 of the Application, directed Applicants to serve Application and Affidavit in Support on Respondents by 4.00pm on 3 August 2015, and adjourned the Application to 7 August 2015 at 9.20am, for mention.
- 1.4 On 4 August 2015, Second Respondent filed Acknowledgement of Service.
- 1.5 On 6 August 2015, First Respondent filed Affidavit in Opposition.
- 1.6 On 7 August 2015, this Court directed parties to file Affidavits and Submissions and adjourned the Application to 7 October 2015 at 2.30 pm for hearing.
- 1.7 On 24 August 2015, First Respondent filed Acknowledgement of Service and Statement of Defence.
- 1.8 Parties failed to file Submissions as directed.
- 1.9 On 7 October 2015, Second Respondent’s Counsel stated that Second Respondent will not make any Submissions and will abide by any Orders made by the Court when Counsel for Applicants and First Respondent handed in Submissions and informed the Court they rely on Submissions handed to Court and do not wish to Reply to either parties Submissions, Applicant’s Counsel was directed to provide case authority by 14 October 2015, and the Application was adjourned for ruling on notice.
- 1.10 On 15 June 2016, Shekinah Law filed Notice of Change of Solicitors for the Second Plaintiff.

1.11 Following Affidavits were filed on behalf of the Parties:-

For Applicants

- (i) Affidavit in Support of Ex-parte Application of Emmett Kent Morgan sworn on 24 July 2015 and filed on 28 July 2015 (hereinafter referred as “**Morgan’s 1st Affidavit**”);
- (ii) Affidavit in Reply of Emmett Kent Morgan sworn on 18 September 2015, and filed on 21 September 2015 (hereinafter referred to as “**Morgan’s 2nd Affidavit**”).

For First Respondent

Affidavit in Opposition of First Respondent sworn on 5 August 2015, and filed on 6 August 2015 (hereinafter referred to as “**First Respondent’s Affidavit**”);

For Second Respondent

Affidavit in Reply of Seni Kuraciri sworn and filed on 21 August 2015 (hereinafter referred to as “**Kuraciri’s Affidavit**”).

2.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

2.1 Counsel for Applicants and First Respondent relied on the principle stated by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 which are:-

- (i) Whether there is a serious question to be tried;
- (ii) Whether damages would be adequate remedy; and
- (iii) Whether balance of convenience favors granting or refusing Interlocutory Injunction.

2.2 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.

2.3 Lord Diplock in **American Cyanamid v. Ethicon Ltd** [1975] AC 396 stated as follows:-

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages of the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where “the balance of convenience” lies.”

2.4 In **Series 5 Software v. Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction:

“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”

- 2.5 Another factor which Courts now take into consideration in addition to the above is **“overall justice”** as stated by His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd** [1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

“Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word “usually” deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.”

Serious Question To Be Tried

2.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

2.7 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant's claim is not frivolous, vexatious or hopeless.

2.8 In **American Cyanamid** Lord Diplock stated as follows:-

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination.” (p 406)

“It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” (p 407)

2.9 His Lordship further stated as follows:-

“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case.”

2.10 The First Applicant claimed that he attempted to set up agricultural business in Fiji with the First Respondent and one Isaac Peter Russell and as a result company under the name of Balaga Bay Farms (Fiji) Ltd (hereinafter referred to as **“BBFL”**) was incorporated in Fiji.

- 2.11 Since First Applicant was a foreign national and required approval from Fiji Trade and Investment Board (“**FTIB**”) and Reserve Bank of Fiji (“**RBF**”), one (1) share was held by Alik Benjamin, law clerk at Law Solutions in trust for First Applicant.
- 2.12 However, prior to approval being granted by FTIB and RBF Alik Benjamin transferred shares held in trust in BBFL to the First Applicant.
- 2.13 Between February 2013 to March 2014, First Applicant sent USD\$74,200.60 into First Respondent’s Bank Account.
- 2.14 On 19 June 2015, First Applicant sent a sum of USD\$5,246.00 to the First Applicant.
- 2.15 Pursuant to Memorandum of Understanding (“**MOU**”) dated 15 April 2013, First Applicant advanced a sum of about FJD\$173,319.67 between 10 November 2014 and 5 May 2015 which sum was to be repaid as stated in MOU.
- 2.16 The First Respondent does not deny that the First Applicant sent the monies as stated at paragraph 2.13 to 2.15 hereof but says that:-
- (i) The amount sent between February 2013 and March 2014 was to set up a poultry farm which was set but the Company that operated the poultry farm had been closed;
 - (ii) A sum of FJD\$15,000.00 together with the sum of USD\$15,946.00 was given to him by the First Applicant as a gift.
- 2.17 It is undisputed fact that the First Applicant obtained shares in Second Applicant in breach of section 10 of Exchange Control Act and as such is invalid. **Bianco v. Ruggiero & Anor.** (1997) 43 FLR 229; **Ruggiero & Anor. v Bianco** [1998] FJCA; ABU0061 of 1997 (7 October 1998)
- 2.18 Sections 10(1) and 11(1) of the Exchange Control Act Cap 211 provides as follows:-

“10.*-(1) Except with the permission of the Minister, no person shall in Fiji issue any security or, whether in Fiji or elsewhere, issue any security which is registered or to be registered in Fiji, unless the following requirements are fulfilled, that is to say:-*

- (a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and*
- (b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.”*

“11.*-(1) Except with the permission of the Minister, a security registered in Fiji shall not be transferred, and a security not so registered shall not be transferred in Fiji, unless, in either case, the following requirements are fulfilled, that is to say:-*

- (a) neither the transferor nor the person, if any, for whom he is a nominee is resident outside Fiji; and*
- (b) the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and that of the person, if any, for whom he is a nominee; and*
- (c) neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and*
- (d) except where the security is registered in Fiji otherwise than in subsidiary register, the Minister is satisfied that the requirements of paragraph (c) are fulfilled:*

Provided that -

- (i) neither the transferee nor his agent shall be deemed to have committed an offence by reason only that the requirements of paragraph (a) were not fulfilled unless the transferee or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled; and*
- (ii) neither the transferor nor his agent shall be deemed to have committed an offence by reason only that any of the requirements of paragraphs (c) and (d) have not been fulfilled unless, in the case of a non-fulfilment of the requirements of paragraph (c), the transferor or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled. (Amended by Legal Notice 112 of 1970; Act 24 of 1979, s. 10.)”*

2.19 The First Applicant by not being a shareholder of the Second Applicant cannot institute proceedings on behalf of the Second Applicant.

2.20 It appears that the First Applicant attempted to mislead the Court when interim Orders were granted when at paragraph 4 of Morgan's 1st Affidavit he states as follows:-

*"4. The third shareholder, with one share, is Isaac Peter Russell. Attached hereto and marked with the letter "B" is a copy of the Certificate of Incorporation of the said Company dated 12 April 2013. The Directors of the Company were changed after I acquired one share on 15 April and a new Return of Directors was filed on 16 April showing me as a Director. **Unfortunately, I was not advised of some restrictions to foreigners setting up companies in Fiji.**"* (emphasis added)

2.21 At paragraphs 3 and 5 of Morgan's 2nd Affidavit he states as follows:-

Paragraph 3

*"The initial shareholders of Balaga Bay Farms (Fiji) Limited at the time of incorporation were Peter Isaac Russell, Ravindra Kumar Lal (First Defendant) and Alik Benjamin, who was the legal clerk at the law firm of Law Solutions. **Alik agreed to hold in trust a share for me until such time as I could obtain the Investment Fiji Approval for me to invest and hold shares in a Fiji Company.**"* (emphasis added)

Paragraph 5

"I then registered another company called Morgan Enterprises (Fiji) Ltd on 12th April 2013 and applied for and got approval from Investment Fiji for this company to be issued a Foreign Investment Registration Certificate (FIRC) pursuant to Section 4 of the Foreign Investment Act. Attached hereto and marked with the letter "A" is a copy of the said FIRC."

2.22 The fact that Alik Benjamin held shares in Second Plaintiff in trust for First Applicant until approval is obtained by First Applicant and setting up another company clearly shows that First Applicant was very much aware about the need to obtain approval from FTIB and RBF.

- 2.23 From what is noted in the preceding paragraphs it seems that the First Applicant knew about the legal requirements to acquire shares in company incorporated in Fiji and was required to obtain approval from FTIB.
- 2.24 At this point I am not making any concrete finding as to whether First Applicant knew about the need to obtain RBF and FTIB approval and leave this to be determined at the substantive hearing.
- 2.25 Irrespective of whether or not First Applicant knew about the need to obtain RBF and FTIB approval, the shares transferred to the First Applicant by Alik Benjamin in the Second Applicant is void and as such First Applicant is not a shareholder of Second Applicant and as such had no authority to institute this proceeding on behalf of Second Applicant.
- 2.26 The issue that needs to be tried and determined is whether the First Applicant is entitled to claim for the monies sent to the First Respondent from the First Respondent.
- 2.27 If the First Applicant intends to claim monies due under MOU then he should claim that sum from the Second Applicant .

Whether Damages would be Adequate Remedy

- 2.28 Having held that the shares in Second Applicant transferred to the First Applicant is void it is not doubted that only remedy left for the First Applicant is for refund of monies sent by him to the First Respondent.
- 2.29 Therefore it is obvious that damages would be adequate remedy and can be easily assessed.

Balance of Convenience

- 2.30 It is trite law that equity will not assist those who do not come to Court with clean hands.

- 2.31 In this instance the First Applicant attempted to commence business in Fiji without FTIB approval and acquired shares in Fiji company without RBF approval which of course is illegal.
- 2.32 The undertaking as to damages provided by the First Applicant is inadequate as he does not own any property in Fiji nor has monies to his credit in any of the Banks that will be adequate to satisfy any claim if it is determined that First Defendant has suffered any financial loss or damages because of the interlocutory injunction.
- 2.33 Also, even though the First Respondent has stated that his assets comprise of a freehold property, motor vehicle and taxi he has not annexed the Certificate of Title or stated whether his assets are free of charge or not and what is value of these assets.
- 2.34 The First Respondent is engaged in the business of sheep farming and interlocutory injunction will surely affect his business.
- 2.35 However, it is not disputed that First Respondent only came into business of sheep farming after him and the First Applicant came into contact.

3.0 Conclusion

- 3.1 After analysis of the Affidavit evidence and submissions filed by the parties, I make following findings:-
- (i) The Second Plaintiff was wrongly joined as a party on the ground that First Applicant is not a shareholder in Second Plaintiff and as such has no authority to institute legal proceedings on its behalf.
 - (ii) The question that needs to be tried is whether First Applicant is entitled to refund of the monies sent by him to the First Respondent.
 - (iii) Damages would be adequate remedy.

- (iv) Balance of convenience favours discharge of interim injunction granted on 30 June 2015 and dismissal of the Application for Interlocutory Injunction.

4.0 Miscellaneous

- 4.1 It is apparent that this action was filed in High Court Suva due to its urgency instead of High Court Labasa.
- 4.2 It is clear from the pleadings and Affidavits filed that cause of action in this proceedings arose in Savusavu, Vanua Levu and such in exercise of my discretion I have no alternative but to transfer this proceedings to High Court Labasa registry. **Order 4 Rule 1-(4), High Court Rules 1998.**

5.0 Costs

I have taken into consideration that:-

- (i) Plaintiffs (in particular First Applicant) and First Respondent filed Affidavits, Submissions and made Oral Submissions;
- (ii) Second Respondent only filed a short Affidavit and chose not to file Submissions or make Oral Submissions and chose to abide by the Order of the Court.

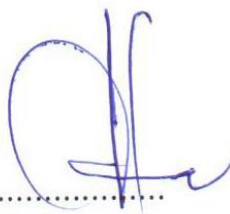
6.0 Orders

I make following Orders:-

- (i) The Second Plaintiff's name be removed from this proceedings;
- (ii) The interim Orders granted on 30 July 2015, be discharged;

- (iii) The Notice of Motion dated and filed on 28 July 2015, is dismissed and struck out;
- (iv) The First Plaintiff pay First Defendants/First Respondents costs assessed in the sum of \$2,000.00 within twenty-one (21) days of this Ruling;
- (v) There be no Order for costs in favour of the Second Defendant/Second Respondent;
- (vi) This proceedings be transferred to Labasa High Court and be called before the Master of the Court.




.....
K. Kumar
JUDGE

At Suva

31 August 2016

Penijamini R. Lomaloma Esq. for the Plaintiffs/Applicants
Maqbool & Co. for the First Defendant/First Respondent
Legal Officer for the Second Defendant/Second Respondent