

DONALD THOMAS PICKERING & OTHERS

v.

NATIONAL BANK OF FIJI & OTHERS

[HIGH COURT, 1998 (Fatiaki J) 22 May]

Civil Jurisdiction

Practice: Civil – need to avoid multiplicity of proceedings.

In the course of discharging an interlocutory injunction the High Court deprecated the practice of instituting multiple proceedings against the same or related defendants based on essentially the same factual circumstances and seeking the same or similar reliefs. Such conduct was described as being “tantamount to an abuse of court process and smack (ing) of harrassment.”

No case was cited.

S. Matawalu for the Plaintiffs
P. Knight for the 2nd Defendant
R. Naidu for the 3rd Defendant

Interlocutory application in the High Court.

Fatiaki J:

This application for an injunction is the latest in a series of similar unsuccessful applications mounted by the plaintiffs in related almost identical actions instituted by them against some or all the defendants since the second plaintiff company Donald Pickering & Sons Enterprises Ltd. was placed under receivership in 1996.

In the first of these above-mentioned actions namely HBC 500/96, the first named plaintiffs in this action sued the third-named defendants seeking the compulsory retirement or removal of the first-named third defendant as receiver of Donald Pickering & Sons Enterprise Ltd. trading as “United Engineers” ostensibly on the grounds of lack of independence and conflict of interest. The plaintiffs also sought to restrain the receiver from continuing with the sale by tender of an industrial property belonging to United Engineers.

Pain J. in rejecting both applications said (as to the removal application) at p.8 of his Decision:

“ In view of the allegations made against Brian Murphy I have deliberately dealt with the challenge to his appointment on the merits. It has not been established that he was unfit or in anyway precluded from appointment by NBF as receiver.”

and (as to the injunction application) at p.9 :

A "The Court will not interfere with the proper exercise of his powers by a receiver. The rights of a debenture holder over the secured property takes priority over any rights of others."

In another action, HBC 447/97, the first plaintiffs in this action and an associated company sued five named defendants including the three defendants named in the present action.

B In an interlocutory motion in that case the plaintiffs sought two injunctions under Section 125 of the Fair Trading Decree against the defendant banks named in the present action. The first sought to restrain the banks from continuing with the receivership of Donald Pickering & Sons Enterprises Ltd. and the second injunction sought to restrain the third defendant in the present action from continuing with the sale of the assets of Donald Pickering & Sons Enterprises Ltd.

C Byrne J. in rejecting the plaintiffs' injunctions application said at p.9 of his interlocutory judgment :

D "In my judgment it is clear that a pre-condition of the granting of an injunction under Section 125 is that the Court must be satisfied that a person is contravening the Decree or attempting to do so. Nothing in the affidavit of Donald Thomas Pickering ... persuades me at this stage that there has been any such contravention."

and later at p.13 his lordship said :

E "It appears to me that the plaintiffs are attempting to lay the blame for this on Mr. Brian Murphy and the fifth defendant (NBF Asset Management Bank) but in Action HBC 500/96 Pain J. was in no doubt as to the real reason for the financial problems of the Company.

F His lordship also (at p.14) :

G (accepted) that the law is that only in the most exceptional cases will a Receiver be restrained from exercising his powers of sale. I also agree ... that the whole thrust of the Fair Trading Decree is to protect the public and not a private contractual arrangement between a bank and one of its customers.

I have taken the liberty of referring in some detail to the other actions instituted by the first-named plaintiffs in this action, not only to highlight the duplicitous nature of the various claims made by the plaintiffs in the three actions pending before this Court, but more especially, in order that I might be able to compare and contrast the various claims and ascertain whether the relief(s) claimed might or might not have already been considered in an earlier interlocutory application.

In my view it is neither right or proper for a litigant to institute a multiplicity of proceedings against the same defendants based on essentially the same factual circumstances and seeking the same or similar relief.

A

Furthermore, the fact that the existing civil registry procedures allowed the plaintiff's three actions to be placed before no less than three different judges only serves to highlight the shortcomings of that administrative process.

The fact that all three actions were filed by the same solicitor albeit at different times and involving slightly different defendants is tantamount, in my view, to an abuse of court process and smacks of harrassment.

B

The proper procedure to adopt where it is sought to sue an additional defendant after an action has been commenced is to seek joinder and an amendment of pleadings in the existing action, and not, as appears to have occurred in this case, to issue a fresh action.

C

Having set out that brief background of pending litigation instituted by the first plaintiffs, I return to the present application. In a June 1997 issue of the Fiji Times the second defendant bank (Asset) as mortgagee, sought tenders for the purchase of five properties owned by the first and third plaintiffs which had been mortgaged to secure banking facilities provided by Asset's predecessor the first named defendant bank (NBF) to the second plaintiff company.

D

On 1st July 1997, the day after tenders closed, the plaintiffs issued an indorsed Writ of Summons and an ex-parte motion seeking injunctions to restrain Asset from exercising its powers of sale arising under five separate mortgage deeds. The application was ordered to be heard inter-partes.

E

The motion was supported by an affidavit deposed by Donald Thomas Pickering a director of the plaintiff companies. He outlined in some detail the business relationship between the plaintiff companies firstly with NBF and then later, with Asset, and the circumstances under which the above-mentioned mortgages were granted over the properties.

F

In particular, Donald Pickering deposed that he had provided three third party mortgages over his personal properties by way of collateral security for banking facilities provided to the second plaintiff company by NBF.

He further deposed that NBF withheld "additional facilities undertaken to be provided ... without reasonable cause to the extent that the second plaintiff company found itself unable to meet its obligations"

G

The professional services of the third defendant accounting firm (KPMG) was then sought in order to advise and find ways and means to extricate the second plaintiff company from its predicament. The end result of this exercise was that a lucrative multimillion dollar contract for the construction of five fishing vessels for a Tahitian company (the Tahitian contract) was assigned to a local rival shipyard Ship Building Fiji Limited and the second plaintiff

company being placed under receivership by Asset with the first named third defendant, a principal of KPMG, as the appointed receiver.

A Against the third defendant, KPMG, it is deposed that "(it) was negligent and had a conflict of interest ... whereby they did not give proper advice that the appointment of receiver manager was for the benefit of the first defendant."

B These various matters were later incorporated into a Statement of Claim filed by the plaintiffs on 24.4.98 which indicates that the plaintiffs claim against the defendant banks is for breach of contract and possibly negligence in failing to provide the second plaintiff company with finance, and, against the third defendants, professional negligence in failing to give proper advice and protect the second plaintiff company's interest and acting in conflict of interest.

C If I may say so these various causes of action looks suspiciously like those pleaded in the plaintiffs earlier-mentioned actions and were partially addressed in the interlocutory decisions already rendered by both Pain and Byrne JJ.

D Returning then to the plaintiff's application. On 11th July 1997 all parties appeared by counsel and upon the application being adjourned to allow the defendants time to file an answering affidavit an interim injunction was granted temporarily restraining the sale of the plaintiff's properties.

E On 1st December 1997 the Chief Manager of Asset filed an affidavit denying that NBF had at any time promised or undertaken to provide finance to the second plaintiff company during the entire life of the Tahitian contract. Instead it was deposed that the facility offered and provided by NBF "... was the establishment of a performance bond and of a payment guarantee" as evidenced by NBF's offer letter of January 25th, 1995. This has not been denied.

The contents of the offer letter are sufficiently clear as to the additional facility being offered by NBF and especially Clause 8 of the Special Conditions which reads :

F "8) the company shall meet all over run in costs of construction or any other related matter by additional equity input."

It is also noteworthy that at the date of the offer letter the plaintiff company already had, with NBF, an over-draft balance of \$548,132 against a limit of \$420,000 !

G I digress briefly at this point to draw attention to an opinion letter dated 1st November 1993 written by NBF concerning the second plaintiff company in which it stated :

"Although we are not at liberty to release any financial information on our client, the company has good reputation with this Bank. The Bank is aware of the European Development

Fund - "General Conditions of Contract", and shall provide total support and assistance to united Engineers in the area of Project Funding, provision of Performance Guarantee and payment Guarantee throughout the life of Project No : 3665."

A

The opinion letter however, predates the offer letter by over a year, is addressed to a third party, and is clearly stated to be : "... given in confidence and without responsibility on the part of the Bank or its officials in this documents interpretation."

B

Given the above circumstances I do not accept that the NBF opinion letter raises any triable issue as to the precise nature of the contract entered into between NBF and the second plaintiff company. Much less can it support on its own a claim of negligence on the part of Asset.

Mr. Matawalu for the plaintiffs sought however to raise what he claimed were breaches of unspecified and unpleaded provisions of the Fair Trading Decree by the defendants in their dealings with the plaintiffs.

C

I cannot accept that it would be in any way proper to entertain such a bald submission which was effectively sprung on the defendants and the Court at the last minute. No serious issue(s) could be said to arise therefrom, nor, in my view, is it the Court's function, however benevolent, to seek to identify or elicit a triable issue from the plaintiffs affidavit, annexures and/or pleadings in that regard.

D

It is settled law that the Court will not ordinarily interfere to restrain a mortgagee from exercising its power of sale except in exceptional circumstances and, even then, only upon payment into Court of the amount sworn by the mortgagee to be due and owing under the mortgage.

E

In this case I find there are no exceptional circumstances raised in either the plaintiffs claims or in the affidavit evidence to justify the continuation of the injunction, nor has there been any suggestion or offer to pay in the amount claimed to be owed to the defendant bank under the mortgages.

F

If I am wrong however in my assessment of the plaintiff's claim, which does not deny or dispute that it is in default of loan repayments to the defendant bank, then there is not the slightest doubt in my mind, given the fact that the second plaintiff company has been in receivership since August 1996, and bearing in mind the clear prejudice to the defendant bank in allowing interest to continue to accumulate on its outstanding debt thereby reducing the value of its securities, that the balance of convenience in this case would be best served by allowing the mortgagee sale to take its natural course.

G

Needless to say the plaintiffs, as mortgagors, retain their rights of redemption over the mortgaged properties until such time as they are sold, and thereafter, the right to sue the defendant bank for any unlawful, negligent or improper exercise of its powers of sale. Such a claim, if successful, would sound only

in damages.

A I am accordingly satisfied that against the defendant banks, the plaintiffs have raised no triable issue(s) and the interim injunction must be and is hereby discharged with costs of \$150.00 in favour of the second defendant bank payable within 14 days of the date hereof.

(Injunction discharged.)