

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 129 of 2009L

BETWEEN : **STEVEN GRANT PETHERICK** of Level 3 and 4, 5-7 Vivian Street,
Wellington, New Zealand, Managing Director and/or nominee (who
together with his executors administrators and assigns

Plaintiff

AND : **AUSSIE HOUSES INTERNATIONAL LIMITED** (An International
Business Company incorporated under the International Business
Companies Act Cap 291 British Virgin Islands I.B.C No. 382542) and
having its registered local office at Denarau, Nadi in the Republic of
the Fiji Islands

1st Defendant

AND : **HAROLD JOHN HEELEY** of 2 The Cove, Denarau Island, Nadi, in the
Republic of the Fiji Islands, Company Director

2nd Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr. M. Kafoa for the Plaintiff
[Ex-Parte]

Solicitor: Muaror & Co. for the Plaintiff

Date of Hearing: 31 July 2009

Date of Judgment: 31 July 2009

INTRODUCTION

[1] This is an ex-parte application by the Plaintiff to restrain the Defendants from selling a freehold property at Denarau Island and from removing fixtures and chattels from it.

- [2] The Plaintiff's papers were filed on **Friday 31 July 2009** and because of the urgency of the matter I heard Counsel for the Plaintiff on that day and made certain injunctive orders. I orally gave Counsel my reasons for granting the orders but it is important that I record them in writing and publish them so the parties, especially the party that was not heard, know of them. These are the written formal reasons for granting the orders sought.
- [3] The Plaintiff filed an Ex-parte Motion, an Affidavit in support of his application and a Writ of Summons with an endorsed claim.
- [4] It is the practice of this Court now that any such ex-parte application must meet the requirements of **Order 29 rule 1(2)** of the **High Court Rules 1988 (HCR)** otherwise the application will be heard inter-parte.

THE FACTS

- [5] The Plaintiff says in his Affidavit that the parties entered into a sale and purchase agreement on **19 June 2006**. The agreement is yet to be fully performed. He is the purchaser and the First Defendant is the vendor. The Second Defendant is a director of the First Defendant and signed the agreement on behalf of the First Defendant. Both parties were represented by the same lawyer for the sale and purchase. As is usual for purchases of land in Denarau Island the purchase price is over a million dollars and so is the deposit. I am conscious of the commercial sensitivity of these matters so in this judgment I will not refer to actual amounts but to approximations only.
- [6] At the time of execution of the sale and purchase agreement, the vendor was in the process of constructing a luxury water front residence on the land. It was then agreed between them that the development and construction of the residence would be managed by the Second Defendant.
- [7] The agreement required the consent of the Director of Lands which was obtained on **24 July 2006** and remains current till **24 October 2009**. The Plaintiff was to pay a deposit of well over a million dollars to the solicitor's trust account to be

released to the vendor on receipt of the Director's consent. The Plaintiff says that he has already paid the deposit as well as further sums pursuant to the agreement, all totalling close to half of the total purchase price. Payment of the balance of the purchase price was to be based on the progress of the construction work.

- [8] The agreement required the vendor to complete construction of the residence within 12 months of the agreed commencement date of **19 June 2006**. Construction work has now stopped so the Plaintiff has stopped making further payments.
- [9] The agreement allowed the purchaser to lodge a caveat on the title to protect his interest until completion of the sale. On **12 September 2006**, the solicitor acting for both parties lodged a caveat on behalf of the Plaintiff pursuant to the agreement. However, on **12 November 2008**, notwithstanding the agreement, the vendor lodged an application pursuant to **section 110(1)** of the **Land Transfer Act** [cap 131] requiring the Plaintiff to remove his caveat. That notice was apparently sent to the parties' former solicitors in December 2008. The Plaintiff instructed his current solicitor in late December 2008 to obtain an order extending the caveat, which order the solicitor obtained on **24 December 2008** and lodged with the Registrar of Titles on the same day. Unfortunately, it seems that the caveat was removed at **10.00am** but the Court order was lodged at **12.40pm** which means that there is no longer any caveat to protect the Plaintiff's interest in the land and unfinished residence.
- [10] The vendor's new solicitors by letter dated **28 January 2009** gave notice of rescission of the agreement based on the Plaintiff's alleged failure to pay the balance of the purchase price. The notice of rescission says the deposit and all other sums paid by the Plaintiff are now forfeited to the vendor and the vendor will resell the property and sue the Plaintiff for any deficiency in the sale price. This matter has been the subject of without prejudice negotiations between the parties and their respective solicitors since then but negotiations appear to have broken down.

[11] The Plaintiff is concerned that his interest is not protected. He has already suffered stress and pecuniary losses personally and in his business interests in New Zealand as well as his family as a result of this dispute. He now seeks the Court's assistance.

THE PRINCIPLES – ORDER 29 RULE 1(2) HCR

[12] I have set out the principles that this Court applies in cases such as this in **Sharma v Raj** [2009] FJHC 136; HBM019.2009 (26 June 2009):

[3] I apply the same principles applicable to Order 29 Rule 1(2) of the High Court Rules as to whether this application should be heard ex parte or inter partes. In Kobee v Public Trustee [2003] FJHC 40, Justice Scott said:

"The combined effect of Order 29 rules (1) and (2) and Order 8 rule 2 (2) is that a plaintiff wishing to proceed ex parte must satisfy the Court (a) that two days notice would result in "irreparable or serious mischief" and (b) that anything less than the total abridgement of the two days notice would result in "irreparable or serious mischief"."

[4] I would also respectfully add that the two elements of "urgency" and "mischief" must be satisfied and consideration of the likelihood of "irreparable or serious mischief" resulting is to be looked at from both the applicant's and the respondent's points of view.

See also: Tokomaru Ltd v. Denarau Corporation Ltd [2009] HBC 118 of 2009L.

IRREPARABLE OR SERIOUS MISCHIEF

[13] Firstly, I have to be satisfied that "irreparable or serious mischief" may result. The Plaintiff has paid close to half of the purchase price. He has a substantial interest in the property, subject to being able to prove it at trial. On the other hand, the Defendants have the Plaintiff's money and the property. At the moment there is no caveat to protect his interest and the law does not allow him to lodge another one on the same grounds. He is not adequately protected. He is insisting

that he is still the purchaser and wants the property. His only remedy is to sue the Defendants and there is no guarantee that, assuming he wins, his judgment will be satisfied. The Defendants can sell at any time if they so wish. Having considered the matter from both sides I think there is a real possibility, and not a fanciful one, that the Plaintiff will suffer irreparable or serious mischief if the Defendants are not stopped by injunction.

URGENCY

[14] I am also satisfied that there is urgency in this matter. The parties have been negotiating since January this year and negotiations seem to have broken down. To require this matter to proceed inter-parte may cause the Defendants to expedite a sale of the property and cause the irreparable or serious mischief that I referred to above.

UNDERTAKING AS TO DAMAGES

[15] The Plaintiff gives his personal undertaking and an undertaking by his companies to pay damages if the orders that he seeks turn out to be granted without merit because of what he has told this Court and causes loss to the Defendants. The Statement of Position of the Plaintiff's company as at **24 April 2009** shows that the Plaintiff's company has a net worth far in excess of the amounts involved here. I am therefore satisfied that the Plaintiff's undertaking is sufficient for present purposes.

AMERICAN CYANAMID PRINCIPLES

[16] As this matter involves the grant of an injunction I need to consider the application of the principles enunciated in the well known **American Cyanamid Case (1975) 1 All E R 396**, on the facts now before the Court.

[17] I am satisfied that there are serious issues to be tried. The balance of convenience lies in favour of maintaining the status quo. An adequate undertaking as to

damages has been given. This is not a case where damages is an adequate remedy, the Plaintiff insisting that he is still the purchaser.

THE ORDERS

[18] The orders sought by the Plaintiff in paragraphs 3 and 4 of his Motion can only be made after a full trial so I refuse them.

[19] The orders sought in paragraphs 1 and 2 are granted for the reasons I have given above.

[20] Service of the court documents may be problematic. Counsel for the Plaintiff said the First Defendant, a company incorporated in the British Virgin Islands and the Second Defendant may be residing overseas. Local solicitors now act for them but they may not have instructions to accept service on behalf of the Defendants in respect of this particular matter so I do not think I should order service on the solicitors. Counsel says he knows the overseas addresses for the Defendants so I think substituted service by registered post to those addresses is sufficient instead of personal service.

[21] I therefore make the following Orders:

(1) That the First Defendant and/or its Agents, Directors or Solicitors be restrained from selling, causing to sell or transfer the land at Denarau described under Certificate of Title No. 35954 being Lot 15 on DP No. 9047 (“the Property”) and/or from completing any sale or transfer of the Property pending further Order of the Court;

(2) That the First Defendant and/or its Agents, Directors or Solicitors be restrained from removing or causing to remove any fixtures and chattels from the Property without the prior written approval of the Plaintiff;

(3) That the Plaintiff to serve all the Court documents on the Defendants by Wednesday 5th August 2009. If the Defendant leaves for overseas or is

resident overseas, then service by registered post at their overseas address is sufficient for this purpose;

- (4) That the matter is adjourned to Friday, 7th August 2009 at 9.30 am for mention;
- (5) Costs reserved.

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Sosefo Inoke
Judge