

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 154 of 2009L

BETWEEN : **GULF INVESTMENTS (FIJI) PTY LIMITED** a limited liability company having its registered office in Nadi, Fiji

Plaintiff

AND : **RESERVE BANK OF FIJI** a statutory body having its head office in Suva, Fiji

Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: **Dr. Sahu Khan for the Plaintiff**
Mr. C. B Young for the Defendant

Solicitors: **Sahu Khan & Sahu Khan for the Plaintiff**
Young & Associates for the Defendant

Date of Hearing: **14 September 2009**

Date of Judgment: **18 September 2009**

INTRODUCTION

[1] This is an application by the Plaintiff, hereinafter "Gulf", for the release of certain documents by the Defendant, hereinafter "Reserve Bank," relating to a mortgage which Gulf had entered into with a third party.

[2] Gulf filed its Writ and Statement of Claim seeking the following relief:

- (i) For the declaration that the Plaintiff is entitled to receive any information or copies of relevant correspondence from the Defendant in respect of the transaction between Strategic and the Plaintiff in relation to the Mortgage No. 609634 given by the Plaintiff to Strategic and the Crown Lease Number 16928 and the Native Lease.

- (ii) Damages (including special General, exemplary and punitive) against the Defendant.
- (iii) Such further or other relief as to this Honourable Court seems just.
- (iv) Costs.

[3] The same relief in paragraph (i) is being sought in this application by the motion filed on 27 August 2009 except this time, Gulf asks the Court to order that the Reserve Bank do provide the information and copies of documents to Gulf.

[4] The application is supported by two affidavits by the Managing Director of Gulf, the first sworn and filed on 27 August 2009 and the second sworn and filed on 11 September 2009.

[5] The Reserve Bank filed an affidavit by its Manager of Exchange Control on 8 September 2009.

[6] Both Counsel filed written submissions and made oral submissions at the hearing.

THE BACKGROUND

[7] Gulf is the lessee from the Native Land Trust Board of about 53 hectares of native land in Nadi under a Class 1 Special Tourism (Development) Lease (hereinafter the "**Development Lease**"). The Development Lease was signed on 18 February 2005 for a period of 5 years from 1st July 2005. Under its terms, Gulf is to develop a "tourist marine resort" with all roads, drainage, sewerage, water and electricity reticulation and all other necessary works.

[8] **Oceania International Limited** (hereinafter "**Oceania**"), a company incorporated in New Zealand, entered into a loan agreement as borrower with another New Zealand company, **Strategic Nominees Limited** (hereinafter

“**Strategic**”), as lender for the sum of NZ\$5.15m on **2 May 2007** (hereinafter the “**Loan Agreement**”).

[9] The Loan Agreement was to be guaranteed by Gulf, Oceania and three other persons.

[10] The securities to be provided under the Loan Agreement included a first mortgage over Gulf’s Development Lease and a Crown Lease registered to Gulf (hereinafter the “Crown Lease”).

[11] Two conditions precedent of the Loan Agreement were:

- (a) Confirmation from the Reserve Bank that Oceania would be permitted to remit its loan repayments to New Zealand, and
- (b) Reserve Bank consent for the issue of securities in favour of Strategic.

[12] A series of letters passed between the Reserve Bank and the Fiji solicitors for Strategic regarding the approvals for the Loan Agreement. On **25 May 2007** the Reserve Bank gave approval subject to certain conditions (hereinafter the “**Approval Letter**”).

[13] Condition 1 was for the parties to provide the Reserve Bank within 3 months documents confirming that certain steps had been taken. Condition 2 was that the loan repayment would be based on the amount drawn on by the Fiji company and its receipt confirmed to the Reserve Bank. The Approval letter also stated that approval would be automatically invalidated if the Reserve Bank did not receive a response within the stipulated time.

[14] On **26 June 2007**, Gulf executed a first mortgage over its Crown Lease in favour of Strategic. The Mortgage was registered on **9 July 2007** as Mortgage No 609634.

[15] Gulf says that it was not aware of the contents of the correspondence between the Reserve Bank and the solicitors for Strategic so its solicitors

wrote to the Reserve Bank on **5 August 2009** wanting to know whether conditions 1 and 2 of the Approval letter had been complied with and other matters. The letter went on further to say: "*The Mortgagee namely Strategic Nominees Limited has advertised for sale and calling for tenders as Mortgagee in the Fiji Times and the Fiji Sun under the Mortgage registered (sic). Accordingly, our client wishes to challenge the Mortgagee Sale. However, we require the above informations (sic) as a matter of extreme urgency to advise our client in the matter.*" The advertised mortgagee sale was in respect of both the Development and the Crown Leases.

THE PLAINTIFF'S ARGUMENT

[16] Dr Sahu Khan, Counsel for the Plaintiff, submitted that his client is directly concerned with the Reserve Bank approval for the issue of the mortgage securities. Prior approval had to be given. He quotes s 10 of the **Exchange Control Act** [Cap 211] as making his client, as the person issuing the securities, the person responsible for securing Reserve Bank approval and not the recipient of the security. He also submitted that his client was responsible to ensure that before it performs its responsibilities in granting the mortgage security and its obligations under the security, Reserve Bank approval was obtained. He quotes s 35(1) of the Act as supporting this proposition. He further submits that Reserve Bank approval was conditional. His client intends to perform the terms of the mortgage but before it does so it wants to know whether Strategic have complied with the "conditions precedent" of the Approval Letter.

[17] I must admit I have some difficulty following this line of argument. I would have thought that it was just a matter of a request to Strategic for the information. Counsel admitted that they have not asked for the documents from the other parties involved in the transactions. This is a rather indirect way of obtaining information from a third party to a transaction involving Gulf and Strategic. Gulf issued the mortgage security over the Crown Lease to

Strategic in June 2007 and I would presume that prior approval by the Reserve Bank for its issue would have been obtained.

[17] Counsel also argued that s 19 gave the Court power to order discovery against the Reserve Bank.

THE DEFENDANT'S ARGUMENT

[18] The Reserve Bank affidavit deposed that the Bank granted consent in its Approval Letter pursuant to s 10 of the Act and that it owed no duty to disclose to Gulf any information relating to it. It further says that s 19 prevents the Bank from divulging the information.

[19] Section 19(1) of the Act provides:

“Except for the purpose of the performance of his duties or the exercise of his functions or when lawfully required to do so by any court or under the provisions of any written law, no director, or any officer or employee of the Reserve Bank shall disclose to any person any material information relating to the affairs of the Reserve Bank or of any bank or credit institution or other person which he has acquired in the performance of his duties under the Act.”

[20] Mr Young for the Reserve Bank submitted that this provision imposes a duty on the Bank not to disclose. He says, the section operates in two ways. Firstly, if the Bank breaches its statutory duties then it can be sued and a court may order the production of documents. Secondly, he says the Bank may be subpoenaed to produce the documents. However, in the present case, there is no allegation in the Statement of Claim that a statutory duty is owed to Gulf or that it has been breached. He therefore submitted that it is frivolous and vexatious to join the Reserve Bank for the purpose of obtaining discovery. He cited the case of **Burstall v Beyfus** [1884] 26 ChD 35 where the English Court of Appeal held that it was frivolous and vexatious to join solicitors for the mere purpose of obtaining discovery from them in support of his argument.

[21] Dr Sahu Khan in response submitted that the Statement of Claim may not have particularised the claim sufficiently but he intends to do that in due course. He argued that **Burstall** did not apply in this case.

CONSIDERATION OF THE ARGUMENTS

[22] I agree with Mr Young. I think this is a misconceived application for discovery as the pleadings and affidavits now stand. Before Gulf can get discovery against the Bank, it must show that it has a cause of action against the Bank. The Statement of Claim does not plead a sufficiently clear cause of action against the Reserve Bank. It, does suggest however, that the Reserve Bank may owe Gulf a duty to disclose based on the fact that Gulf is the entity issuing the mortgage security. As I have said above, I have some reservations about it but perhaps Dr Sahu Khan might make it clearer when he further particularises or amends his client's Statement of Claim.

[23] It is true that s 19 gives the Court power to order discovery against the Reserve Bank but that presupposes that the applicant has some right under statute or common law entitling it to apply to the Court for such an order.

[24] I think the wider principle in **Burstall** applies here. In that case, a firm of solicitors was joined as defendants. The English Court of Appeal examined the Statement of Claim and found that there was no reasonable cause of action pleaded against the solicitors. They were simply joined because they had acted for the parties to the action. Discovery should not be ordered against a party against whom no reasonable cause of action has been pleaded. I think here too, the Statement of Claim, as currently stands, does not clearly plead a reasonable cause of action against the Reserve Bank. But as I have said above, Dr Sahu Khan should be given an opportunity to perhaps better plead his client's claim.

[25] I was also concerned that the discovery that the Plaintiff was seeking was far too wide. It is obvious from s 19 that the Reserve Bank is obliged by

law not to disclose certain documents and I asked Dr Sahu Khan to better describe the extent of the discovery that he is seeking and he limited it to: "Documents relating to the approval given by the Reserve Bank on 25 May 2007. All they want to know is whether the conditions (in that approval) have been complied with."

[26] Even with this limitation, I think the extent of discovery is still too wide. The Approval Letter set out several requirements to be met which were basically confirmations that certain moneys had been paid and certain transactions had taken place. If all that Gulf is interested to find out is whether these conditions have been met then all they had to do, I would have thought, was to just ask and the Reserve Bank would have given the answers as Gulf is an interested party. To seek discovery of related documents is in my view a fishing expedition for purposes other than the prosecution of this action.

[27] Finally, the relief claimed in this application goes further than that sought in the Statement of Claim. As I pointed out to Counsel the other substantive relief claimed in the Statement of Claim, namely damages, will only arise if the Plaintiff succeeds in its claim for discovery. In other words, the only substantive relief sought is in respect of the discovery claim. To obtain principal relief in this summary way when there are so many unresolved issues requiring a full trial is unacceptable. See Order 14 High Court Rules 1988 and **Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FCA 60; ABU19U.2006S (10 Nov 2006).

[28] For these reasons, I therefore dismiss the Plaintiff's application.

COSTS

[29] As the Defendant has won, it is entitled to costs which I assess as \$700 to be paid within 21 days.

APPLICATION TO STRIKE OUT

[30] The only outstanding matter is the Defendant's Summons to strike out filed on 10 September 2009. Counsel may wish to reconsider the application in view of the orders that I make in this application. The Defendant is free in any event to pursue its application if it so wishes so I will adjourn the matter to the Master's List for 25 September 2009 at 9.00am for mention.

ORDERS

[31] I therefore make the following Orders:

1. The Plaintiff's motion for discovery filed on 27 August 2009 is dismissed.
2. The Plaintiff is at liberty to amend and further particularise its Statement of Claim.
3. The Plaintiff shall pay the Defendant's costs of \$700 within 21 days.
4. The matter is adjourned to the Master on 25 September 2009 at 9.00am for mention of the Defendant's Summons to strike out filed on 10 September 2009

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Sosefo Inoke

Judge