

IN THE FIJI COURT OF APPEAL AT SUVA

CIVIL APPEAL NO: ABU0026U of 1997S
(High Court Civil Action No. 407 of 1992)

BETWEEN: MINAMI TAIHEYO KAIHATSU
KABUSHIKI KAISHA

Appellant
(Original Third Party)

AND: PETER GERVAISE JOSEPH EYRE

First Respondent
(Original Plaintiff)

AND: ESTATE MANAGEMENT SERVICES
LIMITED

Second Respondent
(Original Defendant)

CIVIL APPEAL NO: ABU0042U of 1997S
(High Court Civil Action No.407 of 1992)

BETWEEN: ESTATE MANAGEMENT SERVICES
LIMITED

Appellant
(Original Defendant)

AND: PETER GERVAISE JOSEPH EYRE

First Respondent
(Original Plaintiff)

AND: MINAMI TAIHEYO KAIHATSU
KABUSHIKI KAISHA

Second Respondent
(Original Third Party)

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Justice I. R. Thompson, Justice of Appeal
The Hon. Justice J.D. Dillon, Justice of Appeal

Counsel: Mr G.P. Lala for Minami Taiheyo Kaihatsu Kabushiki Kaisha
Mr P. Knight for Mr Peter Gervaise Joseph Eyre
Mr J. Flower for Estate Management Services Limited

Hearing: Friday, 7 August 1998

Date of Judgment: Friday, 14 August 1998

JUDGMENT OF THE COURT

On 30 April 1997 Pathik J. gave judgment in the High Court at Suva in favour of Mr Eyre (the plaintiff) against Estate Management Services Ltd (the defendant/vendor) for \$30,625 and interest for breach of contract, and made a declaration that Minami Taiheyo Kaihatsu Kabushiki Kaisha (the third party/"Kaisha") indemnify the vendor in the amount of the judgment and costs. Both Kaisha and the vendor appealed and both were heard together.

1. History

On 25 January 1972 the vendor under its former name of Pacific Hotels and Developments Ltd agreed to sell Mr Eyre 5 lots in a proposed subdivision at Deuba for a price of \$6,125 each, with a payment of \$1,531.25 (the "down payment") at the time of the purchaser's offer and the balance of \$4,593.75 within 30 days of the vendor's acceptance thereof. The full purchase price was duly paid, making a total of \$30,625 in respect of all 5 lots.

The agreement provided for extensive development and other work on the subdivision, to be carried out by the vendor "with all reasonable speed having regard to all relevant factors", with a proviso that the defendant was not to be liable for compensation for any delay unless it was wilful. The purchaser was entitled to possession of each lot on registration in the Titles Registry at Suva of a survey plan containing it, and when a separate certificate of title was available the vendor undertook to execute a proper and registrable transfer.

The vendor failed to carry out those obligations and made a decision for commercial reasons in 1975 not to proceed with the development of that part of the subdivision containing these lots. Matters remained in abeyance until 1989 when it agreed to sell them to Kaisha. On 30 September 1991 Mr Eyre's solicitors wrote requiring the vendor to transfer the lots to their client and seeking damages in default. The defendant replied on 12 November advising that the subdivision of Section F in which these lots were comprised had not proceeded to the stage where separate titles could be issued, and they had been sold to Kaisha which had assumed the vendor's contractual obligations. These proceedings were commenced on 11 September 1992.

2. The Pleadings

In his statement of claim Mr Eyre pleaded the vendor's breach of contract in failing to survey and carry out the works in the subdivision with all reasonable speed and in failing or neglecting to execute the stipulated transfers. He sought repayment of the total purchase price of \$30,625 and interest, and further or alternatively, damages. The vendor filed a statement of defence substantially admitting all the allegations of fact in the statement of claim, but denied having breached the relevant clauses of the agreement, or that the plaintiff had suffered any damage.

On 19 November 1992 the vendor issued with leave a third party notice to Kaisha seeking indemnity against Mr Eyre's claim, based on clause 8E of a Deed of Settlement dated 20 March 1990 between them whereby it alleged Kaisha indemnified it against any and all claims of any nature arising out of the vendor's failure to complete any of its obligations under (inter alia) the agreements for sale of the lots to Mr Eyre. On 7 February 1993 the vendor filed an amended

statement of claim against the third party, again pleading reliance on clause 8E of the Deed in the same terms in support of the indemnity, to which Kaisha filed a brief defence admitting that allegation. Then, on 12 February 1993 the Chief Registrar ordered that the question of the liability of the third party to indemnify the defendant be tried in the action, and that the third party was to be at liberty to appear and take such part as the Judge should direct, and be bound by the result of the trial.

On 9 December 1994 there was a pre-trial conference pursuant to Ord.34, in which the indemnity under the Deed of 20 March 1990 was admitted as pleaded. However, on 13 October 1995 the third party was granted leave to file an amended statement of defence, in which it challenged the plaintiff's right to claim damages and interest as well as the defendant's right to claim under the indemnity. The latter filed a reply to this amended statement of defence.

3. The Trial

At its commencement on 12 March 1996 Mr Knight referred to the pleadings and to the agreed statement of facts to submit the plaintiff should be entitled to judgment on them, and he called only one witness, a surveyor, to say that the delay in carrying out the subdivision was unreasonable. Mr Knight also queried the third party's right to contest the plaintiff's claim against the defendant in the absence of any directions as to mode of trial, but the Chief Registrar's order of 12 February 1993 noted above effectively left it to the trial Judge to decide what part the third party could play in the proceedings. As it turned out, the matters raised by it against the plaintiff appear to have been fully aired at the trial and dealt with in the judgment.

The only other witness was called by the vendor to give a general account of the development up to the sale to Kaisha. Counsel made written submissions which are included in the record, from which it is clear that they all accepted and relied on parts of the agreed statement of facts.

4. The Judgment

On the question of whether there had been a breach by the vendor of its contract to sell to Mr. Eyre, *Pathik J.* referred to the pleadings, the agreed statement of facts and the evidence, and found it had no intention of complying with the essential terms and that its delay in completing the survey and other works was unreasonable and wilful. As a result he found that the plaintiff was entitled to rescind the contract. (However, the plaintiff did not plead rescission and his claim for damages was based on the defendant's failure to remedy its breaches following his solicitor's letter of 30 September 1992). His Lordship had no difficulty in deciding that Mr Eyre was entitled to the return of his purchase price which for some reason he called a deposit. He also awarded interest at 7% as damages at common law from the date of the solicitors' letter of 30.9.91 to the date of judgment, holding that to be the date on which the plaintiff's cause of action arose. This finding disposed of objections under the Limitation Act raised by the third party.

On the issue of the third party's liability to the defendant, he referred to the agreed facts stating that the former indemnified the latter by virtue of the Deed of 20 March 1990 in respect of the Defendant's failure to complete its obligations under the sale agreements with the plaintiff. (In fact the Deed referred to Kaisha's failure to complete the defendant's obligations, but the effect

is the same). In finding for the defendant on this claim he referred to and rejected various matters raised in the third party's amended statement of defence affecting the plaintiff's claim.

He gave judgment for the plaintiff against the defendant, and made a declaration that the latter was entitled to be indemnified by the third party.

5. The Appeals

(i) The main appeal (26/97) is by the third party Kaisha against the declaration that it indemnify the defendant vendor. Five grounds were advanced in the notice but the fifth was abandoned. The first ground (that the Judge failed to consider the validity of the Indemnity agreement) is unsustainable. The third ground is that he was wrong in not holding the Plaintiff's claim was statute-barred, but we are satisfied that his finding that the cause of action arose on 30 September 1992 was correct and the action was commenced only 1 year later. Nor is there any merit in the proposition that he failed to consider the staleness of the claims. Both the defendant and the third party knew in 1990 that there could be outstanding claims by purchasers for failure to develop the lots, and they were provided in the Deed for completion by the third party. Accordingly it cannot be said that the present claim by Mr Eyre would have come as a surprise to them.

The fourth ground alleged that the Judge was wrong in not considering the defences raised by the third party against the plaintiff. As we have noted above under **The Trial**, these matters raised in the third party's amended statement of defence were considered by the Judge, as Mr Lala himself conceded in his written submissions.

Also included in the fourth ground is a complaint that the Judge was wrong to hold that the third party was bound by the minutes of the pre-trial conference, which Mr Lala submitted should be regarded as superseded to the extent they were inconsistent with the third party's amended statement of defence filed later. This complaint was related to the defence raised by the latter to the plaintiff's case, but it appears from the judgment that His Lordship paid no regard to the agreed facts in considering them, which he identified as illegality, statute of limitations and the need for the purchaser to give notice to the vendor. We have already rejected the submission that the plaintiff's claim was time-barred and there is no substance in the contention that the contract was illegal, an allegation which we cannot perceive in the third party's statement of defence, and which was not raised as a ground of appeal.

The claims about notice referred to by the Judge and advanced in the second ground of appeal arise in two ways. First it was submitted that before the plaintiff could sue for the breach of contract he had to give the vendor reasonable notice requiring completion. We think this is correct; after such a delay, apparently acquiesced in by the purchaser, it was incumbent on him to make it clear that he wanted the vendor to complete. This was the obvious intention and effect of his solicitor's letter of 30 September 1991. The response in the vendor's letter of 12 November indicated that it was no longer able to do so and that the plaintiff should apply to Kaisha. Although the latter pleaded it was ready willing and able to carry out the development within a reasonable time, it gave no evidence, merely pleading that it had offered alternative lots to the plaintiff who refused them. It is accordingly quite clear that when the writ was issued the defendant was in irremedial breach of its contract with the plaintiff, who was entitled to return of the purchase price

he paid with interest as found by the judge. Its decision not to proceed was deliberate, based on commercial considerations, and the Judge was right to find that its delay in completion was wilful, satisfying the provision in clause 6(b) of the sale contract about compensation or damages arising as a result.

The other point relating to notice raised in the second ground of appeal was an allegation that the defendant should have given the third party notice that it required completion within a reasonable time before being able to claim indemnity under the Deed. That document contains no such requirement, and we are satisfied notice was unnecessary, having regard to the fact that the indemnity was given to cover the contingency of claims against the vendor by purchasers arising as a result of third party's failure to complete the development. Such claims could arise whether or not the latter fulfilled that obligation to the vendor in time, so that notice to complete was irrelevant. All that was necessary to trigger the indemnity was a valid claim by a purchaser against the vendor. In any event it is clear from what we have said earlier in this Judgment that the trial proceeded on the basis of the acknowledgment of the indemnity in the agreed statement of facts and His Lordship referred to it in finding the third party liable. In the light of this acknowledgment it may well be that neither party thought it necessary to call evidence relating to the operation of the indemnity.

Accordingly, for these reasons we are satisfied that the third party's appeal against the defendant vendor must fail.

(ii) Mr Flower frankly acknowledged that the second appeal (42/97) by the vendor against the purchaser was brought as a defensive tactic, in case the points raised by the third party against his client succeeded. At the close of the argument he felt justified in abandoning

it subject to the amendment to the order made hereunder, to which third party's Counsel offered no objection.

Decision

Appeal 26/97 is dismissed, with costs of \$2,000 to each of the respondents against the appellant together with disbursements and expenses to be fixed by the Registrar if the parties cannot agree.

Appeal 42/97 is allowed to the extent only of amending the order in the High Court to provide that the defendant have judgment against the third party for the amount and interest and costs, instead of the declaration made to that effect. We make no order for costs on that appeal.

M. Casey
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Sir Maurice Casey
Justice of Appeal

I.R. Thompson
.....
Justice I.R. Thompson
Justice of Appeal

J.D. Dillon
.....
Justice J.D. Dillon
Justice of Appeal

Solicitors:

- Messrs. G.P. Lala & Associates, Suva for the Appellants
- Messrs. Cromptons Solicitors, Suva for the First Respondent
- Messrs. Q.B. Bale & Associates, Suva for the Second Respondent