

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBC 122 OF 2012

BETWEEN : **WILLIAM DUFFY** of Marina Point, Denarau Island, Fiji
Islands

PLAINTIFF

A N D : **EMILLIE PETRONELLA CORANDINA VERVOORT** of
Wailoaloa, Nadi

DEFENDANT

Appearances:

Mr Janend Sharma for the Plaintiff
No appearance for the Defendant

JUDGMENT

Introduction

1. The Plaintiff states the following facts in his Statement of Claim filed on 1st June, 2012:
 - i) By an agreement dated 17th November, 2010 (1st Agreement) he agreed to pay the Defendant certain monies and some of the monies were paid to the Defendant.
 - ii) The Plaintiff thereafter alleged certain anticipatory breaches of the 1st Defendant and the parties then agreed to terminate it and later into a further agreement and/or Deed to release each other from any monetary obligation the Plaintiff may have or may have had to the Defendant.
 - iii) The Plaintiff denies he ever had or has any obligations to pay any monies to the Defendant but agreed to pay the Defendant certain monies.

- iv) The Agreement by the Plaintiff to pay monies to the Defendant as aforesaid was made ex gratia.
- v) The Agreement and/or Deed between the Plaintiff and the Defendant was to be governed and construed in accordance with the Laws of Fiji and the parties submitted to the exclusive jurisdiction to the Courts of the Republic of Fiji Islands.
- vi) The Plaintiff duly signed the said Deed of Release and the Counterpart on 6th April, 2011 on the belief that they embodied the terms agreed as set out above.
- vii) In fact due to a mistake Clause 15 of the Deed of Release and Counterpart states that:

"This Deed is governed by laws of the Republic of the Fiji Islands. Each Party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Deed."

- viii) Clause 15 of the Deed of Release and the counterpart ought to have stated that:

"This Deed is governed by the laws of the Republic of the Fiji Islands. Each Party submits to the exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Deed."

As was intended by the parties.

2. Accordingly, the Plaintiff claims the following reliefs from Court:

- i) For an order that clause 15 of the said Deed of Release dated 6th April, 2011 may be rectified in the following manner:

"This Deed is governed by the laws of the Republic of the Fiji Islands. Each Party submits to the exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Deed."

- ii) Cost for this action.
- iii) Such further and other relief this Honourable Court deems just.

3. In her Amended Statement of Defence the Defendant states inter alia that:

- i) The Defendant was under duress and unduly influenced by the Plaintiff to execute the Agreement dated 17th November, 2010 and that the Plaintiff pressured the Defendant to execute it failing to which the Plaintiff would have the Defendant deported from Fiji as the condition of residency stamped on the Defendant's passport was that the Defendant's residency was dependant on living with the Plaintiff.
 - ii) The Defendant denies the allegation that they agreed to terminate the 1st Agreement and enter into further Agreement and states further that the Plaintiff by himself wanted to enter into a further agreement and/or Deed to release himself from any monetary obligation the Plaintiff had to the Defendant.
 - iii) The Defendant states further that she denies of agreeing for the Agreement and or/Deed between the Plaintiff and the Defendant was to governed and constructed in accordance with the Laws of Fiji and the parties submitted to the exclusive jurisdiction to the Courts of the Republic of Fiji Islands. She state that the Deed was prepared by the Plaintiff's Solicitors on Plaintiff's instructions without consulting and or the knowledge of the Defendant.
 - iv) It is further stated by the Defendant that the Plaintiff was explained the contents of the Deed and upon understanding the same the Plaintiff executed the said Deed.
 - v) The Defendant also denies that Clause 15 of the Deed of Release and the Counterpart ought to have stated that the deed is governed by the Laws of the Republic of the Fiji Islands, and that each party submits to the exclusive jurisdiction of Courts exercising jurisdiction there in connection with matters concerning the Deed.
- 4) In her Counter Claim she states inter alia that:
- (i) The Plaintiff is a businessman and had properties in Fiji and in New Zealand.
 - (ii) The Plaintiff and the Defendant had been living in a de facto relationship for the past 12 years and that their relationship became volatile as the result of the Plaintiff's excessive drinking.
 - (iii) The Defendant was also physically abused by the Plaintiff on several occasions and as a result the Defendant has spinal injuries and skull fractures.

- (iv) The Plaintiff in order to save himself from any claims from the Defendant pressured, under duress and/or unduly influenced the Defendant into entering into an agreement dated 17th November, 2010 and Deed of Release dated 6th April, 2011 respectively with the Plaintiff.
5. The Defendant has also stated that she has suffered loss and damages as a result of the Plaintiff's actions and claims damages by her Counter Claim.
6. The Plaintiff has filed a Reply to Amended Defence and Amended Defence to Counter Claim on 6th August, 2013 and Amended Reply to Amended Defence on 15th May, 2014.

Trial

7. When this matter was taken up for Trial on 1st July, 2015 Statement of Defence was struck out subject to costs due to the non-appearance of the Defendant and the Plaintiff's Counsel was granted time to proceed by way of formal proof.
8. As directed by Court the Learned Counsel for the Plaintiff submitted Affidavit evidence of the Plaintiff on 4th December, 2015 and sought the reliefs claimed by the Plaintiff in his Statement of Claim.

Determination

9. From the facts deposed by the Plaintiff in his Affidavit, it is revealed that the Defendant has instituted an action in the High Court of New Zealand (**CIV - 2011-404-6668[2015 NZHC 808]**) seeking Orders granting her an interest on assets held by the Plaintiff and Trust named William Duffy FAMILY Trust. (paragraph 21 of the Affidavit). The Plaintiff states in his Affidavit evidence that he challenged the New Zealand Courts' Jurisdiction to hear the Defendant's Claim and that the challenge had been rejected by Associate Judge Sargisson in March 2013. He also states in evidence that he is neither a New Zealand resident nor a New Zealand citizen and that he has no assets in New Zealand either. Furthermore he states that he then decided not to participate in the New Zealand proceedings as he is a Fiji Resident and he consider the New Zealand Courts not having any jurisdiction over him nor the properties that William Duffy Family Trust had in Fiji. He states he continues to maintain that the Fiji Courts have jurisdiction over him.

10. In paragraph 25 of the Plaintiff's Affidavit it is stated that the New Zealand High Court then proceeded to hear the Defendant's Claim by way of Formal Proof and in coming to a conclusion the said High Court did not have the benefit of his side of events.
11. The Plaintiff states further in his Affidavit the New Zealand High Court has decided that the 1st Agreement and the Deed of Release and Counterpart executed on the 6th of April, 2011 are voidable at the Defendants choice. A copy of the Judgment of Ellis J delivered on 23rd April, 2011 is annexed to the Plaintiff's Affidavit marked "W-3".
12. Plaintiff then goes on to state in his Affidavit that he does not intend to participate in the Appeal process either because of his belief that the New Zealand Courts do not have jurisdiction over him and the William Duffy Family Trust and neither he nor the William Duffy Family Trust have any properties in New Zealand.
13. Paragraph 2 of the Judgment marked "W-3" refers to another case in which the Plaintiff has unsuccessfully challenged the jurisdiction of the New Zealand Court. In paragraph [2] Ellis J states:

"[2] In part because of the Fijian connection the Defendants challenged this Court's jurisdiction to hear the claims. That challenge was rejected by Associate Judge Sargisson in March, 2013. Rather than seeking a review of that decision there was an unsuccessful attempt to appeal to the Court of Appeal. Since that time (late 2013) the Respondents have taken no further steps to defend the claim, which therefore proceeded before me essentially by way of formal proof."

14. In **Vervoort v Forrest [2013] NZHC 590 (26 March, 2013)** the Judgment referred to by Ellis J the issue of jurisdiction has been dealt with when it was challenged by the Plaintiff who was a Defendant in the said case.

It is pertinent to note the findings of the Associate Judge Sargisson which appears in paragraphs 48, 49, 50 and 53 of the said Judgment.

"[48] The underlying issue in this case is a claim to property that the Plaintiff says is not placed beyond reach by the Trust and the Deed of Release. One of the key issues

to be considered when deciding the appropriate forum for this proceeding, therefore is the governing law of the Trust. The Trust is governed by New Zealand law as established by the Trust Deed. Further, the Trust is comprised largely of assets in or acquired in New Zealand. These are factors suggesting New Zealand is the appropriate forum. (Though these are two pieces of reality in Fiji, I am satisfied that if this proceeding goes ahead in New Zealand the trial Judge would be able to refuse jurisdiction over the two foreign pieces of realty, as was done in *M v DB*.²³ The existence of such reality is not therefore determinative).

23 *M v DB* [2012] NZHC 1152

[49] **The Defendants argue that the Deed of Release is governed by Fijian law and therefore the question of the validity of the Deed should be heard in the Fiji Courts. The Defendants argue that this is a mutual mistake and that the deed should read the 'exclusive' jurisdiction. However, there is no factual evidence of it being mutual mistake. Furthermore it seems futile to hold that the Deed must be considered Fijian law, as if it is held to be void, any decision as to the impact of such finding on the Trust will still have to be determined by a New Zealand Court given that the Trust is governed by New Zealand law. Furthermore, if the Trust is found to be a sham trust then Ms Vervoort's claim under the Property (Relationships) Act will have to be considered. That could involve a determination as whether the Deed constitutes as agreement. Any finding of a Fijian court as a duress would only be persuasive in such a proceedings.**

[50] There is evidence of both parties having a strong connection with New Zealand. Throughout the greater part of the relationship the parties resided in New Zealand and the main assets are, or are derived from, assets acquired in New Zealand. Furthermore, **Mr Duffy holds a New Zealand Residency Visa, which means that he may properly be considered to be a resident who is temporarily absent from New Zealand. Though the evidence is unclear as to where Ms Vervoort is currently living, her evidence is currently living, her evidence is that she is living between New Zealand is that New Zealand is a convenient forum for her.**

[53] Based on submissions made and weighing all of the factual considerations put before me, I am persuaded that Ms. Vervoort has established that New Zealand is the appropriate forum for the trial.”

[emphasis added]

15. In considering the findings of the aforesaid Judgment as above I am of the view that I should not grant an order to rectify Clause 15 of the Deed of Release dated 6th April, 2011 as prayed for by the Plaintiff in his Statement of Claim. If I do so, it will have an impact on the litigation pending in the Courts of New Zealand between the parties. Although this Court is not bound by the decision of Associate Judge Sargisson it is not proper to ignore the said Judgment and grant an order to rectify the jurisdiction clause of a deed which would nullify the findings of the said Judgment. In my view this Court needs to respect the said decision although it's not binding.
16. I also find that the Plaintiff's appeal against the Judgment of Associate Judge has been dismissed for want of jurisdiction **Duffy v Vervoort [2013] NZCA 522 (25 October 2013).**
17. Furthermore the Plaintiff has also suppressed the fact that he hold a New Zealand Residency Visa. At paragraph 50 of the Judgment of Associate Judge Sargisson she states that the Plaintiff holds a New Zealand Residency Visa which means that he may properly be considered to be a resident who is temporarily absent from New Zealand.


Conclusion

18. In the light of all of the above reasons I hold that the Plaintiff's Claim should be dismissed without costs.

Accordingly the Plaintiffs Claim is dismissed, no costs.



**At Lautoka
3rd February, 2016**


**Lal S. Abeygunaratne
Judge**