IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA

HBC No. 92 of 2011

BETWEEN : **SEA JOY ENTERPRISES GROUP LIMITED** a company incorporated according to the Laws of Hong Kong having its business address at Suite 2, 2nd Floor, Brijlal Building, Cumming Street, Suva.

PLAINTIFF

AND : **THE FANTASY COMPANY FIJI LIMITED** a Company incorporated according to the laws of Fiji and having its registered office at Wailoaloa, Nadi.

DEFENDANT

Solicitors : O'Driscoll & Company for the Plaintiff
AK Lawyers for the Defendant

RULING

INTRODUCTION

1. The plaintiff, Sea Joy Enterprises Group Limited (**"Sea Joy"**), paid $877,500 (eight hundred and seventy seven thousand and five hundred dollars) to the defendant, The Fantasy Company Fiji Limited (**"Fantasy"**), on 06 December 2010.
2. The money was paid as deposit pursuant to an agreement for the sale to Sea Joy by Fantasy of a total parcel of 10.1 hectares of *Tiri* Land referred to in an Approval Notice of Lease LD Ref 60/519. Sea Joy, a non-resident company incorporated in Hong Kong, had plans for a hotel and resort project on this land.
3. For one reason or another, the agreement fell through. The parties of course have different accounts as to why this was so and have been pointing the finger at each other.
4. Sea Joy is interested first and foremost in recovering the deposit of $877,500 that it had paid to Fantasy pursuant to their arrangement.

5. On 15 June 2011, Sea Joy would file a writ and a statement of claim, seeking a declaration that Fantasy, by its conduct, had wrongfully repudiated their agreement. Alternatively, Sea Joy seeks a declaration that the same agreement is illegal and void *vis a vis* the Land Sales Act.

6. An excellent background to this case can be found in Mr. Justice Inoke's rulings in **Sea Joy Enterprises Group Ltd v Fantasy Company Ltd** [2011] FJHC 810; HBC92.2011L (5 August 2011) and **Sea Joy Enterprises Group Ltd v Fantasy Company Ltd** [2011] FJHC 681; HBC92.2011L (1 November 2011).

7. What is before me now is an application filed by Sea Joy on 20 October 2011 seeking an order that the statement of defence filed by Fantasy be dismissed and that judgement be entered in favour of Sea Joy.

8. The application is filed **"[u]pon the grounds set forth in the accompanying affidavit of Wu Xiaochun sworn and filed herewith..."**

9. In paragraphs 9 and 10, of Xiaochun deposes as follows:

> 9. Subparagraph 4 of paragraph 6 of the said affidavit is denied in that the reasons for the Plaintiff not paying further amounts to the Defendant are well known to it and subject of the within action. The Defendant was unable to satisfy the contractual conditions for the payment to be made by the Plaintiff and as the sum involved was large and because the conditions for payment were not satisfied. That the Defendant is seeking to refinance is of grave concern to the Plaintiff as it suggests that the Defendant seeks to encumber its assets to the potential detriment of the Plaintiff should the Plaintiff prevail in this action.
> 10. Subparagraph 5 of paragraph 6 of the said affidavit also reinforces the Plaintiff's view that the Defendant is seeking to defeat its rights without the matter having been determined. It is the Plaintiff's view that the dealing between the parties was based on an illegal contract and part of the Plaintiff's claim concerns recovering any amounts paid with interest under the principles of restitution. The Plaintiff has been advised by its solicitors and believes that the contract was illegal because the same was signed by it on 27th September 2010 prior to consent being obtained and no contract was signed on 6th December 2010. The Plaintiff is reinforced in this view by the contents of the judgment of this Honourable Court dated 15th August 2011 and even now there has been no contract dated on 6th December 2010 produced. The

Plaintiff only signed certain paperwork on 27th September 2010, including a sale and purchase agreement.

11. Subparagraph 6 of paragraph 6 of the said affidavit is denied in that the only hardship that will be faced is that to the Plaintiff by being potentially deprived of any fruits of judgment if the current application by the Defendant is allowed.
12. Subparagraph 8 of paragraph 6 of the said affidavit annexes a document that is speculative in nature. It is based on future contingencies and should not be entertained.
14. Paragraph 7 of the said affidavit is denied in that the documents purportedly relied on by the Defendant do not agree with what the documents show. The simple fact is that there is no agreement dated 6th December 2010, but only one signed by the Plaintiff on 27th September 2010, prior to consent, and which I am informed by my solicitors and believe is illegal and void. The insertion of a date post signing, when signing has clearly occurred on a particular date, does not make an agreement effective from such later date. An agreement is effective the date it is signed, which in this instance was 27th September 2010. Due to lack of consent prior to 27th September 2010 I am advised by my solicitors and believe that the contract is illegal.

10. Fantasy denies that the agreement was void and illegal under the Land Sales Act. It pleads that the contract was concluded on 06 December 2010 after the Minister's consent in writing dated 25 November 2010.

11. In paragraph 5 of his affidavit, Abbas Ali, shareholder and Managing Director of Fantasy, deposes as follows:

5. That in response to paragraphs (9), (10) and (14) of the said Affidavit:-
   1. That I deny the contents thereof.
   2. That contract dated 06/12/2010 has been produced to this Honourable Court by way of annexure in my affidavit filed herein on 25/8/2011 in support of the application for the stay filed herein on 25/8/2011. That the agreement was executed and or dated on the 6th of December, 2010 by the Plaintiff's own former Solicitors, Messrs Sherani and Company.
   3. That furthermore, there was a **strict requirement** of the Honourable Minister for Lands that prior to the grant of the consent, both parties were to execute the Sale and Purchase Agreement and annexed it together with the **Land Sales Agreement** as the Honourable Minister wanted to be familiar with what terms and conditions were contained in the said transaction. That annexed hereto and marked with letters as follows:-
      - "A" - Copy of letter dated 27/10/2010 from the defendant to the Honourable Minister of Lands.
      - "B" - Copy of letter dated 21/10/2010 from the Plaintiff's previous Solicitor to the Honourable Minister of Lands.
      - "C" - Copy of letter dated 28/10/2010 from the Defendant Solicitor to the Plaintiff's Solicitors.
      - "D" - Copy of letter dated 28/10/2010 from the Defendant to Wahid Ali (Plaintiff's Agents).

"E" - Copy of letter dated 30/10/2010 from the Defendant to Plaintiff's Representative.

"F" - Copy of letter dated 2/11/2010 from the Defendant to the Honourable Minister of Lands.

That the above annexures clearly confirm the requirements of the Honourable Minister of Lands was for parties to provide **executed agreement** and as such, the allegations of the agreement being null and void is of no merits.

4. That I have been further informed by our Solicitor and verily believe that what the Plaintiff is basically doing is playing **"HOT AND COLD"** in that at one time, it is seeking for refund of monies paid as deposit and other remedies **under the agreement** and on the other time, it is saying that **the agreement is invalid, null and void** because there was no consent of the Honourable Minister obtained prior to the execution of the said agreement.

5. That I deny that the Defendant was unable to certify the contractual condition of the Agreement. The Plaintiff was **never able to appoint an engineer** of its choice to do inspection of the development works that were carried out by the Defendant and certify the payment of the second deposit.

6. That I deny all allegations that the Defendant is seeking to encumber its assets to the potential detriment of the Plaintiff. The Plaintiff claim is found to be laid after the trial of the matter.

12. Fantasy has also filed a counter-claim in which it claims *inter alia* that Sea Joy had breached the agreement and seeking declaratory orders that the deposit paid be forfeited accordingly and also seeking damages.

13. The Agreement in question, according to the statement of claim, was dated 27 September 2010. Fantasy however, pleads that the contract was dated 06 December 2010 **"after the Minister had granted its consent for the dealing on 25 November 2010"**.

14. According to paragraph 6 of the Statement of Claim, the consent of the Minister pursuant to the provisions of the Land Sales Act was granted on 25 November 2010. Then, on 06 December 2010, a deposit of $877,500-00 (eight hundred and seventy seven thousand and five hundred dollars)

15. The Statement of Defence in question is almost all a bare denial of all that the plaintiff has pleaded in its statement of claim filed on 18 July 2011.

16. The argument that the agreement is illegal and is null and void *vis a vis* the Land Sales Act takes centre stage in the application now before me.

17. In its statement of defence, Fantasy refutes all allegations levelled against it by Sea Joy and pleads *inter alia* that it was Sea Joy that had breached clause 3(2)(b) of the agreement and had failed to rectify the breach within twenty one days of the Notice To Rectify given pursuant to Clause 13.1 and 13.1(b). Fantasy has also filed a counter-claim.

RELEVANT PROVISIONS OF THE AGREEMENT

18. Under clause 13.1(a) of the Agreement[1], Fantasy will be entitled to rescind the agreement and retain the deposit paid as liquidated damages, if Sea Joy should continue to default in payment of any monies due or in performing or observing any stipulation, after twenty one days of a written notice by Fantasy.

19. Under clause 14.1(a), Sea Joy will be entitled to rescind the agreement if Fantasy defaults and if that be the case, to a refund of all monies paid without deduction together with 10% p.a interest from the date when Sea Joy had paid the money to Fantasy[2].

20. Clause 28 of the Agreement provides as follows:

> **28. RECISSION AND TERMINATION BY THE PURCHASER**
>
> 28.1 If any consent required to be obtained pursuant to this Agreement or pursuant to clause 27 hereof is refused or any works required to be done by the Vendor pursuant to clause 27 is not completed within the time stipulated or the registered lease issued by the Director of Lands is contrary to the conditions stipulated in clause 27 hereof then the Purchaser shall have the right to terminate this

[1] Clause 13.1 states:
Subject to clause 28 hereof if the Purchasers shall make default in payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of twenty one (21) days from the date of a Written Notice by the Vendor specifying the default to the Purchaser then and in any such case the Vendor without prejudice to any other remedies available to it, may at its option exercise all or any of the following remedies namely:
(a) May enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and at once payable; or
(b) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be forfeited to the Vendor as liquidated damages; or
(c) May sue for specific performance of this Agreements;

[2] Clause 14.1states:
If the Vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor's part herein contained and if such default shall continue for the space of twenty one (21) days from the date of a Written Notice by the Purchaser specifying the default to the Vendor then and in any such case the Purchaser without prejudice to any other remedies available to it, may at its option exercise all or any of the following remedies namely:
(a) May rescind this present contract and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be forthwith refunded to the Purchaser without deduction together with interest at the rate of 10% per annum from the date of payment by the Purchaser.
(b) May sue for specific performance of this Agreement.
(c) May claim damages in addition to seeking specific performance of this Agreement.

Agreement forthwith and the Vendor shall forthwith refund to the Purchaser all monies paid to it with interest at 10% per annum from the date the monies were paid to the Vendor.

28.2 If the Agreement is rescinded and/or terminated by the Purchaser pursuant to the breach of the provisions of clause 27 then the Purchaser shall be discharged and forever released from all liabilities and responsibilities under this Agreement save for its claim against the Vendor for the deposit and part payment and all other monies paid under this Agreement by the Purchaser to the Vendor which shall be refunded forthwith to the Purchaser together with the interest at the rate of 10% per annum from the date the payment was made.

28.3 It is acknowledged by the parties hereto that the termination of the Agreement pursuant to clause 28 hereof by the Purchaser shall not give rise to or entitle the Vendor to commence or institute any action, suit or proceeding in any Court of Law or otherwise against the Purchaser and the Vendor shall on such termination release the Purchaser from all further actions, proceedings, claims and demands for or on account of this Agreement save for the claim on the Vendor by the Purchaser for the refund of the deposit and part payment made by it together with interest thereon at 10% per annum from the date the monies were paid to the Vendor.

OBERVATIONS

21. At this time, it is not important to go into the details of the allegations and the cross-allegations of breach between the parties.

22. Theoretically, there are two ways by which Sea Joy could recover the deposit.

23. The first is to recover it through contract under clause 14.1 (a). To do so, the basic premise is that the agreement in question was a valid one and flowing therefrom, that Fantasy had defaulted on one its obligations thereon and had failed to rectify it after due notice. The second is by arguing that the agreement in question was null and void on account of the fact that the prior consent of the Minister for Lands was not obtained as was required under section 6 of the Land Sales Act.

24. Obviously, if the agreement is null and void on that account, the question as to which of the two parties had committed a repudiatory breach of the agreement does not arise as the agreement was never in existence in the first place. Hence, the agreement cannot form the basis for seeking recovery of the deposit.

25. In **Sakashita v Concave Investment Ltd** [1999] FJHC 3; Hbc0121j.1998s (5 February 1999), a similar issue of whether or not to refund a deposit paid under an illegal agreement presented before Mr. Justice Fatiaki.

26. Fatiaki J took the following course in his reasoning:

(i) the general principal of *ex-turpi causa non oritur actio* is founded on the public policy that any transaction tainted by illegality in which both parties are equally involved is beyond the pale of law and as such – no person can claim any right or remedy whatsoever from such contract.

(ii) the 'general principle' to monies paid under such a contract and in recognising an 'exception' to the 'general principle', Cheshire and Fifoot's **Law of Contract** (9th ed.) say at pages 349/350:

> 'Neither party can recover what he has given to the other under an illegal contract if in order to substantiate his claim he is driven to disclose the illegality. The maxim *in pari delicto potior est conditio defendentis* applies and the defendant may keep what he has been given.'

(iii) the question then becomes - whether in seeking to recover the 'deposit' paid to the defendant company, the plaintiff is 'driven to disclose the illegality'. In other words, a party to an illegal agreement is entitled to recovery unless he is forced to plead or rely on the illegality to substantiate his claim.

(iv) the dilemma is that, the defendant would be unjustly enriched if the deposit was not returned and on the other hand, if returned, the court might be seen to be lending assistance to a party to an illegal contract[3].

(v) in the end, Fatiaki J resolved the dilemma by categorising the plaintiff's claim as one which is either for "money had and received" or for restitution based on the judgments of the House of Lords in **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.** (1943) A.C. 32[4].

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[3] As Fatiaki J said:
In determining this question I am acutely aware that in the event that the *'deposit'* is not returned the defendant company may be said to have been unjustly enriched in so far as it will be permitted to retain both the land and the *'deposit'* which is a considerable sum of money.
Conversely, if the *'deposit'* is refunded to the plaintiff then on one view, it might be said that the court was lending its assistance to a party to an illegal contract or in the language of equity, one who has not *'come to equity with clean hands'* (*See*: ***Damodar & Ratanji Ltd. v. Redwood Investments Ltd. (1988) 34 F.L.R. 30*** at p.36 and 37).
In similar vein **Bingham L.J.** said in ***Saunders v. Edwards (1987) 1 W.L.R. 1116*** where the defence of *'ex turpi causa'* was rejected, at p.1134:
'Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an ... agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.'
Neither is my decision made any easier by considering the conduct or relative moral culpability of the parties to 'the Agreement' since both were aware of the need to obtain the Minister's approval and both have acted on the basis that there was a valid and binding contract in existence.

[4] As Fatiaki J said:

27. This case before me, however, takes the issue further because the agreement in question had provided that the first deposit paid shall be used by Fantasy to carry out certain works. As Mr. Justice Inoke had observed in an earlier ruling, Fantasy pleads that it used the deposit towards certain capital works which the agreement allows it so:

> [9] Clause 27.6 of the Contract provides that the agreement was conditional and subject to the vendor carrying out and completing within 8 months of the date of execution of the agreement to the satisfaction of the civil engineers the works designed by the consultants Wood & Jepsen. The clause then lists the various works to be done.
> [10] The civil engineers to certify the works are the engineers appointed by the plaintiff.
> [11] The first deposit, paid on **8 December 2010**, according to the defendant's managing director, Mr Abbas Ali, was used to fund the works as provided for under the clause and which he notified the plaintiff's representative in February 2011 to be 50% complete. A series of emails and letters passed between Mr Abbas Ali, and the plaintiff's representative in China with regards to completion of 50% of the works and the release of the second deposit. The plaintiff's representative wanted drawings and other information to enable them to ascertain whether the works had been completed but Mr Ali considered them unnecessary and only a delaying tactic and in the end Mr Ali terminated the Contract for the defendant's failure to pay the second deposit, effective from **23 March 2011**.

28. Although Fantasy's counsel does not argue so, in the event that the agreement is held to be null and void, Inoke J's observation in paragraph [11] above may yet support a defence of change of position against a claim based on restitution (see **Phillip Collins Ltd v Davis** [2000] 3 All ER 808). This, of course, will have to be the alternative to the first argument , whereby Fantasy asserts that the agreement was valid and that Sea Joy had breached it.

29. The defence of change of position, as Parker LJ observed in **Phillip Collins Ltd**, is :

In the final analysis I am content to categorise this aspect of the plaintiff's Originating Summons as being a claim for *'money had and received'* or for restitution according to the principles discussed in the judgments of the House of Lords in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. (1943) A.C. 32.* In particular I am satisfied that with little modification the words of Lord Roche in the *Fibrosa* case *(ibid.)* are directly applicable to the plaintiff's claim, where his lordship said at p.75:

'It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: See: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than a payment on account of the price. Its payment had advantages for the (defendant company) *in affording some security that the* (plaintiff) *would implement their contract and take up* (the transfer) *and pay the balance of the price, and it may be that it had other advantages ... but if no ... document of title were delivered to* (the plaintiff) ... (or, as in this case, the contract is declared illegal ab initio) *then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable. It was contended that unless there is found some default on the part of the recipient of such payment ... the consideration cannot be said to have wholly failed merely because the frustration of the contract produced a result which, had it been due to some default, would have amounted to a failure of consideration. I find no authority to support this contention, which seems appropriate to an action for damages, but foreign to the action for money had and received.'*

In light of the foregoing and accepting the sworn concession of the managing director of the defendant company: *'... that the purchaser made two payments of $29,500 each as deposit'*, I order that the defendant company repay to the plaintiff or his solicitors within 21 days the sum of $59,000 with costs to be taxed if not agreed.

The Change Of Position Issue

76 As Mr Howe correctly observed in the course of argument, "change of position" is what this case is really all about.

77 In **Lipkin Gorman** (above) the House of Lords recognised change of position as a defence to restitutionary claims. In the course of his speech in that case Lord Goff said this (at p. 580c–h):

> "I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration. They do not arise in the present case. Here there is no doubt that the respondents have acted in good faith throughout, and the action is not founded upon any wrongdoing of the respondents. It is not however appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence. A prominent example will, no doubt, be found in those cases where the plaintiff is seeking repayment of money paid under a mistake of fact; but I can see no reason why the defence should not also be available in principle in a case such as the present, where the plaintiff's money has been paid by a thief to an innocent donee, and the plaintiff then seeks repayment from the donee in an action for money had and received. **At present I do not want to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.** I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions."

Lord Goff went on to emphasise that the defence of change of position will avail a defendant only to the extent that his position has been changed (see **Lipkin Gorman**, above, p. 580h).

78 Earlier in his speech in **Lipkin Gorman** (at p. 578) Lord Goff said this:

> "The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."

Thus, if recovery of the overpayments is to be denied in the instant case, it must be denied not as a matter of discretion but of legal principle. What, then, are the relevant legal principles, in the context of the instant case?

79 For obvious reasons, it would not be appropriate for me to attempt to set out an exhaustive list of the legal principles applicable to the defence of change of position, but four principles in particular seem to me to be called into play in the instant case.

80 In the first place, the evidential burden is on the defendant to make good the defence of change of position. However, in applying this principle it seems to me that the court should beware of applying too strict a standard. Depending on the circumstances, it may

well be unrealistic to expect a defendant to produce conclusive evidence of change of position, given that when he changed his position he can have had no expectation that he might thereafter have to prove that he did so, and the reason why he did so, in a court of law (see the observations of Slade L.J. in **Avon County Council v. Howlett** (above) at pp. 621–2, and **Goff & Jones** (above) at p. 827). In the second place, as Lord Goff stressed in the passage from his speech in **Lipkin Gorman** quoted above, to amount to a change of position there must be something more than mere expenditure of the money sought to be recovered, "because the expenditure might in any event have been incurred ... in the ordinary course of things". In the third place, there must be a causal link between the change of position and the overpayment. In **South Tyneside Metropolitan B.C. v. Svenska International plc** [1995] 1 All E.R. 545, Clarke J., following Hobhouse J. in **Kleinwort Benson Ltd v. South Tyneside MBC** [1994] 4 All E.R. 972, held that, as a general principle, the change of position must have occurred after receipt of the overpayment, although in Goff & Jones (above) the correctness of this decision is doubted (see ibid. pp. 822–3). But whether or not a change of position may be anticipatory, it must (as I see it) have been made as a consequence of the receipt of, or (it may be) the prospect of receiving, the money sought to be recovered: in other words it must, on the evidence, be referable in some way to the payment of that money. In the fourth place, as Lord Goff also made clear in his speech in **Lipkin Gorman**, in contrast to the defence of estoppel the defence of change of position is not an "all or nothing" defence: it is available only to the extent that the change of position renders recovery unjust.
81 With those basic principles in mind, I turn to the facts of the instant case.

CONCLUSION

30. For the above reasons, I am not inclined to strike out the defence at this time.

The issues are best postponed to trial.

31. Case adjourned to **12 July 2016** for directions at **10.30 a.m.**

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Anare Tuilevuka
JUDGE
28 June 2016