

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No.HBC 112 of 2014

**BETWEEN** : **ONE HUNDRED SANDS LIMITED** a duly registered company having its registered office at Level 8, BSP Life Center, 3 Scott Street, Suva.

**PLAINTIFF**

**AND** : **TE ARAWA LIMITED** a duly registered company having its registered office at Level 10 FNPF Place, 343 Victoria Parade, Suva.

**DEFENDANT**

**BEFORE:** Master Vishwa Datt Sharma

**COUNSEL:** Mr. Davenesh Sharma - for the Plaintiff  
Mr. Willie Clark - for the Defendant

**Date of Hearing:** 02<sup>nd</sup> June, 2016

**Date of Ruling :** 14<sup>th</sup> September, 2016

**JUDGMENT**

[Application by Summons to Enter Summary Judgment pursuant to Order 14 Rule 1 of the High Court Rules, 1988 and the inherent jurisdiction of this Court]

## APPLICATION

1. The Plaintiff is seeking the following orders-
  - (i) That Summary Judgment be entered against the Defendant herein in the sum of \$1,200,000 together with Costs of this action;

UPON the Grounds that the Plaintiff was wrongfully compelled to pay \$1, 200,000 to the Defendant as an Option Fee and Deposit which payment was then deemed by the Defendant to be forfeited by virtue of an alleged breach of Sale and Purchase Agreement when in fact the said Sale and Purchase Agreement was null and void to begin with since at all material times the land that was subject to the Sale was already the subject of a subsisting prior agreement between the Defendant and Carpenters Properties Limited and also subject to a subsisting litigation between those parties.

2. This application is made pursuant to *Order 14 Rule 1 of the High Court Rules, 1988*, and the *inherent jurisdiction of this Court*.
3. The Defendant has opposed the Summary Judgment application and filed An Affidavit deposed by Elizabeth Morris on 26<sup>th</sup> June, 2014.

## THE LAW

4. The Plaintiff is making an application for **summary judgment** be entered against the Defendant herein for the sum of \$1, 200,000 pursuant to *Order 14 Rule 1 of the High Court Rules*, which provides:

### Summary judgment (O.14, r.1)

1. (1) *Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defense to a claim included in the writ, or to a particular part of such a claim, or has no defense to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.*



*(2) Subject to paragraph (3), this rule applies to every action begun by writ other than-*

*(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,*

*(b) an action which includes a claim by the plaintiff based on an allegation of fraud.*

*(3) This Order shall not apply to an action to which Order 86 applies.*

### PLAINTIFF'S CASE

5. The Plaintiff submitted-

- (a) The Defendant is the registered lessee of Native Lease 434878.
- (b) On 26<sup>th</sup> March 2010 the Defendant entered into an Agreement with Carpenters Properties Limited ["CPL"] for the sale and purchase on NL 434878. CPL paid a deposit of \$1,100,000.00.
- (c) On 27<sup>th</sup> July 2013 CPL issued a Cancellation Notice seeking to cancel the Sale and Purchase Agreement with the Defendant and asking for the refund of its deposit.
- (d) The Defendant refused to accept the Cancellation Notice and filed a High Court Civil Action No. HBC 239 of 2010, [HBC No. 239 of 2010"] seeking Specific Performance under the Sale and Purchase Agreement or as an alternative relief the forfeiture of the Deposit.
- (e) CPL had also lodged a caveat against the NL 434878 and in a separate court action Justice Amaratunga removed the Caveat on the basis that CPL had by its own Notice sought to cancel the Sale and Purchase Agreement and could now no longer claim an interest in the said land.
- (f) A Sale & Purchase Agreement ("S & P") for the same NL 434878 was entered into between the Defendant as Vendor and the Plaintiff as Purchaser on 07<sup>th</sup> October, 2011.
- (g) On 26<sup>th</sup> January 2012 the Defendant filed an Amended Summons in Civil Action No. 239 of 2010 seeking Specific Performance against CPL.  
This means that even though it had entered into a Sale and Purchase Agreement with the Plaintiff on 7<sup>th</sup> October 2011 the Defendant was still seeking Summary Judgment for an Order for Specific Performance against CPL, even after the date of the Sale and Purchase Agreement was signed with the Plaintiff.

- (h) In February 2012 the Plaintiff duly paid the Defendant's Solicitors, Howards Lawyers ["Howards"], the Deposit and the Option fee totaling FJ\$1,200,000.00 to be held in escrow in their Solicitors Trust Account. The Defendant did not inform the Plaintiff even at this stage that on 26<sup>th</sup> January 2012 it had filed an Amended Summary Judgment by way of Specific Performance against CPL in order to sell the property in NL 434878 to CPL.
- (i) Clause 3.1 (a) of the S & P stated that one of the Conditions Precedent was the Defendant had to be entirely satisfied that the Prior Agreement with CPL was at an end and that no further claims, proceedings or legal issues existed or may arise in relation to the Prior Agreement.
- (j) The term Prior Agreement of course referred to the earlier Sale and Purchase Agreement entered into between the Defendant and CPL on 26<sup>th</sup> March 2010.
- (k) On 28<sup>th</sup> March 2012 in Civil Action No. 239 of 2010 the Court adjourned matters in that case to 24<sup>th</sup> May 2012 and ordered that *status is to remain in all respects until the conclusion of the matter...?*
- (l) On 24<sup>th</sup> May 2012 the Defendant withdrew its Amended Application for Summary Judgment against CPL which it had filed on 26<sup>th</sup> January 2012 on the issue of Specific Performance.
- (m) On 16<sup>th</sup> May 2013 Howards issued a Settlement Notice whereby they claimed that the Defendant was ready, able and willing to complete settlement.
- (n) On 7<sup>th</sup> June 2013, the Plaintiff's then Solicitors Siwatibau & Sloan ("S & S") wrote to Howards and informed them that the Plaintiff was unable to settle.
- (o) On 7<sup>th</sup> June 2013 Howards wrote To S & S and informed them that Defendant would exercise its purported rights to cancel the S & P on the basis that the Plaintiff was unable to settle. Since settlement did not take place the Defendant took the position that the deposit and option fee paid by the Plaintiff was forfeited.
- (p) That the prior agreement between the Defendant and CPL was still current because the Defendant had filed with the High Court an application seeking specific performance of the prior agreement and this issue was still unresolved and pending before the High Court.
- (q) As a consequence of above at Paragraph (p), the Defendant could not claim that it had satisfied and complied with clause 3(1) (a) of the S & P. False representations and/or beliefs were made by the Defendant or held by the Defendant.
- (r) The Purported S & P between the Plaintiff and the Defendant was null and void



**DEFENDANT'S CASE****6. The Defendant submitted-**

- (a) The Plaintiff seeks summary judgment on the basis that the Sale And Purchase Agreement between the Plaintiff and the Defendant was 'null and void' because at all material times the land was subject to the sale was already the subject of a subsisting prior agreement with Carpenters Properties Limited.
- (b) There was subsisting litigation between the Defendant and Carpenters Properties Limited.
- (c) The Defendant enquires as to what the Plaintiff meant when they say the contract is null and void, whether it means void ab initio or the Plaintiff does not articulate when it alleges it became so.
- (d) The Plaintiff's application is misplaced and should be dismissed.
- (e) There are serious and meritorious matters to be determined in this case and that can only be done in a full trial.
- (f) That in fact the matters set out herein are a complete Defence to the Plaintiff's claim and will see it ultimately fail.
- (g) The Defendant has set out a very clear Defence.
- (h) The Contract between the Plaintiff and the Defendant (OHS Agreement) was at all times effective and enforceable and not unlawful.
- (i) The Defendant had strong and unchallengeable grounds on which to be satisfied that clauses 3.1 (a) (i) and (ii) had been fulfilled and satisfied in relation to its legal proceedings in HBC 239 of 2010.
- (j) The Carpenters Properties Limited Agreement was, in any event, unlawful to the extent that it could not constitute a dealing in land because the Consent of the TLTB lapsed in 2010 and was therefore inoperative at all times during the terms of the Agreement.
- (k) That the only real preposition the Plaintiff offers is that the Defendant misrepresented its understanding of the situation viz a viz the Carpenters Litigation which is denied. The OHS Agreement was valid and binding.
- (l) OHS Agreement was an option agreement in its first stage, exercisable by payment of the Deposit.

- (m) On 13<sup>th</sup> February, 2012, the Plaintiff paid the Deposit which meant the OHS Agreement was no longer an option agreement and became an agreement for the sale and purchase of land subject to the preconditions to settlement.
- (n) Under clause 10.3(b) of the Carpenters Agreement, the Defendant always had the right to sell the land to a third party if Carpenters was in default. Such default entitled the Defendant to cancel the Carpenters Agreement, and upon the Defendant entering into a conditional or unconditional contract for a sale to another party, the Carpenters Agreement would be deemed to be cancelled.

### ANALYSIS AND DETERMINATION

7. On 06<sup>th</sup> May, 2014 the Plaintiff filed a **Summons seeking for an Order for Summary Judgment** to be entered against the **Defendant** herein in the sum of **\$1,200,000** together with **Costs** of this action.
8. The Defendant opposed the application for Summary Judgment.
9. According to the **principles of summary judgment**, the Defendant is required to file an affidavit that **deals specifically with the Plaintiff's claim and state clearly the defence and facts** it relies upon to support it. If there is **no affidavit filed** at least the **Statement of Defence** must clearly set out the **Defence**.

In *Coral Surf Resort Ltd v Yam Civil Action No. 66 of 2008*, Master Tuilevuka (as he was then) stated as follows-

*'Once a claim is established, the evidential and persuasive burden shifts to the Defendant (see Thomas J in Hibiscus Shopping Town Pty Ltd v Woolworths Ltd [1993] FLR 106 at 109) who must adduce affidavit claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: Magan Lal Brothers Ltd v L.B. Masters & Company Civil Appeal No. 31/84.'*

10. The defendant resisting the summary judgment must establish that there is an **issue or question in dispute** with respect to the claim or the part of the claim which ought to be tried or there ought for some reasons to be a trial of that claim or part. If the defendant fails to do so, then the court will enter summary judgment against the defendant on that claim or part pursuant to *Ord. 14, r.3* of the *HCR. 1988*.



11. Pursuant to *Ord. 14, r. 1 (1) of the HCR, 1988, where in an action to which this applies, a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim, apply to the court for summary judgment against that defendant.*
12. *Further, pursuant to Ord. 14, r.1 (2), subject to paragraph (3), this rule applies to every action begun by Writ other than an action which includes a claim by the Plaintiff for libel, slander, malicious prosecution or false imprisonment, and an action which includes a claim by the Plaintiff based on an allegation of fraud.*  
*Sub paragraph (3) stipulates that this order shall not apply to an action to which Order 86 applies.*
13. Bearing in mind the above provisions of the law, it is therefore important that I must decide whether **summary judgment** is available to the plaintiff in this case with regards to the **nature of the claim**.
14. In this case, the writ of summons was served and the **Defendant** had filed an acknowledgement of service giving a notice of **intention to defend** the action. Hereafter, the Defendant was required to file and serve a Statement of Defence, but for one reason or the other did not file any Statement of Defence.
15. The plaintiff is **entitled** to apply for Summary Judgment against the defendant pursuant to *Ord.14 of the High Court Rules, 1988*.
16. Further, the filing of a Statement of Defence before an application for Summary Judgment does not preclude an application being made, nor does it prevent Summary Judgment being granted if the court is of the view that there is no Defence to the Plaintiff's claim.
17. The Fiji Court Appeal in *Carpenters Fiji Ltd v Joes Farm Produce Ltd [2006] FJCA 60; ABU 0019U of 2006S (10 November 2006)*, Case dealing with summary judgment application, laid down the well-established principles in relation to the entry of **summary judgment** under paragraph 21 as follows:



- (a) *"The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.*
- (b) *The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
- (c) *It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it*
- (d) *Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v Green (1958) 2 QB 9 at page 29 per Sellers LJ.*
- (e) *Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. Morgan and Son Ltd - v - Martin Johnson Co (1949) I K 107(CA).*

*See 1991 The Supreme Practice Vol 1 especially at pages 146, 147,152 and 322."*

18. Reference is also made to the *Halsbury's Law of England (4<sup>th</sup> Ed) Volume 37 para 413-415, which states as follows-*

*413: Defendant showing cause:*

*Where the Plaintiffs application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant, and it is for him to satisfy the court and there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just having regard to the nature of the remedy or relief claims.*

*The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must "condescend upon particular", and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence. The defendant must serve his affidavit on the plaintiff or his solicitor at least three days before the return day. The affidavit may contain matters of hearsay provided the sources of information and grounds of belief are disclosed. The*



court has power to order a defendant showing cause or an officer of a body corporate to produce any document, and to attend and be examined on oath if there are special circumstances making it desirable to do so. By necessary implication, the obligation on the defendant to show cause allows the plaintiff to answer the defendant's case.

414: Unconditional leave to defend:

The power to give summary judgment under Order 14 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes to delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there are reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence.

However, the defendant does not have to show a complete defence, but only a fair probability of a defence, or that there is a real substantial issue or question to be tried, or that there is a dispute as to facts or law which raises a reasonable doubt whether the plaintiff is entitled to judgment. The procedure under order 14 was not intended to shut out a defendant who could show that there was an issue or question that ought to be tried or that for some other reason there ought to be a trial.

Leave to defend will be given where the amount recoverable to be clearly subject to a reasonable inquiry or to an account being taken.

415: Conditional leave to defend:

The court may give a defendant against whom an application for summary judgment is made under Order 14 leave to defend the action with respect to the claim, or the part of the claim, to which the application relates either unconditionally or conditionally, that is, on such terms as to giving security or time or mode of trial or otherwise as the court thinks fit. Conditional leave to defend will be granted where the court forms the view, on the material before it, that the defence set up is a sham defence or it is shadowy, or that there is little or no substance in it or that there is something suspicious in the defendant's mode of presenting his case or the master is very nearly prepared to give judgment for the plaintiff. However, if there is no sign of bad faith nor anything to show that the defence is a sham nor any suspicious circumstances as to the mode of presenting the case, leave to defend should not be conditional, nor should it be conditional where the practical result would be likely to deprive the defendant unjustly to his defence. The usual form of conditional leave to defend requires the payment of the whole or part of the claim into court.

19. Reference is also made to the case of *Metal works & Joinery Limited v Fiji Islands Revenue & Customs Authority*, Justice Pathik applying the Court of Appeal decision delivered by Greig J in *Australia Guarantee Corporation (NZ)*



*Ltd-v- Mc Beth [1992] 3 NZLR 54 at 58* held in determining the issue before him on the facts and circumstances of this case:-

*'The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made see Pemberton v Chappell [1987] 1 NZLR 1 at 2. The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it: Harry Smith Car Sales Ltd v Clay com Vegetable Supply Co Pty Ltd [1978] 29 ACTR 21. There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see Bilby Dimock Corporation Ltd v Patel [1987] 1 PRNZ 84 and Cegami Investment Ltd v AMP Financial Corporation [NZ] [1990] 2 NZLR 308 at p. 313. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong.'*

20. Although the Defendant has not filed any Statement of Defence to the Plaintiff's substantive Writ Action, but the Defendant has filed and served an Answering Affidavit in response to the Affidavit in support of the Plaintiff's Summons seeking for Summary Judgment deposited by Elizabeth Morris.
21. Although the Defendant has not filed any Statement of Defence to the Plaintiff's substantive Writ Action, but the Defendant has filed and served an Answering Affidavit in response to the Affidavit in support of the Plaintiff's Summons seeking for Summary Judgment deposited by Elizabeth Morris.
22. In a summary judgment application the affidavit in support should observe all requirements which have to be fulfilled so that the court can assess whether there are any defences or not. That the plaintiff failed to do and it was only when the defendant responded then it was discovered that there was not a full disclosure of facts.
23. This compliance with the requirements in an affidavit is very important in an application for summary judgment for failure to do so deprives a defendant of "the opportunity to defend the plaintiffs claim and in particular the opportunity of hearing and cross-examining the plaintiffs witnesses". Lord JUSTICE Roch in Barclays Bank plc -v- Piper [the Times 31 May 1995].



24. In an application for Summary Judgment, the Court has to be satisfied that all relevant issues can be addressed and disposed in a summary way.
25. I have perused the Defendants Answering Affidavit deposed and filed by Elizabeth Morris on 26<sup>th</sup> June, 2014 as well as the Plaintiff's Affidavit deposed and filed by Timothy Manning on 06<sup>th</sup> May, 2014. Both affidavits at least addresses the Court on the following relevant issues:

*According to the Plaintiff, 'the legal issue is very clear, could the Defendant claim as it did on the 07<sup>th</sup> May, 2012 that the precedent condition set out in Clause 3.1 (a) of the Sale & Purchase Agreement had been satisfied. If it couldn't then the contract could not have been unconditional. The facts before the Court clearly establish that Clause 3.1 (a) had not been satisfied as at 07<sup>th</sup> May, 2012 and therefore the claim by Messrs Howards that the Clause had been satisfied was quite simply, untrue.'*

*The Plaintiff states further, 'that the Defendant relied on the letter written by Howards on 07<sup>th</sup> May, 2012 to claim that the Sale & Purchase Agreement between the Plaintiff and the Defendant had become unconditional. They claimed that the conditions set out in Clause 3.1 (a) of the Sale & Purchase Agreement has been satisfied. They used this letter to claim that the Defendant was ready to settle and ultimately the Defendant sought to forfeit the Plaintiff's deposit on the grounds that the Plaintiff had failed to settle. The correct position was that the letter of 07<sup>th</sup> May, 2012 was a misrepresentation.'*

*According to the Defendant, 'That the matters set out in Clause 3.1 (a) were matters of opinion for the Defendant alone to satisfy itself about is emphasized by the fact it did not include a requirement for any form of notice to be given to the Plaintiff. The conditions are simply stated as matters about which the Defendant is 'entirely satisfied with.' Once satisfied, the Defendant could notify the Plaintiff in two ways: by issuing a notice or appointment to settle (which it did several times), implicit in which is a notification that it had satisfied itself of the matters in these conditions; or it could send a formal letter giving notice that it was satisfied (which it also did through his Solicitors).'*

*The Defendant states further 'that the Plaintiff's argument is the allegation that the Defendant has misrepresented the true state of affairs in relation to the matters set out in Clause 3.1 (a). The fatal weakness in this is that Clause 3.1 (a) matters are matters relating to the Defendant's opinion or belief, they are not matters of fact.'*



26. It can be seen from some of the matters derived from both Affidavits hereinabove, in terms of the Summary Judgment application, that the **facts are seriously disputed**. Not only that, the interpretation of **Clause 3.1 (a)** of the Sale & Purchase Agreement is a **Question of Law** in itself.
27. I find as a fact that there are **triable issues** and **Questions on Law** which should be tried within a Hearing or a trial accordingly. In fact the evidence needs to be substantiated to the Court and tested accordingly.
28. In the light of my observations hereinabove, I wish to make reference to the following case authorities which are rather pertinent and useful to bear in mind-
- Express Newspapers Plc v News (UK) Ltd and Others [1990] 3 All E.R. 376 at 379 Browne-Wilkinson V-C* said:
- "Summary judgment under Order 14 is a judgment given in the clearest cases before an ordinary trial has taken place. Summary judgment is only given where it is clear that there is no arguable defence to the claim. If there is an arguable issue to be tried, in particular where there are matters of fact to be resolved which can only be resolved at trial, the court gives leave to defend and the case goes to trial to be heard out. Summary judgment is a means of short-circuiting that system in the clear case where it is shown that, even if it went to trial, the defence could not succeed".*
29. In summary judgment procedure, as was held in *Maclean v Stewart unreported, 20 August 1997, CA 288/96*, the Court of Appeal confirmed an important principle of the summary judgment procedure, that the onus remains on the plaintiff throughout to establish that the defendant has no defence.
30. The Plaintiff in the current case before me, in my observations has not satisfied this Court that the **Defendant** does not have a **Defence** or rather the **Defence** is a **sham Defence**.
31. Therefore, the Plaintiff's **Summary Judgment** application has to be accordingly **dismissed**. In my view, to do otherwise, the Court will be involve itself in deciding the merits of the pending claim rather than confining itself to the pertinent issue **whether there is an arguable defence**.
32. This Court has found that there are **triable issues** coupled with **Questions on Law** in this case. It is noteworthy in the circumstances to make reference to the



judgment of Greer L.J in Powszechny Bank Zwiakony W Polsch v Paros (1932) 2 K.B. 353. At p.359 Greer L.J. said -

*"It has long been the rule that in proceedings under Order XIV, what the Court, whether this Court or the King's Bench Division, has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in the plaintiff's favour, it must order a trial."*

*"All the defendant need say is that he requires the plaintiff to prove his case, and the law puts upon the plaintiff the onus of proving it. When the defendant says he does not admit the claim he need not carry the case any further than to say: 'There is a triable issue and I want to have it tried'.*

### IN CONCLUSION

1. For the aforesaid rational, I make the following orders:
  - (i) The Plaintiff's Summary Judgment application is hereby Dismissed.
  - (ii) The costs to be reserved until the final hearing and determination of the substantive action.
  - (iii) Matter to take its normal cause.

Dated at Suva this 14<sup>th</sup> Day of September, 2016



VISHWA DATT SHARMA  
Master of High Court, Suva

cc: R. Patel Lawyers, Suva.  
Howards Lawyers, Suva.