THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 112 of 2014

BETWEEN : ONE HUNDRED SANDS LIMITED

PLAINTIFF

AND : TE ARAWA LIMITED

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. K. Singh for the Plaintiff
Ms L. Prasad for the Defendant.

Dates of Hearing : 27 February and 1 March 2018
Date of Judgment : 3 May 2018

JUDGMENT

1. This is the Plaintiff's Summons for determination of the following preliminary issues::

(1) Whether the condition precedent that the Sale and Purchase Agreement (SPA) dated 7 October 2011 between the Plaintiff and the Defendant regarding the sale and purchase of Native Lease No.434878 (the property) had been satisfied. The condition precedent was that the Vendor was entirely satisfied that:

(i) The prior agreement is at an end.

(ii) No further claims, proceeding or legal issues exist or may arise in relation to the prior agreement.

(2) The Defence and Counter-Claim filed by the Defendant be struck off as being frivolous and vexatious and an abuse of the (process of) the Court.

(3) The prior agreement is that between the Defendant (as Vendor) and Carpenters Properties Limited (as purchaser) for the sale and purchase of the property.

(4) The Application is made pursuant to Order 33 rule 3 and Order 18 rule 18 (b-d) of the High Court Rules (HCR).

2. It is supported by the affidavit of Brandan Worthington (Worthington) who deposes he is a director of the Plaintiff, which has filed a writ of summons seeking certain relief.

(1) He says the Defendant entered into an agreement with Carpenters Properties Limited (CPL) for the sale and purchase of the property NL 434878 and CPL paid a deposit of $1,100,000 (prior agreement).

(2) On 27 July 2010 CPL issued a cancellation notice seeking to cancel the prior agreement and a refund of the deposit. The Defendant refused to accept the cancellation notice and filed a High Court Suva Civil Action seeking, inter alia, specific performance of the prior agreement.

(3) The SPA for the property was entered into between the Defendant as Vendor and the Plaintiff as Purchaser. In this agreement the Defendant did not disclose that the Defendant was seeking specific performance for the sale of the property to CPL.

(4) In February 2012, the Plaintiff paid the Defendant's solicitors, Howards Lawyers, the Deposit and Option Fee totaling $1,200,000 is to be held in their solicitors trust account. The Defendant did not advise the Plaintiff that the condition precedent had not been satisfied or would be satisfied in view of its claim for specific performance of the prior agreement.

3. The affidavit in opposition was affirmed by William Wylie Clarke (Clarke) who deposed he is the principal of Howards Lawyers and acted as the solicitor for the Defendant (as vendor) for the sale and purchase or the property.

(1) He says that Worthington is not in a position to depose the Plaintiff's affidavit as he was not a director of the Plaintiff at the material time.

(2) Further, when the parties entered into the SPA agreement, a condition was inserted relating to the prior agreement with CPL and the proceedings in HBC 239 of 2010 were still on foot between the Defendant and CPL. Clause 3.1(a) was included because the Defendant wanted to be sure it would have no problem selling the property to the Plaintiff.

(3) Accordingly it only required the Vendor (Defendant) to be fully satisfied that the prior agreement was at an end and that there were no further proceedings etc between the Defendant and CPL. The Plaintiff could not settle under the SPA when required to do so and its solicitor admitted on 7 June 2013 that it had no funds to pay in settlement. That is why the SPA was cancelled by the Defendant on 7 June 2013.

(4) On 13 August 2015 Kumar J made a consent order in terms of the Terms of Settlement attached thereto.

4. The Plaintiff in its Statement of Claim says :

(1) A Sale and purchase agreement was entered into between the Defendant as Vendor and the Plaintiff as Purchaser on 7 October 2011.

(2) Sometime after 8 February 2012 the Plaintiff paid the Defendant's solicitors, (Howards) the Deposit and Option Fee totaling $1,200,000 to be held in their Solicitors Trust Account.

(3) Clause 3.1(a) of the SPA stated that a condition precedent was that the Defendant had to be entirely satisfied that a prior agreement was at an end with no further claims etc

(4) The prior agreement was entered into between the Defendant and CPL.

(5) On 7 May 2012 Howards wrote and confirmed that clause 3.1(a) of the SPA had been dealt with to the satisfaction of the Defendant.

(6) On 16 May 2013, Howards issued a settlement notice whereby they claimed the Defendant was ready, able and willing to complete settlement.

(7) On 7 June 2013, Howards wrote to the Plaintiff's then solicitors that the Defendant would exercise its rights to cancel the SPA and to forfeit the deposit and option fee.

(8) On 3 January 2014, Kumar J in Suva High Court Civil Action No. HBC 239 of 2010 held the prior agreement was still in place and the Defendant's application for specific performance was still before the court.

(9) By reason of the above, the SPA between the Plaintiff and the Defendant was null and void and the forfeiture of the Deposit and Option Fee was also null and void and their retention by the Defendant is tantamount to unjust enrichment.

(10) Wherefore the Plaintiff claims:

(i) The sum of $1,200,000

(ii) Interest thereon from February 2012 to the date of judgment

(iii) An order that the Defendant and Howards provide an account of the whereabouts of the monies paid by the Plaintiff into Howard's Solicitors Trust Account.

5. The Defendant in its Defence states as follows:

(1) The Defendant was ready, willing and able to complete settlement.

(2) The Defendant was lawfully entitled to cancel the SPA on the basis that the Plaintiff was unable to settle and retain the option fee and deposit.

(3) The Carpenters' agreement did not constitute a binding and valid agreement as no Native Land Trust Board consent was in force.

(4) Kumar J's decision was an interlocutory judgment and not a final determination that the Carpenters' agreement was a binding and valid agreement.

(5) It was a term and condition of the SPA that the Deposit and Option Fee was to be forfeited to the Defendant if the Plaintiff defaulted in the performance of its obligations.

6. The Defendant in its Counter-Claim states as follows:

(1) The Defendant was ready, willing and able to complete the sale of the land to the Plaintiff but the Plaintiff was unable to settle whereupon the SPA was cancelled and all monies paid by the Plaintiff were retained by the Defendant as it was entitled to.

(2) Wherefore the Defendant prays for:

(i) A Declaration that the Defendant is entitled to retain the option fee and deposit totaling $1,200,00 for its own use and benefit.

(ii) An order that the sum of $1,200,000 be paid to the Defendant.

(iii) Interest accruing on the said sum.

7. The Plaintiff in its Reply to the Defence responds as follows:

(1) The Defendant was not in a position to effect settlement at any of the settlement dates because there was a charge registered against the title on all of these dates and the case between the Defendant and CPL was still ongoing.

(2) At no stage have the findings made by Kumar J been overruled or set aside.

(3) The Defendant is not entitled to retain the deposit.

8. The Plaintiff in its Defence to Counter-Claim states it was unable to settle but the Defendant could not settle either and therefore cannot forfeit the deposit.

9. The undated Pre-Trial Conference Minutes record inter-alia, the following :

A. Agreed Facts

(1) On 7 October 2011, a Sale and Purchase Agreement (SPA) was entered into between the Defendant as Vendor and the Plaintiff as Purchaser, wherein the Deposit was $1,000,000 and the Option Fee was $200,000

(2) Sometime after 8 February 2012, the Plaintiff paid the Defendant's Solicitors, Howards, the Deposit and the Option Fee totaling $1,200,000 to be held in their Solicitors Trust Account.

(3) Clause 3.1(a) of the SPA had a condition precedent that the Defendant had to be entirely satisfied that a Prior Agreement was at an end and that no further claims etc existed or may arise in relation thereto.

(4) The Prior Agreement referred to an earlier Sale and Purchase Agreement entered into between the Defendant and CPL on 26 March 2010.

(5) On 7 May 2012, the Defendant's solicitors confirmed that clause 3.1(a) of the SPA had been dealt with to the satisfaction of the Defendant.

10. The hearing commenced with Mr Singh submitting that the preliminary issue will decide the fate of the action. The issue is confined to clause 3 that the condition precedent was not complied with. The 1st (prior) agreement has to end before the 2nd agreement is valid. He said the condition precedent was not satisfied so there was no binding agreement. As the Defendant has sold the subject land (the property) to CPL, it cannot sell it to the Plaintiff, therefore it should refund the monies to the Plaintiff.

11. Ms Prasad said she had a preliminary objection that Worthington is not a proper person to depose for the Plaintiff. She said 0.41 r.5(1) HCR precludes his affidavit as he was not a director at the material time. She also said Clarke is not the attorney of the Defendant and Annexure WWC1 is not the resolution of its Board of Directors. She submitted that the prior agreement had come to an end and clause 3.1(a) had been satisfied.

12. Ms Prasad also said $1.2m had been paid by the Plaintiff to the Defendant and the Defendant is not obliged to refund that to the Plaintiff. The Deposit was forfeited on 7 June 2013 as the Defendant was entitled to, because it had satisfied clause 3.1(a) of the SPA and so the SPA was valid and binding.

13. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my judgment.

14. At the outset I shall deal with the issue of the affidavits. Ms Prasad's advocacy was so persuasive that she left me in no doubt that I should not admit as evidence the affidavit of Clarke. By submitting that Worthington's affidavit should not be admitted as he was not a director at the material time it followed that Clarke's affidavit should also not be admitted as he was not a director at the material time.

15. Ms Prasad further confirmed that Clarke is not the attorney of the Defendant and the Authorization given by the Defendant is not a resolution of its Board of Directors. .

16. I refer now to the Ruling made on 4 October 2004 by Jitoko J. in Suva High Court Civil Action No. HBC 0011 R.2004S between No Jae Chul AND Doo Won Industrial (Fiji) Ltd and Ors. His lordship said in para 2 "Any action taken on behalf of the Company including this present application, can only be done by a director under the seal of the Company". In that case, the Applicant was one, Jin Chae, who purported to act for the first Defendant by virtue of a power of attorney given by a director of the first Defendant when the Applicant himself is not a director. The Defendant's application to set aside was dismissed.

17. On the authority of No Jae Chul, I accept the affidavit of Worthington who is presently a director of the Plaintiff and reject the affidavit of Clarke who is not and has never been at any time a director of the Defendant.

18. I shall now consider the evidence to determine the preliminary issue. I therefore turn to the SPA.

"Clause 2.4 **Exercise of Option:** the Option will be exercised by the Purchaser delivering to the Stakeholder a bank cheque for the Deposit no later than 4.30pm on the last Business Day of the Option Period. On payment of the Deposit, the Vendor and Purchaser will become immediately bound as vendor and purchaser respectively for the sale and purchase of the Property on the terms in this agreement. If the Purchaser falls to deliver to the Stakeholder the Deposit on or before 4.30pm on the last Business Day of the Option Period this agreement will terminate as provided in clause 2.5".

Clause 3.1 **Conditions:** This agreement is subject to and conditional upon:

(a) The Vendor being entirely satisfied that:
   (i) The Prior Agreement is at an end; and
   (ii) No further claims, proceedings or legal issues exist or may arise in relation to the Prior Agreement.

And the caveat lodged against the Property by Carpenters Properties Limited being removed;

"Clause 3.3 **Date of Satisfaction: The Conditions are to be satisfied by:**

(a) As to the Condition in clause 3.1(a) the date 45 Business Days after the date of exercise of the Option; and

(b) .....

"Clause 3.7 **Refund or Forfeiture of Option Fee and Deposit:**

(a) Subject to clause 3.7(b), if this agreement is cancelled due to any of the Conditions not being satisfied, the Stakeholder will promptly refund to the Purchaser the Option Fee and the Deposit less the Vendor's reasonable legal costs incurred in relation to this agreement (provided that such costs will not be more than NZ$15,000).

(b) .....

(c) For the avoidance of doubt, any repayment of the Option Fee and Deposit will exclude any interest earned on those amounts".

19. The starting point being the SPA the following chronology will illustrate the way to the determination.

(1) The SPA is dated 7 October 2011.

(2) The option period of 4 calendar months commences on the above date and would end on 28 February 2012.

(3) The option was exercised sometime after 8 February 2012, within the option period.

(4) The condition precedent viz the Defendant being entirely satisfied that the prior agreement is at an end and there are also no further claims etc and the caveat lodged by CPL being removed, had to be satisfied by the Defendant 45 business days after the exercise of the option by the payment of the Deposit which would be a date circa 11 April 2012. (Clause 1.1 defines a business day as a day other than Saturday, Sunday and public holiday).

(5) The Defendant's solicitors on 7 May 2012 wrote and confirmed clause 3.1(a) had been dealt with to the satisfaction of the Defendant. This in plan English meant that the Defendant was satisfied that the conditions in clause 3.1(a) had been satisfied. However, even if true, this was a date well after the date stipulated in clause 3.3(a). Thus the Defendant had failed to comply with the condition precedent.

20. In my opinion Howards were obligated to promptly refund the deposit and fee without delay circa 11 April 2012 but has still not done so.

21. Further, I am of opinion that condition 3.1. was entirely satisfied ONLY on 4 August 2015 (the date of the terms of settlement between the Defendant and CPL) or on 13 August 2015 the date of the consent order of Kumar J. Both these dates are a considerable period (more than 3 years) after the date stipulated by clause 3.3(a) for the satisfaction of the condition precedent.

22. The above terms of settlement include, inter-alia, the following:

1.2(a) Te Arawa Limited discontinues the Main Proceeding and CPL discontinuous the Counter Claim.

1.2 of : CPL discontinues the Caveat Action and Caveat Appeal.

23. The terms of settlement were then incorporated into the consent order.

24. Thus it is as plain as a pikestaff that the Defendant could not be entirely satisfied that clause 3.1 (a)(ii) (no further claims, proceedings or issues relating to the Prior Agreement) had been complied with circa 11 April 2012. In truth, it had not.

25. Consequently on the above grounds the SPA would be cancelled and under clause 3.7(a) "the Stakeholder will promptly refund to the Purchaser the Option Fee and the Deposit less the Vendor's reasonable costs incurred....." This repayment will exclude any interest earned on those amounts (see clause 3.7(c). Thus the Plaintiff cannot claim interest on the $1,200,000 nor that the Defendant and Howards provide an account regarding the monies paid.

26. At the end of the day I have reached my decision based on the agreement, the consent order and the evidence before this Court. In doing so I note that no evidence was provided by the Defendant of its (Vendor's) reasonable legal costs so none will be deducted from the sums to be refunded to the Plaintiff. My judgment is given under the provisions of Order 33 rule 7 HCR.

27. In the result the Defendant is not entitled to succeed on its Counter Claim and its prayers for a Declaration that it retain the Option Fee and the Deposit and that the sum of $1,2000,000 be paid to it are dismissed with costs. The Plaintiff has succeeded in its claim, so I will therefore enter judgment for it.

28. I hereby make the following orders:

(1) The Stakeholder, Howards Lawyers, are to promptly pay the Plaintiff the sum of $1,200,000

(2) The Defendant is pay the Plaintiff the costs of this action summarily assessed at $5,000.

(3) The Defendant's Counter-Claim against the Plaintiff is hereby dismissed with costs summarily assessed at $1,000 to be paid by the Defendant to the Plaintiff.

Delivered at Suva this 3rd day of May 2018.

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David Alfred

Judge of the

High Court of Fiji