

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 275 of 2022

BETWEEN **BUILDING MARKETING LIMITED** a limited liability company having its registered office at Lot 2, Nasinu Road, Valelevu in the Republic of the Fiji Islands.

PLAINTIFF

AND **HARCOURT REALESTATE AGENT LIMITED** a limited liability company having its registered office at 87 Gordon Street, Suva in the Republic of Fiji islands.

DEFENDANT

BEFORE **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Khan A. o/i of Sushil Sharma Lawyers for the Plaintiff**

Ms. Singh K. for the Defendant

DATE OF DECISION: 8th November, 2023

DECISION

[Deposit held in Trust Account to be released to the Plaintiff]

Introduction

(1) The Defendant filed the Originating Summons together with an affidavit of Support pursuant to Order 28 of the High Court Rules, 1988 and sought for the following orders:

[1] That the deposit sum of \$6,000 (Six Thousand) held in the trust account of the defendant [Harcourt] which was paid by the plaintiff to be transferred to Messrs.: Sushil Sharma Lawyers Trust Account.

[2] That the defendant be ordered to pay cost of this application on Solicitor client indemnity basis.

[3] That the court makes any other or further order that it deem just and necessary.

(2) The Defendant filed its Affidavit in opposition on 02nd June 2023.

(3) The Plaintiff furnished Court with the written submissions whilst the Defendant made oral submissions.

Plaintiff's Contention

(4) From affidavit of Ajesh that he is the Company Director of **Buildex Marketing Limited**.

(5) That the company entered into a sales and purchase agreement Joseph Rakeshwar Bhikam Singh whereby, the company agreed to purchase a property amounting to \$145,000.00.

(6) That the defendant at all material times is a property dealer and on the advice of the defendant. The company pays this sum of \$5,000 on the 21st day of January, 2016 deposit to the Defendants trust account. Also, the company deposited \$1000 dollars on the 11th February 2016 to the defendants trust account.

(7) That the subject properties have been sold and transferred to a third party and the company now requires the refund of the holding \$6,000 dollars withheld in the defendant's trust account.

- (8) That the previous solicitor's Patrick Kumar Lawyers for the release of the funds to his trust account. However, the defendant advised the lawyers to make an application in court for the release of the Trust Fund.

Defendant's Contention

- (9) That Savinesh Chandra Mudiliar of Bluewater Real Estate (Fiji) Pte Ltd trading under the name and style of Harcourts.
- (10) The Company Search annexed and marked as Annexure A in the Affidavit shows that the deponent of the Affidavit is a Company Secretary and not a Company Director.
- (11) That the Plaintiff Company entered into two Sale and Purchase Agreements dated 22 January 2016 and 11 February 2016.
- (i) The Plaintiff Company entered into Sale and Purchase Agreements with Mr. Joseph Rakeshwar Bhikam Singh whereby, the Plaintiff agreed to purchase a property situated at Lot 9 Maleya Road, Koronivia for \$155,000.00
 - (ii) The total sum for purchase of the property was in the sum of \$155,000 (One Hundred Fifty Five Thousand Dollars) and not \$145,000 (One Hundred Forty Five Thousand Dollars).
- (12) In response to Paragraphs 5 and 6 of the Affidavit, I say as follows:
- (i) The reason for filing the present application is absurd;
 - (ii) The Plaintiff reneged on the Sale and Purchase stage when CGT ought to have been lodged and stamped with FRCS.
 - (iii) The subject property was subsequently sold to a new buyer^a.
 - (iv) Pursuant to Clause 15(b) of the Sale and Purchase Agreements, all monies paid thus far under the terms of sale shall inter alia be forfeited to the Vendor;

- (v) At all material times, the Plaintiff ought to have been aware that the Vendor has made claims to the deposit sum of \$6,000 (Six Thousand Dollars) being for costs associated with the rescission of the Agreements;
- (vi) At no time, has the Vendors agreed for this claimed sum to be released to the Plaintiff.
- (vii) No such agreement have been reached between the Plaintiff and the Vendors to this end.

(13) That this application is inappropriate, misconceived and wrong in law.

Determination

- (14) The Plaintiff Company entered into two (2) Sales and Purchase Agreement on 22/01/2016 and 11/02/2016 with Mr. Joseph Rakeshwar Bhikam Singh whereby the Plaintiff agreed to purchase a property situated at Lot 9 Maleya Road, Koronivia for a purchase sum of \$155,000 and not \$145,000.
- (15) The Plaintiff paid a sum of \$5,000 on 21/02/2016 deposit to the Defendant Trust Account. Also paid a sum of \$1,000 to the Defendant on 11/02/2016.
- (16) The Defendant does not deny holding the total deposit sum of \$6,000 in his trust Account.
- (17) The Defendant's Contention is that the Plaintiff has brought the within action against a wrong entity, such entity as Harcourts Real Estate Agent Limited. The correct entity name of the Defendant should be Bluewater Real Estate (Fiji) Pte Ltd and there are no claims made by the Plaintiff against Bluewater Real Estate (Fiji) Pte Ltd.
- (18) Further, the subject property has now been sold to a third party pursuant to clause 15(b) of the Sale and Purchase Agreements - *'all monies paid thus for under the terms of sale shall inter-alia be forfeited to the Vendor'* after the plaintiff reneged on the Sale and Purchase Stage when CGT ought to have been lodged and stamped with FRCS.
- (19) I have carefully perused the two (2) Sales and Purchase Agreements dated 22/01/2016 and 11/02/2016 respectively. The parties entering and executing both agreements are Joseph

Rakeshwar Bhikam Singh and **Buildex** Marketing Limited and NOT **Building** Marketing Limited. The Sales and Purchase Agreement is not signed before a Solicitor and/or witness. The space remains blank. Therefore, both Sales and Purchase Agreements are ab-initio in evidence and Null and Void accordingly.

- (20) Further, Building Marketing Limited does not have the locus to file this proceedings against the Defendant and claim for the sum of \$6,000 refund since the Receipts Exhibited and annexed to the Plaintiff's affidavit in Support establishes that both payments of \$5,000 and \$1,000 respectively were paid by **Buildex** Marketing Ltd and not the Plaintiff **Building** Marketing Ltd. I also note for the company search that Ajesh Kumar Sharma has deposed the affidavit as the Company Director whereas search confirms he is the company's secretary.
- (21) For the aforesaid, rational, it is only appropriate that I proceed to dismiss the Plaintiff's Originating Summons.

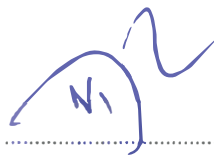
Costs

- (22) Although the Originating Summons proceeded to full hearing, it is only fair that each party to the proceedings bear their own costs accordingly.

Orders

- (i) Plaintiffs Originating Summons is dismissed in its entirety.
- (ii) Each party to the proceedings to bear their own costs.

Dated at Suva this 08th day of November, 2023.



Vishwa Datt Sharma
JUDGE



CC: Sushil Sharma Lawyers, Labasa

Neel Shivam, Barristers and Solicitors, Suva