

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL APPEAL NO. HBC 8 OF 2013

BETWEEN: HIROKAZA TAKAYANAGI also known as **TAKAYANAGI HIROKAZU**
formerly of Martintar Nadi presently Ichihara-Shi, Chiba, Japan Business.

PLAINTIFF

AND : SSS INTERNATIONAL HOTEL (FIJI) LIMITED a limited liability
Company having its registered office at 70 Cuming Street, 3rd Floor, 2nd
Suite, Brijlal Building, Suva.

DEFENDANT

Appearances : Mr Singh R. for **Plaintiff**
Mr Vuataki for the **Defendant**

Date of Hearing : 21st May 2014

Ruling

Introduction

1. By summons dated 5th November 2013 the defendant seeks inter-alia the following orders;
 - (c) That the defendant be given leave to adduce further evidence by having the affidavits of Ravikash Nand deposed 26th August 2013, You Cheng Cao deposed 26th August 2013, Joytika Devi deposed 26th August 2013, Jone Bula Namakadre deposed 26th August 2013, Young Yu deposed 30th October 2013 and You Cheng Cao deposed 30th October 2013.
2. The said summons is supported by the affidavits of You Chang Cao and Yang Yu both sworn on 30th October 2013.

Background

3. The claim by the Plaintiff is based on a sale and purchase agreement for the purchase by the defendant of the plaintiffs land for a sum of \$480,000.00. the land has already been transferred to the defendant on 17th September 2007 without the full consideration sum being paid to the plaintiff.
4. in his statement of claim the plaintiff claims a balance of \$260,000.00 from the purchase price and a sum of JPY 196,727,000 as Air fares, Travel Insurance and cost of moving to Fiji.
5. In the statement of defence filed by the defendant it is stated that the balance due to be paid to the plaintiff is \$178748.10 and also that it did not agree to pay the plaintiffs air fares, insurance, plaintiffs cost of moving to Fiji.
6. While this matter was pending at the Masters Court defendant made an application to amend the statement of defence incorporating a payment of \$160,000 made by the defendant in four instalments of \$40,000 on 12th February 2013 and 12th March 2013 which was allowed.
7. On 21st October 2013 Honourable Master ordered that Summary Judgement be entered against the defendant in the sum of \$178748.00 together with costs in the sum of \$1150.00 and the defendant to pay interest at the rate of 6% from 12th December till the date of payment.
8. The defendant in its summons seeks to adduce further evidence to be used on appeal from the said Masters Orders of summary judgement for part of claim by plaintiff against the defendant.
9. When this matter was taken up for hearing on 21st May 2014 both counsel made oral submissions and tendered written submissions with the leave of the court.

Law

10. The conditions that have to be satisfied to lead fresh evidence were set out in **Ladd V Marshall [1954] 3 All ER 745** by Lord Denning as follows;

"In order to justify the reception of fresh evidence or new trial, three conditions must be fulfilled:

First, it must be shown that the evidence could have been obtained with reasonable diligence for use at the trial.

Second, the evidence must be such that, if given it would probably have an important influence on the result of the case, although it need not be decisive.

Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible"

11. It was argued by the learned counsel for the defendant that **Ladd V Marshall** conditions do not apply to this matter as the Honourable Master's decision on the four cheques is an ex-parte decision and what the Honourable Master wanted to know on the said payment by cheques should be clarified in adducing evidence. He went on to state that the test now on calling fresh evidence is wider than **Ladd V Marshall's** test and cited judgement **Western Marine Limited V Levakarua [2013] FJCA 52 ABU 90.2010 (30th May 2013)** in support of his argument. Accordingly, he submitted that fresh evidence should be allowed considering the overall interests of justice.

12. I do not agree with the submission of the learned counsel for the defendant that the Honourable Master's findings are ex-parte findings. In the matter before the Honourable Master, HBC 08 of 2013 both parties have been represented by counsel and they have adduced evidence by submitting affidavits. Therefore Honourable Master has pronounced his judgement after considering the evidence of both parties which were before him and it becomes Judgement pronounced after an inter-parte hearing. I am of the view that the Honourable Master has questioned the payments of the defendant by four cheques due to the inadequacy of the evidence placed before him.

13. At this point, I draw my attention to paragraph 14 of **Western Marine Ltd V Levakarua** which states as follows:

*"[14] The cases that have applied the rules in Ladd V Marshall have been cases where the trials have been concluded inter parte and where there has been no complaint made regarding the presence of the parties at the hearing
....."*

14. It is clear from the said paragraph of the above mentioned Judgement that **Ladd V Marshall** rules will not apply to cases where the judgement are pronounced after ex-parte hearings. As such the said rules are applicable to this matter where the Honourable Master has delivered the judgement after an inter-parte hearing.

Therefore, I will now consider whether the defendant has satisfied the three conditions laid down in **Ladd V Marshall** to make this application to adduce fresh evidence.

15. First condition that the defendant should satisfy is to show that the evidence could not have been obtained with reasonable diligence for use at the trial.
16. By the summons dated 5th November 2013 the defendant seeks leave to adduce further evidence by having affidavits of Ravikesh Nand deposed 26th August 2013, You Cheng Cao deposed in 26th August 2013, Joytika Devi deposed 26th August 2013, Yang Yu deposed 30th October 2013 and You Cheng Cao deposed 30th October 2013.
17. The affidavits of Ravikash Nand, You Cheng Cao, Joytika Devi and Jone Bala Namakadre all sworn on 26th August 2013 were available at the time the defendant filed its reply to the Summary Application made by the plaintiff. As such said evidence could have been adduced before the Honourable Master which the defendant has failed to do.
18. Therefore, I am of the view that the defendant has failed to prove that the evidence could not have been obtained with reasonable diligence for use at the trial.
19. Furthermore, the learned Master has dealt with the evidence contained in the said affidavits and arrived at the findings in his judgement.
20. In considering the other two affidavits mentioned in the summons, You Chang Cao deposed 30th October 2013 contains explanations why the cash cheques were given to him as plaintiffs attorney by the plaintiff on 12 February 2013 and why separate cheques of \$40,000 each were given to him.
21. The said explanation of the deponent is in answer to the questions raised by the Honourable Master in his judgement.
22. The defendant submits that the Honourable Master decided the said questions ex-parte without hearing explanations from the defendant.
23. I am not in agreement with this argument of the Learned Counsel for the defendant as the Honourable Master has arrived at the findings in the judgement on the evidence placed before him by both parties. Therefore his findings cannot be taken as ex-parte findings.
24. I am of the view that the defendant who failed to adduce adequate evidence before the Honourable Master is now attempting to provide evidence explaining the alleged payments in answer to the questions raised by the Honourable Master in his judgements.

25. Furthermore, three cheques annexed as YCC 1, YCC 2 and YCC 3 to the affidavit of You Cheng Cao is annexed to the affidavit of Ravikash Nand sworn on 14th June 2013 marked Exhibit RN 9, RN 10 and RN 11.
26. YCC 6 and YCC 7 are two cheques in the sum of \$40,000, number 118 and 119. These two cheques payment was deposed at paragraph 14 (5) of Ravikash Nands affidavit, though the copies of the two cheques were not attached.
27. It is evident from the above facts that the cheque payments mentioned therein were adduced in the lower Court to be considered by the Honourable Master before the judgement was delivered.
28. In regard to evidence in the affidavit of Yang Yu sworn on 30th October 2013 deponent gives explanation why the cheques were given to plaintiffs attorney by the defendant on 12th February 2013 and also why 2 separate cheques of \$40,000.00 were issued.
29. The evidence deposed in the affidavits of You Cheng Cao and Yang Yu sworn on the 30th October 2013 could have been adduced at the time you Cheng Cao deposed an affidavit on 10th August 2013 in reply to summary judgement application. From the facts deposed in the said affidavits its clear that the defendant had the information available with him but did not depose at the first instance before the Master.
30. From all of the above, I find that the defendant is now attempting to provide answers to the questions raised by the Honourable Master in his judgement due to lack of evidence provided by the defendant.
31. Furthermore, the evidence the defendant now seeks to adduce cannot be considered evidence which would probably have an important influence on the result of the case.
32. In considering all of the above, I hold that defendant is attempting to adduce further evidence when the Honourable Master was not satisfied or convinced with the evidence placed before him in reply to summary application made by the Plaintiff.

The fresh evidence that the defendant seeks to adduce were available before the hearing of the summary judgement. Therefore, I hold that the defendant cannot be given another opportunity of adducing fresh evidence to cover up lapses on its part.
33. In conclusion, I hold that the defendant has not satisfied the three conditions laid down in Ladd V Marshall to adduce fresh evidence in this matter.

34. Accordingly, I make the following Orders:

- (a) The defendant's summons dated 5th November 2013 struck out and dismissed.
- (b) The defendant must pay to the plaintiff costs summarily assessed at \$500.


L.S. Abeygunaratne

Judge

05/06/2014

