

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

**Civil Action No: HBC 112 of 2014**

**BETWEEN:**           **ONE HUNDRED SAND LIMITED**, a dully registered company  
having its registered office as level 8, BSP Life Center, 3 Scott Street,  
Suva,

**PLAINTIFF**

**A N D:**               **TE AEAWA LIMITED**, a dully registered company having its  
registered office at level 10, FNPF Place, 343 Victoria Parade, Suva,

**DEFENDANT**

**Before:**               **Master ThusharaRajasinghe**

**Counsel:**           **Mr. Sharma D** with **Ms. Choo .N** for the Plaintiff  
**Mr. Udit .J** for Defendants

**Date of Hearing:**    **14<sup>th</sup> of October 2014**

**Date of Ruling:**    **20<sup>th</sup> February 2015**

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**RULING**

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1. The Defendant filed this Summons pursuant to Order 4 and Order 17 of the High Court Rules seeking following Orders inter alia;
  - i. *That the whole of the proceedings in this action including the Plaintiff's summons for summary judgment be stayed pending the determination of Suva High Court Civil Action No 239 of 2010,*
  - ii. *That the application be determined first before the hearing of the Summary Judgment application filed by the Plaintiff,*

2. The Defendant relied on the affidavit of Elizabeth Morris sworn and filed on 26 June 2014 to support this Summons. Upon being served with this Summons, the Plaintiff filed an affidavit of Timothy Manning in opposition to this Summons. Subsequently, this Summons was set down for hearing on 14<sup>th</sup> of October 2014. Having heard the learned counsel of the respective parties, I decided to proceed with this Summons before the hearing of the Summons for Summary Judgment filed by the Plaintiff. The learned counsel for the Defendant and the Plaintiff made their oral argument and submissions during the course of the hearing and tendered their respective written submissions at the conclusion of it. Having carefully considered the respective affidavits and submissions of the parties, I now proceed to pronounce the ruling as follows.
  
3. The Plaintiff as the purchaser and the Defendant as the vendor entered into a sale and purchase agreement for the sale and purchase of the land comprised in *iTaukei* lease 434878 containing an area of 6.95058 hectares on 7<sup>th</sup> of October 2011. The agreed price was FJ \$ 12,100,000 plus VAT. The Plaintiff was required to pay a deposit of FJ \$ 1,000,000 plus option fee of FJ \$ 200,000 at the execution of the agreement, which was paid by the Plaintiff into the trust account of the Defendant's solicitors. According to the clause 3.1 (a) of the said agreement, the vendor was required to advise the purchaser that they have fully satisfied the prior agreement which the vendor had with the Carpenters Properties Limited ( hereinafter referred as CPL) and no further claims, proceedings, or legal issues exist or may arise in relation to the said prior agreement. Then only the agreement becomes unconditional and parties could proceed for the settlement.
  
4. The Defendant's solicitors informed the Plaintiff in writing on 7<sup>th</sup> of May 2012, that the Defendant was satisfied with the clause 3.1 (a) of the agreement. Subsequently, the settlement date was extended on several occasions. Eventually the Plaintiff informed the Defendant on 7<sup>th</sup> of June 2013 that they were not in a position to proceed with the settlement of the agreement. Hence the Defendant cancelled the agreement. The deposited sum of FJ \$ 1,000,000 together with option fee of FJ \$ 200,000 were forfeited by the Defendant on 7<sup>th</sup> of June 2013.

5. The Plaintiff then instituted this action by way of writ of summons on 24<sup>th</sup> of April 2014 seeking following orders inter alia;

- i. *Judgment in the sum of FJ \$ 1,200,000,*
- ii. *Interest on the sum of FJ \$ 1,200,000 from February 2012 to the date of judgment,*
- iii. *An order that the Defendant and their solicitors Howards Provide an account of the whereabouts the monies paid by the Plaintiff into Howards Solicitors trust account,*
- iv. *Post judgment interest,*
- v. *Costs on an indemnity basis,*
- vi. *Such further and/or other relief as the court may deem just,*

6. The Plaintiff's claim in this action is founded on the allegation that the Defendant, by their letter dated 7<sup>th</sup> of May 2012 falsely misrepresented the fact that they have satisfied the conditions stipulated under clause 3.1. of the agreement.

7. The Plaintiff deposed in their affidavit in opposition that Justice Kamal Kumar in HBC 239 of 2010 has found that the prior agreement between the Defendant and CPL (hereinafter referred as CPL agreement) are still in force. Justice Kumar further held that TeArawa Limited's claim for specific performance in HBC 239 of 2010 is still pending. Accordingly, the Plaintiff contended that the Defendant was actually not in a position to claim that they have satisfied and complied with the clause 3 (1) (a) of the Agreement on 7<sup>th</sup> of May 2012. Accordingly the letter dated 7<sup>th</sup> of May 2012 was a misrepresentation of facts, wherefore; the agreement never became unconditional as per clause 3 of the agreement.

8. The Defendant filed this Summons for stay the proceedings of this action until the determination of Civil Action HBC 239 of 2010. The Defendant argues that the outcome of the HBC 239 has a direct bearing to this action. Therefore, precedence must be given to that action and this action could follow immediately once the HBC 239 is disposed-off.

9. The Plaintiff vehemently opposed this Summons and contended that this action is founded on a separate issue than of the HBC 239.

10. Order 4 rule 2 of the High Court rules states that:

*“Where two or more causes or matters are pending, then, if it appears to the Court-*

- a. that some common question of law or fact arises in both or all of them, or*
- b. that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or*
- c. that for some other reason it is desirable to make an order under this rule,*

*the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.”*

11. It appears that Order 4 r 2, has given a discretionary power to the court to either consolidate or stay one of the proceedings if it appears to the court that both actions are involved in some common question of law or fact, or the disputes in both action have arisen from a same transactions or for some other reason which is desirable to make an order under this rule.

12. Accordingly, the Defendant is required to satisfy the court that HBC 239 and this action are based on some common question of law or facts, or the disputes in both actions have derived from same transaction.

13. The Defendant being the Plaintiff in HBC 239 of 2010 instituted HBC 239 of 2010 seeking following orders inter alia;

- i. A declaration that the agreement remains on foot and that the cancellation Notice issued by the Defendant through its Solicitors is null, void and of no effect,*

- ii. *An order for specific performance of clause 2.1 of the Agreement by the Defendant, namely to forthwith lodge the NLTB application with the NLTB and do all things necessary to effect approval of the same,*
- iii. *In the alternatively, a declaration that the Plaintiff is entitled to retain the deposit sum of FJ \$ 1,100,000,*
- iv. *Cost to the Plaintiff on an indemnity basis,*
- v. *Any other orders that this honourable court considers appropriate in the circumstances,*

14. Accordingly, it appears that the main dispute in HBC 239 is whether the cancellation notice issued by CPL is null and void and of no effect. Having perused the agreement between the Plaintiff and the Defendant, it appears that the both parties were aware of the existence of HBC 239 of 2010 at the time of the execution of the agreement. Clause 1.1 of the agreement interprets the “prior agreement” as “the agreement for sale and purchase of the property between the vendor ( the Defendant of this action) and Carpenters Properties Limited as purchaser that is currently the subject of litigation over the purported cancellation of that agreement by the purchaser” .
15. The main issue in this action is whether the Defendant was actually in a position to claim that they were properly satisfied that the said prior agreement was properly ended and no further claims, proceedings or legal issues were existed on the 7<sup>th</sup> of May 2012.
16. The Plaintiff contended that the Defendant was aware of the order made by Justice Hettiarachchi in HBC 239 of 2010 on 28<sup>th</sup> of March 2012, where his lordship ordered that the status quo is to remain in all respect until the conclusion of the matter. Moreover, the Defendant being the Plaintiff in HBC 239 of 2010 had filed an amended summons for summary judgment for specific performance on 26<sup>th</sup> of January 2012 and withdrew it only on 24<sup>th</sup> of May 2012.
17. Accordingly, it appears that the parties were aware of the existence of the HBC 239 of 2010 at the time of the execution of this agreement, and it was a duty of the Defendant to fulfil the condition stipulated under clause 3 (1) (a). The claim of the Plaintiff in

this action is founded on their allegation that the Defendant falsely misrepresented the facts under clause 3 (1) (a), wherefore, the eventual cancelation of the agreement and forfeiture of deposited money by the Defendant is illegal.

18. Having considered the reasons set out above, it is my opinion that this action is founded on different set of facts than of the HBC 239 of 2010, wherefore I do not find any satisfactory reason to stay the proceedings of this action pending the determination of HBC 239 of 2010. I accordingly make following orders that;

- i. The Summons dated 9<sup>th</sup> of July 2014 filed by the Defendant is hereby refused and dismissed ,
- ii. The Plaintiff is awarded sum of \$ 1500 as for the cost of this application, assessed summarily,

Dated at Suva this 20<sup>th</sup> day of February, 2015



for

  
R.D.R Thushara Rajasinghe

Master of High Court, Suva