IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA

Civil Action No. 107 of 2013

BETWEEN : **CHANDRA MANI** of Kuma Place, Glenmore Park, Sydney NSW 2745, Australia, Businessman.

PLAINTIFF

AND : **MARK HINTON** of Wailoaloa, Nadi, Businessman.

FIRST DEFENDANT

AND : **HORIZON HOLDINGS LIMITED** a limited liability company having its registered office at HLB House, 3 Cruickshank Road, Nadi.

SECOND DEFENDANT

AND : **IRVINE INVESTMENTS INTERNATIONAL LIMITED** of 3A HLB House, 3 Cruickshank Road, Nadi.

THIRD DEFENDANT

Counsel : Mr. E Maopa for the Plaintiff
Mr. J.Sharma for the 1st Defendant
Ms.Tabuadua for the 2nd & Third Defendants

RULING

INTRODUCTION

[1]. Both defendants seek an order to strike out the plaintiff's claim, or, alternatively, to dissolve an injunction granted *ex-parte* in this case, which, is restraining them from dealing with certain cash deposits paid by the plaintiff pursuant to two sale and purchase agreements. The said monies, by a subsequent order of this court, have since been paid into court. I have decided to dismiss both striking-out applications with costs in the cause. I have also decided not to dissolve the injunction as to dissolve it now would entail having to pay out the monies out of the court account to the defendants' solicitors' account. The issue is still live as to which of the parties had breached the agreements in question.

[2]. There is also pending before me an application by both defendants for security for costs. Taking into account that the plaintiff ordinarily resides in Australia, and has no discernable assets in Fiji that might serve as security

in the event of a judgement against him, and considering his questionable conduct in the manner he had undertaken to pay damages in his ex-parte application for injunction, I have decided to order that he pay into court the sum of $30,000 security for costs (being $15,000 each for the 1st and 3rd defendants) within 28 days of the date of this ruling, and, in the event he fails to do so, his claim will be struck out.

BACKGROUND

[3]. The plaintiff, Chandra Mani, had been interested in purchasing shares in a company called Horizon Holdings Limited (**"HHL"**). HHL was incorporated and registered in Fiji. Mani had entered into separate agreements with two shareholders for the sale and purchase of their respective HHL-shares. One of these was one Mark Hinton. The other was a Fiji company called Irvine Investments International Limited (**"IIIL"**)[1]. Hinton was to sell his 6000 shares for $519,000 and IIIL, its 3999 shares for $346,000. Pursuant to the Hinton-agreement, Mani paid into the trust account of Janend Sharma Lawyers in Nadi a 10% deposit of $51,900. To the IIIL-agreement, he paid the sum of $34,600 into the trust account of Lowing & Associates. As it turned out, the parties did not settle. The first settlement date of 14 May 2013 was, according to the defendants, called off for one reason or another by Mani, who then rescheduled settlement to 20 May 2013. The parties however were also not able to settle on 20 May 2013. Notably, on 06 May 2013, just a little over a week before the first-agreed settlement date, Mani had warned Hinton that he, Hinton, should provide the following at settlement:

(i) a discharge of the Mortgage
(ii) zero vat and taxes paid up to date of settlement
(iii) zero water and electricity bills
(iv) zero town rates

[1] The first agreement was signed on 19 March 2013 between Mani and Hinton. And the second was signed on 29 April 2013 between Mani and IIIL.

[4]. As to why the parties could not settle on the second date, the *prima facie* reason was Hinton's and IIIL's failure to fulfil a condition set by Mani's financier, namely Westpac Banking Corporation Limited (**"Westpac"**). The condition in question was that Hinton and IIIL both provide their respective Capital Gains Tax Clearance at settlement in exchange for the purchase price. This requirement was not discussed hitherto in the period leading up to the first-scheduled settlement date.

ISSUES

[5]. Mani construed Hinton's and IIIL's failure to clear CGT at settlement as a breach on their part of their respective agreement with him, and, which, entitled him (Mani) lawfully to:

(i) rescind both agreements and

(ii) obtain damages on account of the said breaches and

(iii) recover the deposits he had paid.

[6]. In due course, Mani would file a Writ of Summons and statement of claim to allege breach of agreement and also claim damages as well as the return of the deposits. The point of contention between the parties is whether or not it was reasonable and proper for Westpac to have demanded CGT clearance prior to, and as a condition of, settlement. This issue is at the heart of all the finger-pointing that has since ensued between the parties.

[7]. If, in the event, this Court were to find that Mani was unreasonable in demanding prior-CGT clearance at settlement, then, it follows as a matter of course that his conduct in demanding prior- CGT clearance at settlement, and his subsequent *"purported rescission"* of the agreement, would amount to an unlawful repudiation of the agreement such as to entitle the defendants to damages for breach of agreement and following from that, to the deposits paid being forfeited to them (defendants).

DUTY TO FILE CGT RETURN

[8]. A share is a *capital asset* according to section 2 of the Capital Gains Tax Decree 2011[2]. And the sale, exchange or transfer of shares is an act of *disposal* of a capital asset according to section 4[3]. A capital gains tax is imposed on a person who makes a capital gain on disposal of a capital asset according to section 6 of the 2011 Decree[4]. For obvious reasons, the law imposes the obligation to file a capital gains tax return on any person who disposes a capital asset. And the time period allowed to file that return is *"within thirty days after the disposal of the capital asset"*. It is immaterial, as per section 15(1) of the Decree, and in terms of the obligation to file the return, whether or not the person is (or will be) liable for CGT.

> ***CAPITAL GAIN TAX PROCEDURE***
>
> *Filing of Capital Gains Tax Return and Payment of Capital Gains Tax*
>
> ***15.**-(1) A person liable or not liable for capital gains tax in respect of the disposal of a capital asset must file a capital gains tax return within thirty days after the disposal of the capital asset.*
>
> *(2) The capital gains tax payable by a person on the disposal of a capital asset is due on the due date for filing the taxpayer's capital gains tax return in respect of the disposal."*

DEFENDANTS' POSITION

[9]. The defendants in this case have no qualms about their being under the section 15(1)-obligation to file a CGT return within thirty days after the sale of the shares. However, they contend that "disposal of the asset" in this case happens after settlement hence, the 30-day period allowed under

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[2] Section 2 defines "capital asset"

"Capital asset" means – (d) a share, security, equity, or other financial asset;

[3] Section 4 provides:

Disposal

4. (1) A person makes a disposal of a capital asset if the person parts with the ownership of the asset, including when the asset is-

(a) sold, exchanged, transferred, or distributed; or

[4] Section 6 provides:

Imposition of Capital Gains Tax

6.-(1) Subject to this Decree, a tax to be known as "capital gains tax" is imposed on a person who has made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.

(2) The capital gains tax payable by a person on the disposal of a capital asset is 10% of the amount of the capital gain arising on the disposal.

(3) If the person who has made a capital gain is a non-resident person, subsection (1) applies only if the capital asset is a Fiji asset.

section 15 kicks off immediately upon settlement[5]. This submission makes sense considering that section 4 states that *"a person makes a disposal of a capital asset if the person parts with the ownership of the asset, including when the asset is sold, exchanged, transferred..."*.

[10]. The argument goes that, in light of the above, for Westpac to direct the defendants to provide CGT clearance as a condition of settlement is contrary to law and unreasonable. Both defendants assert also that, as there was nothing in their respective agreements with Mani that stipulated that they provide a CGT Certificate at settlement, they were under no contractual obligation to Mani to provide such a certificate at settlement.

[11]. Accordingly, so the defendants argue, when and how they settle CGT is a matter between them and the Fiji Islands Revenue Customs Authority and should not have been imposed as a condition for settlement. To impose that condition as such, and particularly at the very last minute, considering that it was not in the stipulated mechanics of settlement set out in any of the agreements, is a subterfuge contrived by Mani to defeat settlement and to get out of the binding agreement without having to forfeit the deposit paid to the defendants. The defendants also submit that neither of their respective agreements with Mani was subject to finance, hence, for Mani to have derailed settlement by heeding his financier's insistence on prior CGT clearance as a condition for finance and ultimately, settlement, was unreasonable and a breach of agreement on the part of Mani.

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[5] Important to bear in mind section 51 of the Acts Interpretation Act (Cap 7) which, in relation to computation of time, provides:

Computation of time

51. In computing time for the purpose of any written law, unless a contrary intention appears-

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a Saturday, Sunday or a public holiday (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

PLAINTIFFS POSITION

[12]. Mani argues that it is a requirement of FIRCA that the defendants have cleared their CGT status with FIRCA prior to settlement. In this regard, Mani relies on some advice given to him by a FIRCA staff. At paragraph 15 of Mani's statement of claim, he pleads:

> *15. That it is a requirement and policy of the FRCA that CGT Certificate is provided in order that settlement is effected. The defendant's failed to provide CGT Certificate on the 20th May 2013 as required and Westpac Bank cancelled the settlement.*

[13]. At paragraph 24 of his affidavit, Mani deposes:

> *I was informed by my solicitors and verily believed that this office requested the assistance from Fiji Islands Revenue and Customs Authority (FIRCA) on the issue. A response from Reshmi of FIRCA was received and confirmed that without CGT Certificate settlement could not be effected....*

[14]. Annexed to Mani's affidavit is an email from a Reshmi of FIRCA dated 20 May 2013 advising as follows:

> *"Sale of shares will require CGT. The process is same as other CGT transfer. No settlement can be done without CGT Certificate.*
>
> *for this you will have to Submitted* (sic)
>
> 1. *CGT Return Form*
> 2. *CGT Declaration form*
> 3. *Current Stamped share transfer*
> 4. *Last share certificate"*

[15]. Further to the above email, on 21 May 2013 the said Reshmi of FIRCA also responded to an email-query of Mr Janend Sharma in which Reshmi annexes a copy of the FIRCA 2013 Budget.

PRINCIPLES OF STRIKING OUT

No Reasonable Cause of Action

[16]. Courts will strike out a proceeding on this ground if, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed. But if the pleaded facts do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend – the courts will not strike out the claim (see Mr. Justice Kirby in **Len Lindon -v- The Commonwealth**

of Australia (No. 2) S. 96/005 who succinctly summarised s the applicable principles).

Scandalous, Frivolous & Vexatious

[17]. A pleading is scandalous if it imputes things or is abusive of the other party and, in addition, if the imputations and abuse are irrelevant to the issues of the case[6]. A pleading is frivolous and vexatitious if it is not made in good faith (lacks *bona fides*), or, if it is hopeless, oppressive and tending to cause unnecessary expenses and anxiety on the other party. A case can be said to be frivolous when it is a waste of the court's time and everybody else's time and when it is not capable of sustaining a reasonable argument in court (see also White Book Volume 1 1987 edition at para 18/19/14).

Prejudice, Embarrass or Delay Fair Trial

[18]. A pleading will be struck out on this ground if it is so badly drafted as to be obstructive of any fair trial. The **White Book Volume 1 1987 edition at para 18/19/14** states as follows:

> When considering whether a particular passage in a pleading is embarrassing regard must be had to the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but cannot (it is submitted) be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in Addis v Gramophone Co. Ltd [1909] A.C. 488, p. 495.

Abuse of Process

[19]. The Courts will strike out a claim on this ground if its process is being used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes or where its process is being misused. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment" (see **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566[7], **Broxton v McClelland** [1995] EMLR 485[8]and Halsbury's Laws of England 4th Ed. Vol. 37)[9].

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[6] For example, an allegation of indecent or offensive words or misconduct about/against the other party will be scandalous if they are unnecessary or not relevant to the case.

[7] Where Lord Denning said as follows at 574:

> In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so

CONCLUSION ON STRIKING OUT APPLICATIONS

[20]. The defendants' counsel have both made very strong arguments. However, there is clear evidence from counsel that they all received advice from Reshmi (FIRCA staff) to the effect that a CGT Certificate is required before any settlement can be effected. It would appear that Reshmi's advice was the basis upon which both Mani and his financier, Westpac, would have relied. If Reshmi's advice turns out to be correct in law (I am giving her the benefit of the doubt in this ruling) then it would appear not unreasonable for Mani and Westpac to have invoked it as a condition for settlement. But even if it was a wrong advice, does it necessarily follow as a matter of course that any *bona fide* reliance on it would be unreasonable. I need to hear the evidence of Reshmi to explain the basis of her advice as well as Westpac to explain why it took the position it took.

DISSOLVING EX-PARTE INJUNCTION

[21]. The onus is still on Mani to convince this court that the injunction granted *ex-parte* should continue (see Court of Appeal in **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999)[10]. To succeed, Mani will have to convince this court in terms of the principles in the **American Cyanamid** case i.e. (i) that there are serious issues to be tried

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abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

[8] Where, at 498 Simon Brown LJ said:

Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.

[9] Where, at para 434

An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.

[10] Where the FCA said:

When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.

(ii) that damages would not be adequate, and (iii) that the balance of convenience lies in his favour.

[22]. In relation to the striking out application, I have already formed the view that Mani has a reasonable cause of action. In the particular circumstances of this case only, I accept that as conclusive also towards any inquiry as to whether or not there is a serious issue to be tried in the context of the application for dissolution of the injunction.

[23]. The defendants do take issue with the plaintiff's undertaking as to damages. In particular, they highlight that, in giving his undertaking as to damages in his initial *ex-parte* motion, Mani had deposed by affidavit sworn on **13 June 2013** that he had cash in the bank in the sum of $238,693.00[11]. The bank statement for account number 9803091793 held in Mani's name confirmed that, as at **21 May 2013**, the balance stood at $238,693.00. However, the affidavit was sworn in June 2013.

[24]. An affidavit sworn by a Sandhya Devi on 19 November 2013 for and on behalf of Mani in response an affidavit of Hinton on the security of costs application discloses, perhaps inadvertently, a copy of a statement of the same 9803091793-account which was extracted much later than the first statement. The second statement showed clearly that, between 21 May 2013 and 13 June 2013, large sums of money were withdrawn from the account in question and that the balance standing had been reduced from $238,693.00 to $8,099.07 in a matter of a few weeks.

[25]. Hence, at the date when Mani swore an undertaking as to damages and represented that the balance standing in that account was $238,693.55, the actual balance standing in that account was a mere $8,099.07.

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[11] Mani had deposed as follows at paragraph 37 of his affidavit:

37. I hereby give my usual undertaking as to damages if the court finds against me. I have sufficient funds particulars are as follows:

(i) cash at bank $238,693.00 under my wife and my name (refer to annexure CM 24)

(ii) I do not have any creditors, or liabilities.

(iii) the only expenses I incurred are those paid relating to my airline tickets and other payment relating to computers and other necessary for the 3rd defendant marked as.....

[26]. The defendants' counsel argue that in that regard, Mani had failed to make full and frank disclosure of the true status of his financials and had misrepresented his ability to meet damages that may be awarded in favour of the defendants as arising out of the orders sought to be obtained by him ex-parte. This misrepresentation entitles the Court to refuse analysis of the plaintiff's case as acknowledged in **Vinod Patel & Company (Lautoka) Ltd v Vimal Contructions & Joinery Works Ltd** [2011] FJHC 194; HBF 36.2004L (29 March 2011), paragraph 9:

> ".....Furthermore, Lord Cozens-Hardy M.R. in dealing with the consequences of non-disclosure in ex-parte applications aptly summed it up when he said in R. v. Kensington Income Tax Commissioners (op.cit) at p.505:
> "..... the court ought not to go into the merits of the case, but simply say, 'we will not listen to your application because of what you have done'.""

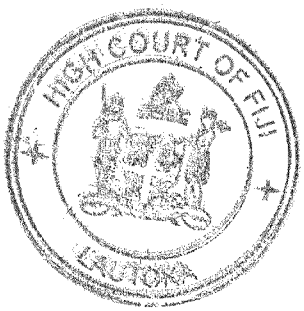
[27]. I agree with the defendants' counsel's submissions. By reason of his dubious and misleading conduct regarding his bank statement, I am of the view that Mani has not given sufficient undertaking as to damages. However, as I have stated above, I am loath to dissolve the injunction at this time as to do so will entail releasing the funds held in court back to the defendants which I feel will not be appropriate while there remains some live substantive issues between the parties.

SECURITY FOR COSTS

[28]. The conduct of the plaintiff in terms of how he misstated his account balance when giving an undertaking as to damages is quite telling of the sort of character he is. Given that, and the fact that he ordinarily resides in Australia, and appears to have no assets in Fiji that might be realised to satisfy any judgement against him, and considering the relative strength of his case, I think that it is only fitting that he be ordered to pay security for costs which I assess at $30,000 ($15,000 each for the defendants). This must be paid into court within 28 days of the date of this ruling, failing which his claim will be struck out.

ORDERS

[29]. Applications to strike out and to dissolve injunction dismissed. Costs in the cause. Plaintiff to pay security for costs in the sum of $30,000 into court within 28 days of the date of this ruling, failing which the claim will be struck out. Case is adjourned to **Monday 27 April 2015** for mention only.



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Anare Tuilevuka
JUDGE
Lautoka High Court

23 April 2015