IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 123 OF 2013

BETWEEN : **ADRIAN BOYD SOFIELD AND CAROL MARY SOFIELD** both of House No. 8 Tanoa Residence, Votualevu, Nadi in the Fiji Islands, Businessman and Businesswoman respectively.

PLAINTIFFS

A N D : **NAFIZ ALI** of 34 Belo Street, Samabula, Suva, Fiji Islands, Director.

DEFENDANT

Counsel : Ms L. Tabuakuro for the Plaintiffs

: Mr W. Pillay for the Defendant

Date of Hearing : 10 February 2017

Date of Judgment : 01 June 2017

J U D G M E N T

Introduction

[01] The Plaintiffs brought this action against the Defendant claiming damages for breach of contract.

[02] The Defendant denied breaching the contract and stated that it was the Plaintiffs that breached the contract by failing to provide Engineering Certificate and Building Plan.

[03] At the trial, the Plaintiffs gave evidence and called two other witnesses in support of their claim. The Defendant gave evidence on his behalf.

[04] Although both parties sought to file and serve closing submissions simultaneously within 28 days, none of them filed written submissions within the time frame.

Background

[05] The Plaintiffs, Adrian Boyd Sofield and Carol Mary Sofield were the owners of the property located at 2 Jalil Drive, Waqadra in Nadi. Bayleys Real Estate Ltd ("BRE") was instructed by the Plaintiffs to secure a purchaser for the property. In April 2013, the Plaintiffs as the sellers and the Defendant as the purchaser entered into a sale and purchase agreement for the property ("the Agreement"). It was agreed that the purchase price to be $600,000.00 and a non-refundable deposit of $10,000.00 was to be paid into BRS trust account.

[06] The transfer document was executed twice due to the Defendant's solicitor misplacing the first transfer document. The Defendant has allegedly lodged the transfer for stamping.

[07] The Defendant asked for the Engineer's Certificate ("the EC") on the property. The BRS advised the Defendant that ANZ had misplaced it and he would have to pay for another one to be made.

[08] The Plaintiffs failed to provide the EC. In June 2013, the Defendant through his solicitors sent a notice to terminate the agreement. The Plaintiff responded and told that the Plaintiffs were not obliged to provide the EC and Building Plan ("the BP") and advised the deposit will not be refunded.

[09] In June 2013, the Plaintiffs' solicitors advised the Defendant that in the first agreement the Plaintiffs were not obliged to provide an EC or BP and that if the Defendant did not meet his obligation by 18 June 2013, the Plaintiffs will seek specific performance.

[10] The Defendant by letter dated 20 June 2013, intimated the Plaintiffs' solicitors that he had terminated the agreement. By that letter the Defendant advised the Plaintiffs that the Defendant had based the termination on an implied agreement that the EC and the BP would be provided and in the absence of the same [the Defendant] was entitled to terminate the agreement and sought the refund of the deposit.

[11] The Plaintiffs informed the Defendant that they accepted termination but will sue for breach of the contract. In July 2013, the Plaintiff instituted this action against the Defendant for damages, but not for specific performance.

[12] The Defendant unilaterally placed a caveat on the property after terminating the agreement. It was later removed by the court upon the Plaintiffs paying the deposit of $10,000.00 into court.

[13] The property was subsequently sold to a third party for the same amount-purchase price but with a deposit of $60,000.00. A default judgment on the counterclaim was entered against the Plaintiffs, which was subsequently set aside and the Plaintiffs were allowed to file and serve a reply to defence and defence to the counterclaim.

Agreed Facts

[14] The following facts were agreed by the parties:

1. The Plaintiffs were at the material time the registered owners of Certificate of title number 16823 described as Lot 2 on DP No. **4443** in the District of Nadi in the island of Viti Levu known as "Waqadra", having an area of 24.9 perches (the **Property**).

2. The Plaintiffs and the Defendant entered into a Sale and Purchase Agreement dated 9 April 2013 (the **Agreement**).

3. It was agreed that the consideration price is FJD $600,000 and a deposit of $10,000 to be paid.

4. A Deposit of $10,000 was paid by the Defendant into the trust account of Bayleys Real Estate Agents who held the deposit as stake holders (the **Deposit**).

The Issue

[15] The parties agreed to the following issues to be decided by the court at the trial of the matter:

1. Is the deposit refundable to the Defendant?

2. Was the agreement conditional upon the Plaintiffs providing an engineer's certificate and building plans?

3. Whether clause 5.1 includes engineer's certificate and building plans as reasonably necessary in conveyancing matters in Fiji?

4. Whether the Defendant wrongfully repudiated the Agreement based on the Plaintiffs not providing an engineer's certificate and building plans?

5. (If the answer to paragraph 4 is yes), is the Defendant in breach of the Agreement?

6. (If the answer to paragraph 4 is no), whether the Plaintiffs are in breach of the Agreement?

7. Whether the Defendant and/or his agents had brought in potential tenants to the Property to inspect the premises?

8. Whether the Plaintiffs are entitled to claim for specific damages for all the costs it incurred after it entered into the Agreement with the Defendant?

9. Are the Plaintiffs entitled to damages?

10. Is the Defendant entitled to a refund of the Deposit?

11. Whether the Defendant is entitled to claim for specific damages and general damages for all the costs he incurred after entering into the Agreement with the Plaintiff?

12. Whether either party can claim for interest under the Law Reform (Miscellaneous Provisions) (Death and Interest Act).

The Evidence

Plaintiffs

[16] For the Plaintiffs, Adrian Boyd Sofield (first named plaintiff) ("PW-1"), Ratu Meli Naevo Koroitamana ("PW-2") and Philip Henry Toogood ("PW-3") gave evidence in support of the Plaintiffs' claim.

Defendant

[17] For the Defendant, Nafiz Ali (the Defendant) gave evidence in support of the defence.

[18] I will shortly discuss where necessary what each of the witnesses stated in evidence.

Discussion

[19] The Plaintiffs claim damages against the Defendant for breach of the contract. The Plaintiffs as vendor and the Defendant as purchaser entered into a Sale and Purchase Agreement dated 9 April 2013 (the Agreement). It was agreed that the consideration price as FJD $600,000.00 and a deposit of $10,000.00 to be paid. The Defendant paid a Deposit of $10,000.00 into the trust account of Bayleys Real Estate Agents who held the deposit as stake holders (the Deposit).

[20] The Defendant repudiated the agreement on the ground that the Plaintiffs had failed to provide the Defendant with the engineering certificate and building plans for the property.

Deposit refundable or not

[21] The primary issue at the trial was whether the deposit of $10,000.00 paid by the Defendant pursuant to the agreement is refundable or non-refundable.

[22] In order to determine the above issue, it is important to consider cl. 2 of the agreement, which reads:

> *"2.1 The full purchase price for the said property shall be the sum of F$600,000 (six hundred thousand dollars). The said sum shall be paid and satisfied by the Purchaser to the Vendor as follows:*
>
> *i. The sum of $10,000 (ten thousand dollars) as deposit paid to the trust account of Bayleys Real Estate (Fiji) Limited Trust Account as stakeholders on acceptance of offer thereafter being non-profitable deposit.*
>
> ii. *The balance of $590,000 (five hundred and ninety thousand dollars) to be paid on the date of settlement)".*

[23] Cl. 2.1.i unequivocally states that the deposit becomes non-refundable upon acceptance of the offer. It is an express condition in the agreement. The Defendant had already agreed and accepted to purchase the property for the consideration price of $600,000.00; thereby the Defendant had accepted the offer. The offer and acceptance had been completed. The clause dealing with the deposit is clear in its term and it requires no interpretation. I would, therefore, find that the deposit the Defendant paid under the agreement is non-refundable. As such, the Defendant is not entitled to refund of it.

Whether the Defendant wrongfully repudiated the agreement

[24] Another issue raised at the trial was whether the Defendant wrongfully repudiated the Agreement based on the Plaintiffs not providing an engineering certificate and building plans.

[25] By letter dated 14 June 2013, written through his solicitor, the Defendant informed the Plaintiffs that he is terminating the agreement with immediate effect as the Plaintiffs failed to provide the engineering certificate and the building plan.

[26] In evidence the Plaintiff stated that four days after settlement date, the Defendant terminated the agreement. There were 60 days for settlement. Before termination, there was no indication that the Defendant is not interested in the property. Engineering certificate was never part of the agreement. The Engineering certificate is not required. It is different from certificate of Local Authority. No reason given why the engineering certificate was required.

[27] PW-2 was an officer from Nadi Town Council (NTC). He has worked in the Building Department for 8 years. In 2013, he was in the Building Department. He confirmed that there is a plan for the property in question in the Building Plan File approved in 2006. He also confirmed that there is a valid engineering certificate for the property in the File. In cross-examination, he confirmed that in May 2013, the documents were in the File and NTC could have provided the copy of the documents, if requested.

[28] PW-3 who is the Chairperson, Managing Director and Partner of Bayleys when giving evidence for the Plaintiff stated that: he was involved in the agreement. There was no condition about engineering certificate. Conditions must be certainly expressed. That was unconditional agreement. He was present at the time of signing the agreement. The deposit goes under our (Bayleys) account. The deposit was non-refundable. The Purchaser should proceed with the agreement without any condition and go on to settlement. There wasn't any request for engineering certificate.

[29] According to the Defendant, he had discussion with Shobna Ali (an employee of Bayleys) when the property was advertised by Bayleys, the

property agent. He asked Shobna for documents such as Valuation, Building Plan and Engineering Certificate. She said 'they had all the documents. Building plan and engineering certificate were not provided although he asked for these documents prior to agreement.

[30] There is no express provision in the agreement that the vendor (the Plaintiff) must provide the purchaser (the Defendant) with the engineering certificate and building plan prior to the settlement. If the engineering certificate and the building plan were the essential conditions of the agreement, such condition should have been expressly stated in the agreement. In the absence of any express conditions in the agreement to that effect, one cannot assume that such conditions were implied condition of the agreement. I accept the Plaintiffs' evidence that there was no discussion about the engineering certificate at the time of negotiation and that was never a condition in the agreement. If the Defendant had thought that the Plaintiff should provide him with the engineering certificate prior to the settlement, he would have caused Bayleys who drafted the agreement to incorporate such a condition in the agreement.

[31] Seemingly, the Defendant contends that cl.5.1 (e) includes engineer's certificate and building plans as reasonably necessary in conveyancing matters in Fiji.

[32] Cl.5.1 (e) of the agreement provides:

> *"The parties shall complete such other ancillary and consequential matters as is reasonably necessary in conveyancing matters in Fiji in relation to transactions as that herein."*

[33] The above clause falls under the heading- "TRANSACTIONS ON SETTLEMENT". The engineering certificate and building plan are, in my opinion, not required for conveyancing. The engineering certificate is a document, which confirms the building is constructed according to the building plan and is safe to occupy. It is not a document necessary for

completion of the conveyancing. Assumingly, even if it is necessary for conveyancing, the Defendant could have easily obtained a copy of the engineering certificate from the NTC with the consent of the Plaintiff. The Defendant has failed to do so. In my view, the engineering certificate and building plan are not ancillary and consequential documents as contemplated in cl.5.1 (e) of the agreement. I would, therefore, find that it was not an implied term of the agreement that the Plaintiff must provide the Defendant with the engineering certificate and building plan prior to the settlement. I also find that the Defendant was not entitled to terminate the agreement three days after the settlement date on the ground that the Plaintiff had failed to provide the engineering certificate and building plan. It follows that the Defendant wrongfully terminated the agreement and thereby had breached the agreement.

Damages

[34] The consequential issue that follows from the finding that the Defendant is in breach of the contract is whether the Plaintiff is entitled to claim damages from the Defendant.

[35] The Plaintiff, being the non-breaching party is entitled to claim damages, as of right, from the Defendant, as the Defendant had wrongfully breached the contract by failing to perform his primary obligation under the contract.

[36] In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Lord Diplock said at p.849:

> *"Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract-breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for loss sustained by him in consequence of the breach..."*

[37] The basic rule of recovery of compensation in the case of breach of contract is that the non-breaching party is to be put into the position it

would have been in had the contract been performed as agreed (See *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha, The Golden Victory* [2007] UKHL 12, [2007] Bus LR 997, [2007] 2 WLR691).

[38] The Plaintiff suffered losses on breach of the contract. In the statement of claim, the Plaintiff summarises the losses he suffered in consequence of breach of the agreement. The particulars of damages suffered, according to the Plaintiff, are as follows:

i) *$1,500.00 being the cost of cleaning the Property and vacating the premises on or about the 5 June 2013;*

ii) *$6,000.00 per month being the loss of rent of the property since the Plaintiffs moved off the Property in contemplation of Completion of the Agreement on 5 June 2013 and continuing;*

iii) *$554.00 being the costs of arranging for Fiji Electricity Authority and Water Authority for meter reading and disconnecting the same on the Property on or about the 7 June 2013;*

iv) *$1,250.00 being the costs of the bond and $1,250.00 per month since 5 June 2013 being the costs of at Tanoa Residence;*

v) *$115.00 being the cost of arranging with ANZ Bank for the discharge of its mortgage on the Property;*

vi) *$20,000.00 being the total of the legal fees in respect to the proposed transfer of the Property and the costs of the within proceedings;*

vii) *$18,035.11 being the cost of the Plaintiffs moving to alternative accommodation;* (see para 14 of the statement of claim)

[39] The agreement between the parties was a Sale and Purchase Agreement. The Defendant agreed to purchase the property from the Plaintiff for the consideration price of $600,000.00. After the Defendant's breach of the agreement, the Plaintiff was able to find a buyer for the same consideration as agreed by the Defendant. However, it is not clear how long from the date of breach of the agreement it took for the Plaintiff to

find a buyer. Damages recoverable by the Plaintiff for breach of the contract need to be considered in light of these facts.

[40] I would not consider, in assessing damages, the costs involved on (i) cleaning the property and vacating the premises ($1,500.00), (ii) arranging for Fiji Electricity Authority and Water Authority for meter reading and disconnecting the same ($554.00), (iii) bond money paid by the Plaintiff (which is refundable) ($1,250.00), (iv) arranging with ANZ Bank for the discharge of its mortgage on the Property ($115.00) and (iv) the Plaintiffs moving to alternative accommodation ($18,035.11). Usually, the Plaintiff would have incurred these expenses when selling the property.

[41] In a case like this, the lost expectation is normally measured in terms of difference in value between what was expected and what was received. This situation does not arise here. The Plaintiff expected $600, 000.00 for the property by the agreement and managed to find a buyer for the same price subsequent to the breach by the Defendant.

[42] Non-pecuniary losses are generally not recoverable in a claim of breach of contract. However, in some circumstances a modest sum may be awarded for disappointment suffered through not receiving the promised performance. In this case, I would award a modest sum to the Plaintiff for disappointment he suffered as a result of breach of the contract.

[43] The Plaintiff had to find an alternative accommodation from the date of breach and until he found a buyer. He says he spent $1,250.00 per month for Tanoa Residence since 7 June 2013 (the last day for settlement). As I said, it is not clear how long the Plaintiff was staying at Tanoa Residence. The Plaintiff states that he incurred legal fees in respect to the proposed transfer of the Property and the costs of the within proceedings totalling $20,000.00. This appears to be exaggerated sum. In addition, the Plaintiff is also entitled to compensation for disappointment he suffered through breach of the contract. I, having all

these in my mind, award a sum of $15,000.00 as compensation for wrongful breach of the contract on the part of the Defendant. I would also award costs of these proceedings, which I summarily assessed at $1,500.00.

Interest

[44] The Plaintiff is also entitled to interest on the judgment sum pursuant to section 3 of the Law Reforms (Miscellaneous Provisions) Act. I accordingly award interest on the judgment sum at 6% from 12 July 2013 (the date of writ of summons) until the date of the judgment.

Counterclaim

[45] In this case the Defendant has made a counterclaim against the Plaintiffs in the sum of $10,000.00, being the deposit the Defendant paid under the contract. The Defendant's counter claim should necessarily fail as I have found that the deposit is non-refundable.

Conclusion

[46] For the foregoing reasons, I conclude that the deposit the Defendant paid under the agreement is non-refundable. Therefore, he is not entitled to refund of the same. I also conclude that the Defendant wrongfully repudiated the agreement and therefore he is liable to compensate losses suffered by the Plaintiff as a result of breach of the contract. Consequentially, I would award damages to the Plaintiffs in the sum of $15,000.00 for losses they suffered through breach of the contract with summarily assessed costs of $1,500.00. I would also award interest on the judgment sum at 6% from 12 July 2013 until the date of the judgment. I would strike out and dismiss the Defendant's counterclaim.

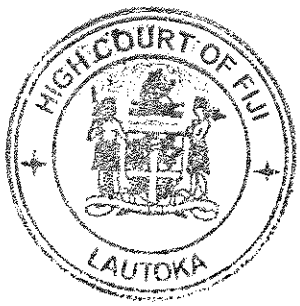
Final outcome

1. There will be judgment in favour of the Plaintiff in the sum of $15,000.00.
2. The Plaintiff is entitled to interest on the judgment sum at 6% from 12 July 2013 until the date of the judgment.
3. The deposit of $10,000.00 the Defendant paid under the contract is non-refundable. As such, the Defendant is not entitled to refund of it.
4. The Defendant will pay summarily assessed costs of $1,500.00 to the Plaintiff.

.....1/6/17.....

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

01 June 2017

Solicitors:

M/s KLaw Chambers & Partners, Barristers & Solicitors for the Plaintiffs

M/s Gordon & Co, Barristers & Solicitors for the Defendant