IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 198 OF 2019

BETWEEN : **WAN TAI HOLDINGS COMPANY PTE LIMITED** a limited liability company having its registered office at Unit C4, Port Denarau Retail Centre, Denarau Island, Fiji.

Plaintiff

A N D : **DENARAU WATERS PTE LIMITED** (formerly Gulf Investments (Fiji) Pte Limited) a limited liability company having its registered office at Unit 01 2A, Commercial Complex, Port Denarau, Nadi, Fiji.

Defendant

Before : A G Stuart - J

Appearance : Mr A K Narayan for the Plaintiff

Date of Hearing : 17th September, 2019

Judgment Delivered: 23rd September, 2019

J U D G M E N T

INTRODUCTION

1. This is a proceeding commenced by Writ of Summons issued out of the High Court at Lautoka on 1 August 2019.

2. It arises from two agreements for the sale and purchase of land, originally dated 17 December 2016, whereby the Plaintiff agreed to buy, for a total of F$16.5m, 24 lots in a development that the defendant proposed to carry out known as Denarau Waters. In terms of the agreements the plaintiff has paid to a stakeholder a deposit of F$1.65m ($500,000 of which was subsequently released to the defendant by agreement), and – the agreements having come to an end – the plaintiff is seeking the return of its deposit.

3. The Writ of Summons and Statement of Claim issued by the plaintiff were served on the defendant company on 1 August 2019, and the defendant has filed (via the defendants 'in-house solicitor') an acknowledgement of service dated 7 August 2019. However the defendant has not taken any further steps, and has not filed a statement of defence. Accordingly the plaintiff seeks judgment, and has issued an ex parte summons for judgment dated 10 September 2019, supported by an affidavit by one of the plaintiff's directors. The ex parte summons asks for:

   i. A declaration that the defendant's termination of the [sale and purchase] agreements and purported forfeiture of the deposit was unlawful and in breach of the agreements
   ii. Judgment in the sum of F$1,650,000 against the defendant
   iii. An order that the sum of F$1,150,000 held in the trust account of Neel Shivam Lawyers as stakeholders be released and paid out to the plaintiffs solicitors AK Lawyers forthwith.
   iv. An order for costs of this action on a full solicitor/client indemnity basis to be assessed before the Master of the High Court.
   v. Such further or other orders as the Court considers just.

4. The plaintiff has not pursued the request (included in the statement of claim but not in the application for judgment) for an injunction restraining the defendant and stakeholder from paying out the deposit. I am informed from the bar that the plaintiff has been given and is satisfied with an undertaking given by the stakeholder not to pay out the deposit pending agreement of the parties or an order of the court.

5. Mr Narayan for the plaintiff appeared before me on 17 September in support of the application for judgment. I am grateful to him for his helpful and thorough submissions, in which he argued that:

   i. The plaintiff is entitled to seek judgment ex parte in the absence of any defence filed by the defendant.

   ii. The orders sought (as listed above) are orders that the court can and should make, notwithstanding that these are not identical to those sought in the statement of claim.

FACTS

6. The statement of claim discloses that the plaintiff is a company incorporated in Fiji to engage in the business of property development and investment. The defendant is also incorporated in Fiji, and is said to be the developer of an Integrated Tourism development located at the south end of Denarau Island known as Denarau Waters. The land on which Denarau Waters is being developed is on a parcel of land comprised in protected Crown Lease No. 16923.

7. In an agreement dated 16 December 2016 the plaintiff agreed to purchase 24 lots on the fourth residential finger of the proposed Denarau Waters development for a total of F$16.5m. On or about 16 December 2016 the plaintiff paid a deposit of F$1.65m which was held in the trust account of Neel Shivam Lawyers as stakeholder.

8. The original agreement was superseded (in December 2017) by two agreements on predominantly the same terms as the original agreement, and the deposit paid under the original agreement was applied to the subsequent agreements.

9. At about the time they entered into the replacement agreements the parties agreed that F$500,000 of the deposit was to be paid out by the stakeholder to the defendant. Otherwise the agreements remained the same as the original agreement in all respects relevant to this proceeding.

10. The sale and purchase agreements provide (by clause 1.2(b) of the Condition Precedent section of the agreements) that they are not to become agreements for the acquisition of land until the condition precedent is satisfied. Until the condition precedent is satisfied, the only obligations that the parties have under the agreements are those recorded in the condition precedent, and to pay the deposit. These obligations require the vendor to obtain the approvals required for the agreement to become an agreement for the sale and purchase of land. The only obligations that the purchaser had were:

    i. to pay the deposit,

    ii. at the request of the vendor – to provide to the vendor all necessary information for, and reasonable assistance with obtaining the necessary approvals.

iii. Not to withdraw any application for, or do anything to compromise the obtaining of the approvals.

11. There is no suggestion that the purchaser was in any way in breach of these obligations. Nevertheless the vendor purported by letter dated 23 May 2019 to cancel the agreements and forfeit the deposit. The plaintiff says in its statement of claim that this termination and forfeiture contravened the terms of the agreements. The deposit has not been repaid.

12. Because no defence has been filed, the plaintiff's assertions in its statement of claim are uncontested.

ISSUES

13. I am satisfied that Mr Narayan for the plaintiff has correctly identified the issues that arise for decision, as set out in paragraph 4 above. Dealing with these:

A Is the plaintiff entitled to seek judgment ex parte in the absence of any defence filed by the defendant?

14. The plaintiff is anxious to ensure that any judgment it gets is obtained regularly and in compliance with the Rules, and so can be set aside only if the defendant is able to show that it has a substantial defence to the claim (in addition of course to explaining its delay in filing a defence and showing that no irreparable harm will be caused to the plaintiff by setting aside judgment).

15. The ex parte summons for judgment dated 10 September 2019 relies on Order 19 Rule 7 of the High Court Rules, which applies in a situation where the defendant has lodged a notice of intention to defend (incorporated in the defendant's Acknowledgement of Service dated 7 August 2019), but has failed to follow that up with a statement of defence.. Counsel for the plaintiff has referred me to the helpful discussion by Master Azhar in **Wati v Lal** [2017] FJHC 921 where in paragraphs 10-12 he lists the various methods whereby judgment by default can be entered/awarded in terms of the High Court Rules. I have also been referred to the decision of the Court of Appeal in **Kumari v Dass** [1999] FJCA 22 on the issue of whether the summons for judgment can be made

ex parte or requires further notice to be given to the defendant. The decision of the Court of Appeal included the following comments:

> *The application was heard on 21 November 1997; the appellant [the defendant] was present unrepresented. She admitted having been served with the summons [for judgment] and having had 'the material' explained to her. Why she had been served is not clear, but it is apparent that at the hearing the respondent [plaintiff] and the learned judge dealt with the application as though it was made, not pursuant to Order 19 Rule 7 by a summonsin an action commenced by writ of summons, but pursuant to section 169 of the Land Transfer Act (Cap.131), with the summons treated as though it was an originating summons. Any disadvantage resulting from the adoption of that course would have been suffered by the respondent and not the appellant, as it gave her a chance to be heard to which she was not entitled.*

16. This decision was referred to and followed by Hettiarachchi J in **Skerlec v Tompkins** [2012] FJHC 1111. These cases show that in a situation where the defendant has not filed a statement of defence, the defendant is not entitled to be served with the summons for judgment, and the plaintiff is entitled to seek judgment ex parte.

17. I am therefore satisfied that in the present case, where the defendant has been served with the writ of summons endorsed with a statement of claim, but has not served a defence in the proceedings, the plaintiff is entitled under O.19 r.7 to seek judgment on its claims without further notice to the defendant.

B. Are the orders sought (as listed in paragraph 3 above) orders that the court can and should make, notwithstanding that these are not identical to the remedies sought in the statement of claim.

18. However I also note in the Court of Appeal decision referred to above the following comment in relation to the filing of an affidavit by the respondent, in support of its application for judgment:

> *Although the learned judge was not entitled to rely on affidavit evidence for the*

purpose of giving judgment for the plaintiff, he was entitled to look at it when the appellant referred to what might possibly be a defence.

This comment reinforces what the rule states: that where an application under O19.r7 is made for judgment, the Court on the hearing of the application shall

give such judgment as the plaintiff appears entitled to on his statement of claim.

19. Thus the plaintiff having served his statement of claim and received no response, is entitled to the remedies that follow from the uncontested pleadings in the statement of claim, which should – as per the well understood l requirement for pleadings – set out the alleged facts that justify the remedies sought. When applying for judgment by default as in this case, the plaintiff is bound by what it has pleaded, because it is only those facts that the defendant is required to answer to. The plaintiff is not entitled to supplement the statement of claim, as it has in this case, by filing an affidavit that expands on the facts pleaded.

20. I am reinforced in this view by the wording of O.19. r.3 referring to judgment in the absence of a defence to a claim for unliquidated damages, and by the wording of other rules in Order 19 relating to other types of claim. In the case of rule 3 the rule provides that judgment is entered against the defendant for damages to be assessed and costs. Of course further evidence may be required in the assessment of damages, but judgment for liability for those damages is determined not on the basis of affidavit or oral evidence, but on the basis of what has been pleaded in the statement of claim This emphasises the importance of adequate pleadings. In the other rules of Order 19, the rules generally specify when affidavit evidence is required – see for example O.19 r.4 (2) and O19. R5 (1). Rule 7 on the other hand makes no reference to filing an affidavit.

21. With this in mind I have disregarded – for the purpose of deciding what remedies the plaintiff is entitled to in this case - the affidavit of the plaintiff's director, but have referred only to the statement of claim.

22. As stated, the plaintiff in its summons for judgment seeks the following orders, which I will deal with separately:

(1) A declaration that the defendant's termination of the [sale and purchase] agreements and purported forfeiture of the deposit was unlawful and in breach of the agreements

This replicates the orders sought in paragraph 1 of the prayer for relief in the statement of claim, and is in turn supported by the allegation in paragraph 14 of the statement of claim that:

> *On or about 23 May 2019, the Defendant unlawfully and in breach, inter alia, purported to forfeit the Plaintiff's deposit and terminate the agreements.*

Paragraph 14 also includes a list of particulars of this allegation, including reference to the lack of any consent by the Director or Minister of Lands to the transactions contemplated by the agreements, and to the defendant's letter of 23 May 2019 being issued in contravention of the agreement,. With the benefit of hindsight it may be that the plaintiff would now like to have pleaded this issue a bit more clearly, but the allegation – to which I remind myself the defendant has elected not to file a defence – is clear enough in the context of the whole of the statement of claim; i.e. that the purported termination by the defendant was in breach of the agreements. In the absence of a defence I am therefore satisfied that the plaintiff is entitled to an order in terms of this part of the application, and I make a declaration in terms of the statement of claim, and paragraph 1 of the summons for judgment.

(2) Judgment in the sum of F$1,650,000 against the defendant.

This is the amount of the deposit paid by the plaintiff, and is of course a liquidated amount (although for reasons that I don't fully understand it is pleaded in the statement of claim as special damages – I would have thought that it is merely a claim for recovery of an amount payable under the contract, rather than a claim for damages).

Counsel for the plaintiff properly pointed out that a potential issue in this case is the impact of the Crown Lands Act and the Land Sales Act 1974, which provide that any dealing or alienation of an interest in affected land without the necessary consents required will be 'null and void'. The question that therefore arises is

whether the agreement between these parties is enforceable to the extent that the plaintiff is able to recover its deposit on cancellation of the agreement. Fortunately that issue is answered by the decision of the Court of Appeal of Fiji in **DB Waite (Overseas) Ltd v Wallath** [1972] 18 FLR 141 dealing with earlier statutory provisions that now appear in the Acts referred to. In that case the court held that insofar as an agreement was conditional on the parties obtaining the necessary consents to an alienation of land, those preliminary parts of the agreement that dealt with the payment of the deposit, obligation to obtain the consents etc., were inchoate in character, and were not themselves void because of the lack of ministerial consent. This approach is one that has been followed by the courts here in a number of cases. One such is the decision of the present President of the Court of Appeal Calanchini J when he was in the High Court in **Resort in Park and Garden Ltd v Naidu** [2012] FJHC 883. That case dealt with an argument by a defaulting purchaser that the vendor was not entitled to forfeit the deposit following the purchaser failing to complete the agreement. The purchaser's argument in that case was that the whole agreement was null and void (and therefore could not give rise to forfeiture of the deposit) because the requirement for obtaining the ministers consents was not genuinely a preliminary condition, but was part of the same document which recorded the proposed transaction for which consent was required. The judge dealt with the argument by reference to the unreported Court of Appeal decision in **Port Denarau Marina Ltd v Tokomaru Ltd** (6/12/06 Appeal 26/2005) and commented at p13:

> *The point that is made by the Court of Appeal is that it is permissible for the parties, in the one document, to bind themselves to obtaining the consent of the Minister and upon that consent being obtained to set out the binding terms and conditions of the proposed sale and purchase contract. If that can be effected by stating general terms or by an annexed copy of the proposed formal contract, I see no reason why the predefined terms and conditions cannot be included in the body of one document. Surely the issue does not depend upon the number of documents but rather whether on a true construction of the one document the Minister's consent is a condition precedent to the formation or making of a contract to purchase land.*

As paragraph 12 of the statement of claim discloses, the agreement in this case did provide that apart from the clauses of what are referred to as the 'Condition Precedent', the parties agreement was not to become an agreement for the sale of land unless and until all the conditions were satisfied. In these circumstances I don't see any reason to deny the plaintiff relief on the basis of concerns about the legality of the agreement. In any case, even if the agreement was null and void, that would leave the vendor with no basis upon which to argue that it was entitled to retain the deposit.

I am therefore satisfied that the plaintiff is entitled to judgment for this sum against the defendant.

(3) An order that the sum of F$1,150,000 held in the trust account of Neel Shivam Lawyers as stakeholders be released and paid out to the plaintiffs solicitors AK Lawyers forthwith.

This is not a claim that was included in the statement of claim. At that point what the plaintiff was seeking was an injunction to prevent this money being paid to the defendant, but for the reasons stated above, that remedy is not now pursued.

O19. R7 provides as stated that on the hearing of an application for judgment in cases to which this rule applies, the Court:

> ... *shall give such judgment as the plaintiff appears entitled to on his statement of claim.*

I do not see on what basis under Order 19 the court can make orders that the plaintiff has not sought in the proceedings that have been served on the defendant. The basis for entering judgment under the various alternatives set out in Order 19 is that the defendant has had the opportunity to defend the claims against it, but has chosen not to do so. This reasoning does not apply to relief that the statement of claim does not seek. Instead what the plaintiff is really asking the court to do is make orders to enforce the judgment that the plaintiff is – as I have found – entitled to. I am also conscious of the fact that the orders sought here affect a third party, the stakeholder Neel Shivam Lawyers, which has not been served with or taken part in the proceedings. It might be that the

stakeholder has some sort of arrangement with the parties that entitles it to retain part of the money held for its costs. If so, making the order requested – which requires payment of the whole of the balance held by the stakeholder (see paragraph 10 of the statement of claim) – would frustrate that arrangement.

Accordingly I am not prepared to make this order, without hearing further from the parties. I have no doubt that the stakeholder, as a solicitor, can be relied upon to honour any undertaking it has given to hold the funds pending agreement or a court order for its disbursement.

(4) An order for costs of this action on a full solicitor/client indemnity basis to be assessed before the Master of the High Court.

I accept that the plaintiff is entitled to costs, and so make an order that costs be assessed before the Master. However nothing that I have seen or heard suggests that there is any basis for the court to direct the Master to award costs on a full solicitor/client indemnity basis as this part of the application seeks. A very quick review of the commentary to O62. r15 of the High Court Rules indicates that an award of costs on this basis is reserved for those cases where there has been '*reprehensible conduct by the party liable*'. There is nothing in the pleadings (or in the evidence that has been filed) to suggest that this applies here. To be fair to him, counsel for the plaintiff did not press this issue when I expressed doubt about the basis for such an order.

23. I make orders accordingly on the matters referred to above.

HIGH COURT OF FIJI LAUTOKA

Alan G Stuart
Judge

At Lautoka

23rd September, 2019