

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

CIVIL JURISDICTION

CIVIL CASE NO.: HBC 182 OF 2018

BETWEEN: **LARRY SIMON** Businessman and semi-retired pilot formerly of Namaka, Nadi and now of 353 Strathford BLVD Strathmore, Alberta Canada TIP 154 and now of 9A Maplewood Green, Strathmore Alberta, Canada, TIP 1G7.

PLAINTIFF

AND: **PACIFIC ISLAND AIR LIMITED** a limited liability company incorporated under the Companies Act of Fiji whose registered office is London Avenue Namaka, Nadi.

1st DEFENDANT

AND: **JOHN SCOTT CURRIE** Company Director and Businessman c-/Pacific Island Air Limited of London Avenue of Namaka, Nadi.

2nd DEFENDANT

Appearances : **Mr. Isireli Fa for the plaintiff**
 Mr. Peter Knight for the defendants.

Hearing : **Tuesday, 26th November, 2019**

Decision : **Friday, 12th June 2020.**

DECISION

(01) In this application, the plaintiff seeks summary judgment under Order 14 of the High Court Rules against the defendants in the sum of USD \$600,000.00. The amount claimed represents the balance sum owing to the plaintiff under an agreement.

(02) In the plaintiff's statement of claim it is averred that: (Reference is made to paragraphs 07, 14 to 22 of the statement of claim).

Agreement

7. *By an Agreement in writing signed by the plaintiff (as representing the 1st defendant), the 1st Defendant and the 2nd defendant on the 6th and 7th of January 2013, the shares and business assets of the 1st defendant was to be transferred to the 2nd defendant for consideration of USD \$16000000.00 (One Million Six Hundred Thousand Dollars) pursuant to the terms and conditions of the Agreement (hereafter the "Agreement").*
14. *That the plaintiff had caused the 1st defendant to comply with clause 4.2 of the Agreement.*
15. *That the plaintiff had on the 8th of January, 2013 caused all the shares in the 1st defendant to be transferred to the 2nd defendant.*
16. *That the 2nd defendant has paid the plaintiff the sum of USD \$100,000.00 (One Hundred Thousand Dollars) upon the signing of the Agreement pursuant to clause 2.2(a) of the Agreement and the sum of USD \$900,000.00 (Nine Hundred Thousand Dollars) pursuant to clause 2.2 (b) of the Agreement.*
17. *That the 2nd defendant upon signing of the Agreement on occurrence of the events in paragraph 14, 15 and 16 above took control of the 1st defendant by becoming a Director of the 1st defendant and appointing other Directors to it.*

Breach of Agreement

18. *That the 2nd defendant, upon the plaintiff complying with the conditions of the Agreement and upon the 2nd defendant taking control and possession of the 1st defendant refused and neglected to pay the plaintiff the final installment of USD \$600,000.00 (Six Hundred Thousand Dollars) due to the plaintiff under the Agreement.*
19. *By a letter dated the 10th of July, 2014 the plaintiff in accordance with clause 2.2 (c) of the Agreement, required the 2nd defendant to say the balance sum of USD \$600,000.00 [SIX Hundred Thousand Dollars] due and payable to the plaintiff from the sale of assets, business and shares of the 1st defendant as the plaintiff had performed all it was required to do under the Agreement.*
20. *The 2nd defendant by its letter of the 14th of July, 2014 refused to complete to pay the plaintiff the sum of USD \$600,000.00 (Six Hundred Thousand Dollars) due and owing to the Plaintiff under the Agreement.*
21. *The 2nd defendant are in breach of the Agreement by its failure to pay the plaintiff the balance of the Purchase price of USD \$600,000.00 (Six Hundred Thousand Dollars) due and owing to the plaintiff under the Agreement.*

22. *That by reason of the 2nd defendant's breach, the 2nd defendant is now in possession of and ownership of the 1st defendant's business and assets without making full payment to the plaintiff pursuant to the Agreement.*

(03) The defendants in their statement of defence and in the counter-claim deny the existence of any agreement for sale and purchase of shares in the first defendant company and claim that: (Reference is made to paragraph 14 of the statement of defence)

14. *As to paragraph 18 of the Claim, the Second Defendant admits that the sum of US \$600,000.00 has not been paid but says that it has not been paid for good reason, namely that the Plaintiff on behalf of the First Defendant has failed to satisfy the conditions of the said Agreement as stated in the Counterclaim hereafter appearing.*

(04) As to the claim for breach of contract the defendants deny. The defendants allege that; (Reference is made to paragraph 17 of the statement of defence)

17. *The Plaintiff, if he is the Vendor in the said Agreement, which is denied, is in breach of the said Agreement as follows:*

PARTICULARS

- a) *The Assets, as defined in the said Agreement, were not of merchantable quality or fit for the purpose as expressed or implied in the said Agreement.*
- b) *He failed to account for the sum of AUD\$20,390.00 that was held in Australia for and/or on behalf of the First Defendant and which was part of the property of the First Defendant which formed part of the sale.*
- c) *He failed to account for and/or pay the accrued holiday pay for employees of the First Defendant amounting to US\$24,709.77 which was liability of the First Defendant and should have been accounted for on settlement.*
- d) *He failed to account for and/or a pay for parts purchased for the First Defendant by the Second Defendant or his New Zealand company valued at US\$6,679.16 which did not form part of the sale.*
- e) *He took parts belonging to the First Defendant and which formed part of the sale valued at US\$30,433.93 and a Garmin 296 GPS belonging to the First Defendant and which formed part of the sale valued at F\$1,100.00.*

- (05) The whole purpose of a summary judgment procedure is to obtain a quick judgment, where there is no defence to a claim.

The Court of Appeal in Carpenters Fiji Ltd – vs- Joes Farm Produce Ltd Civil Appeal Number ABU 0019/2006 comprehensively listed such principles at page (9) and (10) of the judgment as follow:-

“Here is it timely to state some of the well-established principles relating to the entry of summary judgment;

(a) The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiff’s claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff’s claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.

(d) Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v. Green (1958) 2 QB 9 at page 29 per Sellers LJ.

(e) Likewise where a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action, and connect with the grounds of defence, the order should not be for Judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend, even if the defendant admits whole or part of the claim; Morgan and Sons Ltd v.S.Martin Johnson Co (1949) 1 KB 107(CA).

- (06) **The burden of proof lies with the claimant to satisfy the court that the respondent has no defence which has any realistic prospect of success.** Once a claimant establishes the claim, at least the evidential and persuasive burden, shifts to the respondent resisting the application. **Thomas J in Hibiscus Shopping Town Pty Ltd –v- Woolworths Ltd [1993] FLR at 109,** concisely summed up the burden as follows:-

“The legal burden of proof is borne by this plaintiff throughout the application. However, when he has established a prima facie right to an order, a persuasive or a evidential burden shifts to the defendant to satisfy the court that judgment should not be given against him”.

- (07) As noted in paragraph (3) above, the defendants in their statement of defence deny the existence of any agreement for sale and purchase of shares in the first defendant company.

Besides, a number of defences have been raised in the statement of defence. They are;

- (A) The plaintiff was not the owner of all the shares in the first defendant company or a majority of shares. In paragraph one (01) of the statement of defence, it is pleaded that;

1. *The Second Defendant admits that in or about 2012 the First Defendant owned and operated a business as an airline in Fiji and was duly licensed by the Civil Aviation Authority of Fiji to operate such a business but otherwise denies the contents of paragraph 1 of the Statement of Claim (“the Claim”) and says that prior to 8 May 2013 the shares in the First Defendant were owned as follows:*

- a) *The Plaintiff as to 22,000 shares of \$1.00 each.*
- b) *North Cariboo Air International Corp as to 20,000 shares of \$1.00 each*
- c) *Robert Fremlin as to 2,000 shares of \$1.00 each.*

- (B) * Schedule ‘A’ of the agreement was not attached

* The parties have agreed to submit to the jurisdiction of the Courts of New Zealand.

In paragraph four (4) of the statement of defence it is pleaded that;

- (4) *As to paragraph 4 and 5 of the Claim, the Second Defendant says that by an Agreement for Sale of Business Assets dated 28 December 2012 (“the said Agreement”) between the First Defendant as vendor, the Second Defendant as purchaser and the Plaintiff as guarantor, the First Defendant agreed to sell to the Second Defendant the Business and Assets as defined in the said Agreement for the total sum of US\$1,600,000.00 payable as provided for in clauses 2.1, 2.2 and 2.3 of*

the said Agreement but otherwise denies paragraphs 4 and 5 of the claim and further says;

- a) *Schedule A of the said Agreement which was supposed to list the Plant & Equipment forming part of the sale and as defined in the said Agreement was not included in or attached to the said Agreement.*
- b) *Clause 15.2 of the said Agreement provides the said Agreement shall be governed by and construed in accordance with the laws of New Zealand and the parties agree to submit to the jurisdiction of the Courts of New Zealand.*

(C) The plaintiff, if he is the vendor in the said agreement, which is denied, is in the breach of the agreement as follows; (paragraph (17) of the statement of defence)

17. *The Plaintiff, he is the Vendor in the said Agreement, which is denied, is in breach of the said Agreement as follows:*

PARTICULARS

- a) *The Assets, as defined in the said Agreement, were not of merchantable quality r fit for the purpose as expressed or implied in the said Agreement.*
- b) *He failed to account for the sum of AUD\$20,390.00 that was held in Australia for and/or behalf of the First Defendant and which was part of the property of the First Defendant which formed part of the sale.*
- c) *He failed to account for and/or pay the accrued holiday pay for employees of the First Defendant amounting to US\$24,709.77 which was liability of the First Defendant and should have been accounted for on settlement.*
- d) *He failed to account for and/or a pay for parts purchased for the First Defendant by the Second Defendant or his New Zealand company valued at US\$6,679.16 which did not form part of the sale.*
- e) *He took parts belonging to the First Defendant and which formed part of the sale valued at US\$30,433.93 and a Garmin 296 GPS belonging to the First Defendant and which formed part of the sale valued at F\$1,100.00.*

(08) The plaintiff Larry Simon has stated in paragraph (28) of his affidavit in support that “*the*

1st and 2nd Defendants have no defence to the Plaintiffs Statement of Claim". The mere statement in the plaintiff's affidavit that '*the 1st and 2nd Defendants have no defence to the Plaintiffs statement of Claim*'; (1) cannot authorize the court to allow judgment to be entered against the defendants (2) is not sufficient to deprive the defendant of the right to put the plaintiff to his proof, by parol evidence or by documents, that he has a claim against the defendants. **It is an important principle of the summary judgment procedure that the onus remains on the plaintiff throughout to establish that the defendants have no defence.** The court is not satisfied on this point because the affidavit of the plaintiff Larry Simon filed in support of the application for summary judgment makes no reference to the number of issues raised in the statement of defence by both defendants. The plaintiff has not filed affidavit evidence showing that the issues raised in the statement of defence are devoid of realistic prospect of success. The plaintiff has failed to discharge the burden of proof on affidavit evidence. That being the case, the issues must be tried because the court needs to have the opportunity of seeing what is the truth of the matter. With respect, the submissions made from the bar table is not evidence.

The defendant does not have to prove its defence in a summary judgment application.

- (09) In this context the following passages from the judgment in **Powszechny Bank Ziwakowy W.Polsce v Paros** (1932) 2 K.B. 353 are worth noting:

Greer L.J. at p.359 said:

"It has long been the rule that in proceedings under Order XIV, what the Court, whether this Court or the King's Bench division, has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in the plaintiff's favour, it must order a trial."

He goes on to say that:

"All the defendant need say is that he requires the plaintiff to prove his case, and the law puts upon the plaintiff the onus of proving it. When the defendant says he does not admit the claim he need not carry the case any further than to say: 'There is triable issue and I want to have it tried'."


- (10) If the allegations contained in the statement of defence and the counter claim are in general terms and insufficient, the plaintiff should have made an application pursuant to Order 18, rule 11 of the High Court Rules for further and better particulars. The plaintiff has not done so.

Conclusion

I hold that the plaintiff has failed to discharge the burden of proof that the defence is devoid of any realistic prospect of success. As discussed above, there are number of significant defences raised in the defence, which warrants a trial. Accordingly, the application is dismissed with costs in cause. However, I will make an order for speedy trial.



**At Lautoka,
Friday, 12th June, 2020**


.....12/06/2020
Jude Nanayakkara
[Judge]