In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 78 of 2017

Dr Richard Irving Seidman & Mrs Julie Seidman

Plaintiffs

v.

Pacific Building Solutions Limited

Defendant

Closing submissions filed by the plaintiff on 24th February,2022
Closing submissions filed by the defendant on 25th February,2022

Ruling

1. The defendant moves for stay pending appeal my judgment ordering the defendant to pay the plaintiffs damages for failure to construct a safe and structurally sound residence.

2. The affidavit in support states that the defendant's appeal will be rendered nugatory and it will suffer irreparable damage, if stay pending appeal is not granted for the following reasons. If the Judgment is executed, the defendant would lose access to a substantial amount of cash flow to operate its business. The defendant employs approximately 600 staff and workers, including sub-contractors. To its knowledge, the plaintiffs, have no other assets in Fiji besides the subject property of litigation. The plaintiffs did not accept the plan of remedial work, which would have resolved the issues or many of the issues, and to mitigate their alleged loss. The plaintiffs are citizens of the US. It will be difficult if not possible to recover any moneys paid to the plaintiff in the event of a successful appeal. Fiji and USA have no reciprocal enforcement arrangement. The plaintiffs are not gainfully employed.

3. The first plaintiff, in his affidavit in opposition states that there is a real risk that the judgment will be rendered hollow, as there is a significant chance that the defendant will not be able to pay. The plaintiffs are in a much better position financially than the defendant. The plaintiffs own the land (three adjacent lots) and house built by the defendant free and clear of debt. The plaintiffs have since purchased a new residential lot in Taveuni for USD 165,000.00 which is not mortgaged. The plaintiffs have had a substantial residence built on that lot at a cost of approximately FJD 1,164,983.00.The plaintiffs estimate the value of their assets in Fiji at FJD 1,889,655.00, which is more than the judgment sum.

4. The first plaintiff further states that the defendant has failed to place any evidence of its financial position. The defendant has not provided a list of its assets and liabilities nor income/loss statement. The consolidated financial statements provided are not authenticated, neither by its Directors nor Accountants explaining various entries such as the large negative cash amount. The defendants have given a substantial mortgage debenture to ANZ Bank creating a charge over Account No. 12885376 in a sum of $6,043,000.00. The plaintiffs are not aware if the defendant owns any assets.

5. The law on stay pending appeal was summarised in ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd***,(Civil Appeal ABU0011.04S 18th March, 2005) as follows:

> *a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
> *b) Whether the successful party will be injuriously affected by the stay.*
> *c) The bona fides of the applicants as to the prosecution of the appeal.*
> *d) The effect on third parties.*
> *e) The novelty and importance of questions involved.*
> *f) The public interest in the proceeding.*
> *g) The overall balance of convenience and the status quo.*

6. The first test provides that the court must consider whether the appeal will be rendered nugatory if no stay is granted, albeit this factor "*is not determinative*".

7. The Court of Appeal in ***AG and Minister of Health v Loraine Die,*** (Misc. No 13 of 2010) stated:

> ***The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal :..That hurdle is higher than that of chances of success.*** (emphasis added)

8. Calanchini P in ***Newworld Ltd v. Vanualevu Hardware (Fiji) Ltd*** [2015] FJCA172; ABU76.2015 (17 December 2015), at paragraph 16 stated:

> *The respondent's principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This court is required to consider the bona fide of the appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail it is usually sufficient if an appellant has an arguable case.* ***If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused.***(emphasis added)

9. The defendant's grounds of appeal read :

a. *That the learned trial Judge erred in law in accepting the report (Plaintiff's Exhibit 31) tendered through witness Nathan Kirk when the same had not been properly disclosed to the Appellant. In particular the learned trial judge failed to consider the argument that the report had not been given to the Appellant for review and rebuttal by having its own expert peruse, examine and critique the report itself. There was also no acknowledgement, even at the pre-trial conference stage of the report's existence. The pre-trial conference minutes as filed did not reflect the report and the objection raised at the hearing to production of the report should have been upheld.*
b. *That the learned trial Judge erred in law and in fact and disregarded the evidence presented by two qualified and well trained builders of long standing who had testified that the defects to the building were relatively minor and certainly rectifiable and in fact some of the defects had been rectified, particularly as the respondents had called no builder as a witness or an expert witness relative to construction at all.*
c. *That the learned trial Judge erred in law and in fact in failing to properly consider the evidence of Vijay Krishnan as the engineer certifying the property for cyclone worthiness, particularly as the structure withstood at least two major cyclonic events.*
d. *That the learned trial Judge erred in law and in fact by wholly ignoring Defendants exhibit 1, a detailed remediation plan certified by a registered engineer and that was widely referred to and relied upon the Appellant in evidence to show that it had taken considerable trouble to remediate the issues with the structure.*
e. *That the learned trial Judge erred in law and in fact in failing to consider the concession made by the Respondents' engineer that in fact structure could be remediated and that he would unaware as to the cost or mechanism for remediation involved, not being a builder with a clear admission that a builder could explain the methodology for remediation. In particular the learned trial judge should have given little or no weight to the opinion that the building had to be pulled apart when he was not actually an expert in regard to building work and its conduct and as such in no position to express that opinion.*
f. *The learned trial Judge at paragraph 70 of his Judgment misdirected himself when the matters mentioned were actually admittedly fixable and relatively minor remediation works per the builders' evidence and that in fact some of the defects had been remediated (DW1 & DW2).*
g. *That the learned trial Judge erred in law and in fact in failing to consider the evidence presented by DW2 that substantial work had been conducted towards remediating the structure including building a perfectly inhabitable container cottage and the consequences of that and also failing to consider the unrebutted evidence that the remediation work was constantly interfered with by the first named Respondent who refused to occupy the container cottage thus preventing the remaining remediation works from being completed.*

h. *That the learned trial Judge erred in law when circumventing the defects liability clause in the contract (Plaintiff's Exhibit 26) whereby clause 17 (1) clearly limited such period to 6 months whereas it had only been after over three years that the need for remediation of defects had been brought to the attention of the Appellant.*

i. *The learned trial Judge erred in law and misapplied the authorities cited at paragraph 64 and 65 of his Judgment in that notwithstanding that a breach of contract claim could be possible he had actually gone on the assess special damages as the full contracts sum to be repaid when that was unreasonable and not supported either by the matters adduced at trial or by any authority relied on in the Judgment.*

j. *The learned trial Judge erred in law and in fact in failing to properly consider the effect of the completion certificate issued by Taveuni Rural Local Authority and presented as an exhibit at the hearing and the effect of the cyclone certificate and the effect of the fact that insurance cover had been secured based off the completed house which should have led to the conclusion that the house had been constructed, albeit possibly with some remediable defects, and was perfectly habitable. In particular there had been no evidence presented that any of these certificates had been removed or withdrawn, or that the house was uninhabitable or unsafe to occupy, but in fact there was evidence that the Respondents were occupying the house.*

k. *The learned trial Judge erred in law and in fact and misapplied the authority cited by him at paragraph 166 of the Judgment to wholly ignore the Appellant's contention that if damages were awarded the Respondents would be unjustly enriched when that authority clearly only relates to windows and not an entire residence in which the Respondents actually occupied for many years based on their own evidence and without any evidence by way of document being presented to show the house was not occupiable.*

l. *The learned trial Judge erred in law and in fact when he failed to conclude that the engineer presented by the Appellants had certified the structure as safe, that the certificate had never been revoked or withdrawn and that many of the matters raised in paragraph 76 had no relevance to the issuance of a Cyclone Certificate that deals with the structural integrity of the building.*

m. *The learned trial Judge erred in law and in fact and misconstrued the effect of the Taveuni Rural Local Authority Completion Certificate and underemphasized the clear evidence of PW2 that inspections had actually been carried out and approval granted for the completed building notwithstanding the allegation that this was done based off a letter from the builder conducting the construction.*

n. *The learned trial Judge erred in law and in fact and misconstrued the effect of the geotechnical survey when no evidence was presented from either party to the case that there was any issue arising out of the said survey that could or should have led to a conclusion that the ground upon which the structure was built was not suited. In addition the learned trial Judge erred in determining based off no evidence presented by either party that the geotechnical survey actually was not for the site of the building.*

o. *The learned trial Judge erred in law and in fact and misapplied the authority relied on at paragraph 111 of his Judgment in that he failed to consider that the Appellant had south to remediate the situation, began remediation work with considerable cost associated with that in the vicinity of $200,000 and the Respondents had failed in their part to mitigate their claimed loss in any way by co-operating for the remediation work to be done, which on its fact is contrary to the stated authority.*

p. *The learned trial Judge erred in law and in fact and misapplied the authorities cited by him at paragraphs 149 and 150 of his Judgment when those authorities should have led to the conclusion that damages were awarded in respect of matters in those authorities that were wholly different and thus distinguishable from the matter at hand. In particular the* ***Bryne v Hill*** *authority was for a portion of a larger structure and not the whole structure and the outcome was damages, not the full contract price. In* ***Bellgrove v Eldridge*** *the contractor had substantially departed from the specifications on the composition of concrete in the foundations when that obviously was not in any way similar to the matter at hand.*

q. *The learned trial Judge erred in law and in fact when relying on the authority cited at paragraph 160 of his Judgment when that authority should have led to the conclusion that the more appropriate remedy would have been to potentially award damages that were reasonable and proportionate to the cost of remediation, which the cited authority itself concludes and related only to cladding work and not to the entire structure as in the case at hand. Evidence lead, particularly from the quantity surveyors, suggested that a more appropriate award, if any, would have been a fraction of the sum awarded.*

r. *The Appellant had discovered some good time after the matter concluded and submissions had been filed that the engineer firm engaged by the Respondents as their expert witness was also a client of the Respondents' solicitors and it is a clear conflict of interest not to have disclosed that fact prior to the hearing of the High Court action or in any correspondence pertinent to the expert evidence, which should not then have made possible for Respondents' exhibit 31 to be used in evidence.*

s. *The learned trial Judge erred in law and in fact when awarding damages for personal injury to the 2nd named Respondent when there was no evidence of any such injury presented by way of medical report.*

10. On the first ground of appeal, I granted leave for the Report to be produced, as I found that it was disclosed to the defendant seven and a half months before the date of trial.

11. With respect to the contention that the defects to the building were minor, DW1,(*Project Manager of the defendant*) in his evidence said that there was substantial remediation to be done. The defendant proposed a 30 item action plan with detailed Plans covering six phases of remediation works, as stated in the fourth ground of appeal. PW3, the Structural Engineer called by the plaintiff said that it would be difficult, expensive and tricky to remediate the poles and footings. It would be easier to build a new house than remediate. DW3, (*V.Khrishnan, Structural and Geo tech Engineer*) said that appropriate additional works to the remedial work were needed. He had reservations on the remediation plan.

12. The defendant argues that I misapplied the case of ***Bellgrove v Elridge,*** [1954] HCA 36. I found the facts in that case closely parallel the instant case. In that case too, the builder had departed from the specifications. I hence held that the plaintiffs was entitled to have a residence constructed in accordance with the building Contract and specifications. The construction was fundamentally defective.

13. It is also argued that a cyclone certificate was issued and the structure withstood two major cyclones. I found that the two cyclones did not affect the residence of the plaintiff. DW3 said that a cyclone certificate was issued for insurance purposes on a "*visual inspection*". The foundation could not be inspected, as the structure was built.

14. Next, it is contended that I misconstrued the effect of the Taveuni Rural Local Authority, (TRLA) Completion Certificate The building inspector for the TRLA established that the building permit was granted without any structural engineering plans being submitted, the necessary sequential inspections were not conducted and the Certificate of Completion was given without any Engineer's certificate. The TRLA raised concerns that they had not carried out all the stages of inspection and only received the architectural Plans. DW3 said that there were no stamped signed structural engineering drawings for the residence.

15. The defendant had got a geo technical survey done on the adjoining Lot. I found that the ground had not been compacted in accordance with the survey.

16. The defendant argues that the plaintiffs sought remediation of defects after three years, when the defects liability clause was limited to 6 months. I held that the defects liability clause applied to defects which appear during the defect liability period. The defects, in particular, the condition of the poles, foundation, footings rafters and sissilation were not apparent during the defect liability period.

17. The evidence was that the container cottage was not completed.

18. The alleged conflict of interest that the engineer firm engaged by the plaintiffs as their expert witness was also a client of their solicitors, as contended in the penultimate ground of appeal is in my view, without merit.

19. It is not in dispute that the ceiling collapsed. I was satisfied that the plaintiff befell injury and awarded $3000.00 for pain and suffering.

20. In my judgment, the grounds of appeal do not have strong prospects of success. The defendant have not presented an arguable case.

21. I am not convinced that the proposed appeal will be rendered nugatory, if a stay is not granted.

22. In my view, the grounds of appeal do not raise novel questions nor issues of public interest.

23. I do not find any special or exceptional circumstances in this case.

24. In ***Linotype-Hell Finance Ltd v Baker***, (1992) 4 AII ER 887 at pg 888 Staughton LJ. stated:

> *It seems to me that, if a defendant can say that* ***without a stay of execution he will be ruined and that he has an appeal which has some prospects of success, that is a legitimate ground for granting a stay of execution***. (emphasis added)

25. In my view, the defendant will not face irretrievable loss if a stay is not granted.

26. The defendant has not provided a list of its assets. The plaintiffs, on the other hand has presented a list of their assets in Fiji.

27. I am satisfied having considered all the factors and circumstances that the balance of convenience favours the plaintiff.

28. ***Orders***

    a. The defendant's application for stay is declined.

    b. I make no order as to costs.

A.L.B. Brito-Mutunayagam
JUDGE
18th April , 2023