IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0011 OF 2003S
(High Court Civil Action No. HBC 341 of 2002)

BETWEEN:

NBF ASSET MANAGEMENT BANK

Appellant

AND:

TURNER RESORTS INTERNATIONAL COMPANY LIMITED

Respondent

Coram: Barker, JA
Tompkins, JA
Pathik, JA

Hearing: Wednesday, 19th and Thursday, 20th November 2003, Suva

Counsel: Mr. W.W. Clarke for the Appellant
Mr. I. Fa for the Respondent

Date of Judgment: Wednesday, 26th November, 2003

JUDGMENT OF THE COURT

On 11th April 2003, Scott J entered summary judgment in favour of the Respondent against the Appellant in the sum of $500,000.00.

The proceedings in the High Court arose out of a "Deed for Sale and Purchase of Debt and Securities" dated 1st June 2001 ("the Deed") whereby the Appellant, as vendor, agreed to sell and transfer to the Respondent, as purchaser, a number of choses in action, debts, mortgages, guarantees, indemnities and other securities and obligations as specified in the Deed. The Purchase Price was $7.25 million, payable as to $500,000 on or before 25th June 2001 and $6.75 million on

or before 1st August 2001. The Deed was effected pursuant to the National Bank of Fiji Restructuring Act 1996. The first payment of $500,000 was duly made by the Respondent.

A number of approvals were necessary for a contract of this sort. They were indicated in Section 6 of the Deed which also contains other important provisions. Section 6 reads as follows:

"6. CONDITIONS PRECEDENT

6.1 This Deed is conditional upon:

(a) The receipt by the Purchaser of the Fiji Trade and Investment Board and the Reserve Bank of Fiji approvals to complete this transaction;

(b) The receipt by the Purchaser of a copy of the consent of the Native Land Trust Board to the transfer by the Vendor to the Purchaser of the Mortgages described in Schedule One and the Purchaser agreeing to an acceptable position with the Native Land Trust Board in respect of the terms contained in Native Lease 20436;

(c) The receipt by the Purchaser of the permission of the Minister of Finance to the transfer by the Vendor to the Purchaser of the Mortgages and the Debentures described in Schedule One;

(d) The Purchaser completing a due diligence review of the Debt, the Securities and the Property which reveals a situation the Purchaser regards as satisfactory in its entire discretion.

6.2 *Purchaser's Benefit*

The conditions in clause 6.1 ("Conditions Precedent") are inserted for the sole benefit of the Purchaser and may only be waived or approved in its discretion.

6.3 *Failure of Condition*

In the event that any Condition Precedent is not satisfied within the Conditional Period, this Deed shall be of no further effect, the Vendor shall return the Deposit to the Purchaser and this Deed shall terminate on the conditions set out in clause 10.8.

6.4 *Purchaser's Authority re Approvals*

The Vendor authorises the Purchaser to apply for and obtain at the Purchaser's expense in all things the consents and permissions detailed in clause 6.1.

6.5 *Commercial Endeavours*

The parties agree to use commercial endeavours to ensure that the Conditions Precedent are satisfied within the Conditional Period.

6.6 *Advice of Satisfaction of Conditions*

The Purchaser shall fax to the Vendor with the Purchaser's advice of the satisfaction of the conditions precedent as it becomes aware of their having been satisfied and any such advice shall be conclusive evidence against the Purchaser of its truth.

6.7 *Vendor's Consideration*

The Vendor shall reasonably consider any request by the Purchaser for an extension of the Condition Period provided the Purchaser shows reasonable evidence of its efforts to satisfy the Conditions Precedent."

The expression "conditional period" was not defined in the deed which Scott J described, aptly, as "not very well drafted". Counsel agreed, however, that the expression referred to the time between the signing of the deed and the date when the balance of the purchase price fell due in terms of the Deed i.e. 1st August 2001 or any later extension date granted by the Appellant.

Correspondence between the parties' solicitors after 1st June 2001 showed that the Appellant had agreed to an extension of the settlement date to 29th August 2001. The Appellant claimed in the correspondence that the Respondent had not used commercial endeavours to ensure that the Conditions Precedent would be satisfied within the 'conditional period.' The Respondent countered by detailing the endeavours it had made and was continuing to make in that regard. Whether or not the Respondent had made reasonable commercial endeavours as Clause 6.3 required of it obviously could not be decided on a summary judgment application and the Judge did not attempt the exercise.

On 27th August 2001, the Respondent's then solicitors wrote to the Appellant's then solicitors in these terms:

> *"RE: TURNER RESORTS – ACQUISITION OF OFFSHORE RESORTS LTD – DEBT & SECURITIES*
>
> *Further to our conversation of even date, we confirm your communication that settlement will not occur tomorrow (28/8/01).*
>
> *As indicated to you, the approval sought by your client, copies of which have been forwarded to us, do not satisfy the requirements laid out in the contract. This is because the approval sought, deals only with the purchase of the resort. Our agreement relates specifically to the acquisition of Debt and Securities not the purchase of the resort.*

We have therefore not been furnished with satisfactory evidence indicating an expeditious pursuit of required statutory approvals regarding our contract.

Please be advised that if settlement does not occur by Wednesday 29th August 2001, our client will treat this contract as being at an end. As agreed, your client will forfeit its deposit as compensation for its loss of opportunity for the duration of the contract to termination."

On 29th August 2001, the Respondent's then solicitors replied with a detailed summary of actions taken by the Respondent towards fulfillment of the 'conditions precedent' clause. The letter opined that every effort was being made to obtain the necessary approvals. It did not, in as many words, seek a further extension of time for settlement.

On the same day, the Respondent's then solicitors replied by fax in the following terms. This, and their previous letter quoted above, were quite wrongly tagged 'without prejudice' – a greatly misunderstood term.

"RE: TURNER RESORTS INTERNATIONAL CO. LTD.

We refer to your letter of 29th August 2001. We have referred the said letter to our client and advise that we do not accede to a further extension of the completion date. As you will note, the agreement was executed on 1st June 2001 and was to be completed on or before 1st August 2001. An extension was granted to today (29/8/01) and it would appear from your letter that you cannot advise of a proposed settlement date.

Our client is firmly of the view that your failure to obtain the requisite approvals is directly a result of your client's inability to raise the

finance for this transaction. Your client has not used commercial endeavours to obtain the approvals nor has it satisfied us that it has pursued the same with any vigor (sic). Our position is that your client has deliberately delayed obtaining and facilitating the approvals because it cannot obtain the finance. The contract is not subject to finance. If this matter is to proceed to litigation, we will subpoena all banking and financial institutions in Fiji including Westpac Banking Corporation to demonstrate this fact. Your client cannot rely on its deliberate default.

Please do not hesitate to contact the writer should you have any queries."

No settlement of the transaction was effected by 29th August 2001 and no further extension of time was given by the Appellant. However, the parties continued to negotiate against the background of an interim injunction application filed in the High Court by the Respondent's then solicitors on 30th August 2001 seeking to restrain the Appellant from selling or dealing with all the properties etc. assigned by the Deed. The application was granted ex parte with a return date of 17th September 2001. The practical effect of this ex parte order was to extend the completion date.

On 24th September 2001, the High Court, after hearing argument, extended the injunction, but only on terms that the Respondent pay the balance of the purchase price – ($6.75 million) into Court within 14 days. This did not happen and, consequently, the interim injunction was dissolved.

The Court does consider that the Respondent's misconceived injunction application can alter the rights and obligations of the parties as set out in the Deed. It is difficult to see how the Court could have been expected to have varied the

parties' bargain by extending the settlement date without the Appellant's agreement to that course.

Counsels were of the view that negotiations terminated around mid-October 2001.

In August 2001, the Respondent and persons associated with it had filed caveats over the registered mortgages which were included in the assets being assigned under the Deed. On 16th August 2002, the High Court ordered by consent that the caveats be withdrawn and that the $500,000 'deposit' paid by the Respondent to the Appellant under the Deed be paid into Court pending final determination by the Court of the summary judgment proceedings or the parties' agreement to withdraw the funds. The money was paid into Court on 16th August 2003 and continues to be held in an interest-bearing account.

The only other provision of note in the Deed is Clause 10.8 which provides:

"10.8 Termination

> *Either party may terminate this agreement on failure of the other party to comply with terms and conditions of this agreement however, in the event that such default is committed by the Purchaser, the Vendor is not obliged to return any payments already made.*
>
> *Where this Deed provides for termination on the conditions in this clause 10.8, the conditions of termination are:-*
>
> *(a) each party is released from its obligations to further perform the terms of this Deed except for clause 10.7;*

(b) *each party releases the other from any claim that party may have against the other party; and*

(c) *the Purchaser must return to the Vendor all documents and other materials in any medium in its possession which contain information relating to the Debts and the Securities.*

(d) *The Vendor must return to the Purchaser all or any payments already made in respect of this agreement in the event that the "force majeure" clause Clause 10.15) is applicable."*

The term "deposit" is not defined in the Deed, but counsel agreed that it must refer to the $500,000 part-payment. No formal notice of termination was given by the Appellant to the Respondent. There was a threat to do so in the Appellant's letter of 27th August 2001 but nothing more.

High Court Judgment

Scott J granted summary judgment to the Respondent, holding that there was no defence to its claim for the return of the 'deposit'. He held that the whole agreement was void by virtue of Section 12 of the Native Land Trust Act (Cap.136) in that it clearly amounted to a dealing in native land without the consent of the Native Land Trust Board "first had and obtained". His Lordship cited the well-known Privy Council decision in ***Chalmers v. Pardoe,*** [1963] 3 ALL ER 552.

This Court was of the preliminary view that Scott J was correct in this finding. However, counsel for the Appellant drew the Court's attention to a judgment of Gates J delivered in the High Court on 12th November 2003 in ***Naulivou v. Native Land Trust Board*** (Civil Action HBC 0069.94L). There, Gates J. held that the land

title to Vomo Island (including the islands of Vomolevu and Vomolailai) is freehold. Counsel in this present appeal were unable to obtain a copy of the registered title named by Gates J in his judgment. However, they were fairly sure that the mortgages included in the Schedule to the Deed were registered over the title to Vomo Island. If Vomo Island were freehold, then Native Land Trust Board consent to the transaction might not have been necessary. Possibly, the parties may have been labouring under a mutual mistake of law in thinking that such consent was required.

Mr. Fa, counsel for the Respondent, responsibly acknowledged that, given this very recent development, he would not rely on the principal ground for summary judgment which found favour in the Court. Scott J., of course, had no evidence that the status of the title to Vomo Island was other than subject to the provisions of the Native Land Trust Act.

Likewise, counsel for the Respondent did not seek to mount any argument based on the proposition that the $500,000 retained by the Appellant, was in the nature of an illegal penalty. The proposition could require the hearing of evidence, as could the allegedly changed status of the Vomo Island title. The need to hear evidence would make these aspects of the case unsuitable for summary judgment. However, the summary judgment procedure can be used where, as here, the Court has to make a determination on liability based on an interpretation of an agreement.

Scott J found that clause 6.3 of the Deed specifically provided for the return of the 'deposit', following failure of a condition precedent. He considered that, if clauses 6.1(a), (b) and (c) had not been fulfilled by 29th August 2001, whether or not the Respondent had caused or contributed to the failure, the Respondent was entitled to a return of the deposit. He applied the contra proferentem rule when construing the Deed in dealing with a submission that Clause 10.8 enabled the Appellant to retain the deposit.

Reasons for Decision:

Counsel for the Appellant relied on Clause 10.8 which, as the Judge pointed out, may conflict with Clause 6.3 which unequivocally provides for the return of the 'deposit' should the conditions precedent be unfulfilled.

The Court does not accept this argument. Clause 10.8 does not apply and does not give rise to a conflict with Clause 6.3 because there was no notice of termination by the Appellant – just the threat of one in the letter from Appellant's solicitor of 27th August 2001 which was not followed up in their letter of 29th August 2001. This letter seems to allege, inter alia, a lack of proper diligence by the Respondent but invites queries of the author. It is not an unequivocal notice of termination.

Clause 6.3 is quite unequivocal that the deposit is returnable in the event that any Condition Precedent is not satisfied within the Conditional Period. As Scott J pointed out, the reason for any Condition Precedent not being satisfied is immaterial. If there is a conflict with Clause 10.8, the Court considers the Judge correctly construed any ambiguity in the Deed against its proponent – i.e. the Appellant.

Consequently, the Appeal is dismissed.

Result:

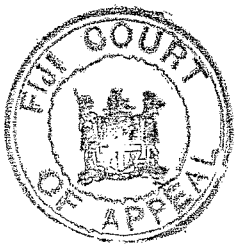
1. Appeal dismissed – summary judgment in favour of Respondent affirmed.

2. $500,000 held in High Court be paid out to the Respondent forthwith together with all interest accrued.

3. Interest on $500,000 at 7% from 16th October 2001 to 16th August 2002 is to be paid by the Appellant to the Respondent.

4. Costs $2000 to Respondent plus reasonable disbursements as approved by the Registrar.

Barker, JA



Tompkins, JA

Pathik, JA

Solicitors:

Howards, Suva for the Appellant
Fa & Company, Suva for the Respondent

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