

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CIVIL APPEAL ABU 27 of 2021
High Court Civil Case No. HBC 241 of 2014

BETWEEN: **J. SANTARAM (STORES) LIMITED** a limited liability company
duly incorporated in Fiji having its registered office at 40 Robertson
Road, Suva, Fiji
Appellant

AND: **DEEP SEA HOLDINGS LIMITED** a limited liability company
duly incorporated in Fiji having its registered office as C/- Naidu
Law, Level 2, Central Rentals Building, 293 Victoria Parade, Suva,
Fiji
Respondent

Coram: A Qetaki, JA
W Morgan, JA
P Andrews, JA

Counsel: Mr R Singh and Mr S A Koya, for the Appellant
Mr R K Naidu and Mr S Ratoto, for the Respondent

Date of Hearing: 14 May 2024

Date of Judgment: 30 May 2024

JUDGMENT

Qetaki, JA

[1] I have considered the judgment of Andrews, JA and I agree with it, the reasoning and orders.

Morgan, JA

[2] I have read and concur with the judgment of Andrews, JA.

Andrews, JA

Introduction

[3] The appellant, Santaram (Stores) Limited (“Santaram”) has appealed against the judgment of Justice Riyaz Hamza, given in the High Court at Suva on 22 February 2021 (“the High Court judgment”).¹ The High Court Judge dismissed an appeal brought by Santaram against the judgment of Master Vishwa Dutt Sharma (as he then was), given in the High Court at Suva on 19 May 2015 (“the Master’s judgment”).²

[4] The appeal to this Court is, therefore, a second appeal. Such an appeal is governed by s 12(1)(c) of the Court of Appeal Act 1949 which provides, as relevant:

PART [3] – APPEALS IN CIVIL CASES

12.–(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal–

...

(c) on any ground of appeal involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal.

Background

[5] On 8 October 2013 Santaram and Deep Sea entered into a Sale and Purchase agreement, pursuant to which Santaram agreed to sell, and Deep Sea agreed to buy, a property at Rodwell Road, Suva (“the SPA”). The following clauses in the SPA are relevant to the appeal:

...

3.0 Settlement date

3.01 The date of settlement shall be within 3 months from the date of execution of this agreement or such other date as may be mutually agreed in writing between the parties.

¹ *J. Santaram (Stores) Ltd v Deep Sea Holdings Ltd* HBC241.2014 (22 February 2021).

² *Deep Sea Holdings Ltd v J. Santaram (Stores) Ltd* [2015] FJHC 367; HBC241.2014 (19 May 2015).

...

9.0 Time

9.01 *Time shall be of the essence in this agreement.*

...

11.0 Purchaser default

11.01 *If the purchaser defaults in the performance of observation of any terms and conditions for a period of seven [7] days from the date of notification of such default, the vendor without prejudice to any other remedies available to it:*

- (a) may enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and owing and at once payable; or*
- (b) may rescind this contract of sale and thereupon all monies theretofore paid or under the terms of the sale applied in reduction of the purchase money shall be forfeited to the vendor as liquidated damages;*
- (c) may sue for specific performance of this agreement;*
- (d) may sue for special and general damages.*

12.0 Vendor's default

12.01 *If the vendor defaults under this agreement for a period of seven [7] days from the date of notification of such default, the purchaser shall be entitled to exercise all its right and remedies under the law and may without prejudice to any other remedies available to it exercise all or any of the following remedies namely:*

- (a) may rescind this contract of sale and thereupon all monies theretofore paid or under the terms of the sale applied in reduction of the purchase money shall be refunded forthwith to the purchaser without deduction; or*
- (b) may sue for specific performance of this agreement; or*
- (c) may sue for special and general damages; or*
- (d) May claim damages in addition to seeking specific performance in addition to seeking specific performance of this agreement.*

...

- [6] On 9 October 2013, Santaram executed an Instrument of Transfer, prepared by Deep Sea's solicitors.
- [7] The three-month period to settlement referred to in cl 3 of the SPA would have expired on 8 January 2014. A course of email correspondence between Santaram and Deep Sea led to settlement being scheduled for 17 July 2014, at 12 noon.

- [8] On 17 July 2014 settlement clerks representing Santaram, Deep Sea and Westpac Bank (from which Deep Sea was obtaining finance) attended at the office of the Registrar of Titles to effect settlement. However, clerical staff of the Registrar of Titles picked up an error in the Instrument of Transfer, which required rectification.³ The error was corrected and the solicitors for Deep Sea advised Santaram and Westpac Bank by email at 4.40 pm on 17 July 2014 that the settlement clerks for Santaram, Westpac Bank and Deep Sea had agreed to defer settlement until the next day (18 July 2014) and that the error had been rectified.
- [9] On 18 July 2014 settlement clerks for Deep Sea and Westpac Bank attended at the Registrar of Titles office to complete settlement. The settlement clerk for Santaram did not attend, and advised Deep Sea's solicitors that the "deal had been cancelled".
- [10] On 18 July 2014, at 12.14 pm the solicitors for Deep Sea lodged a caveat against the title to the property.

Proceedings in the High Court

- [11] On 4 August 2014, the solicitors for Deep Sea issued a settlement notice to Santaram, pursuant to cl 12.01 of the SPA, giving it seven days to perform its obligations under the SPA and complete the transfer of the property. Santaram did not comply with the notice and on 25 August 2014 Deep Sea filed a Writ of Summons and Statement of Claim, seeking an order for specific performance of the SPA, and an order that registration of the caveat be extended until further order of the High Court.
- [12] Santaram filed a Statement of Defence and Counterclaim on 22 September 2014. In its statement of defence, it pleaded that the SPA had lapsed and become null and void on 8 January 2014, and that it had advised Deep Sea that the deadline for settlement was midday on 17 July 2014, and that if settlement did not eventuate by 17 July 2014, it would withdraw from the sale and treat the contract as terminated due to non-performance by Deep Sea. It pleaded that Deep Sea did not complete settlement on 17 July 2014. Santaram further

³ The error was as to the naming of the purchaser.

pleaded that Deep Sea had unlawfully and illegally placed a caveat on the property when Deep Sea had no further interest in the property.

[13] In its Counterclaim, Santaram pleaded that Deep Sea had breached the SPA by failing to complete settlement, and sought orders that the caveat be removed and/or cancelled, and for damages for breach of the SPA and unlawful placement of the caveat.

[14] In its Reply to Santaram's Statement of Defence and Counterclaim filed on 20 October 2014, Deep Sea pleaded that Santaram had waived the condition to complete settlement by way of emails between the parties, and by Santaram's conduct in inducing Deep Sea to believe that the SPA still subsisted.

Application for summary judgment

[15] On 13 November 2014 Deep Sea filed an application for summary judgment against Santaram, pursuant to Order 86 of the High Court Rules. The application was supported by affidavits sworn by Mr Albert Chand, a director and shareholder of Deep Sea, on 11 November 2014 and 5 February 2015, and an affidavit sworn by Ms Timaleti Dutt, a clerk employed by Deep Sea's solicitors (Naidu Law), on 5 February 2015.

[16] In his affidavit sworn on 11 November 2014, Mr Chand set out details of the dealings between Deep Sea and Santaram. He referred to a chain of email correspondence between the respective parties and their solicitors prior to the parties' settlement clerks meeting at the office of the Registrar of Titles on 17 July 2014 to settle the SPA. He also set out the circumstances that led to settlement not being completed on that day. Mr Chand further stated that at around 4.40 pm on 17 July 2014 Deep Sea's solicitors advised Santaram and Westpac Bank that the error had been corrected and that settlement could be done the next morning.

[17] He further stated that Santaram's settlement clerk failed to attend settlement on 18 July 2014, and that Santaram advised Deep Sea's solicitors by telephone that morning that "the deal has been cancelled".

[18] Ms Dutt stated that she attended at the office of the Registrar of Titles on 17 July 2014 at 12 midday to do settlement. She stated that the settlement clerk for Santaram's solicitors (Mr Prasad) did not arrive until 2 pm. In the meantime, she conducted a search of the title to the property to check its current status and noticed that a mortgage to Fiji Development Bank had not been discharged. She stated that after Mr Prasad arrived, there was a further delay as he did not have an original Capital Gains Tax certificate and it had to be brought from his office.

[19] Ms Dutt stated that upon the arrival of the original Capital Gains Tax certificate she presented the papers to the Registrar of Titles clerical staff for lodgement. During the lodgement process the clerical staff noticed the error in the transfer document and asked that it be corrected before the transfer could be accepted for registration. She went on to state:

(5) I rang Mr Ritesh Naidu and informed him of the situation and took further instructions. Mr Naidu instructed me to bring the transfer back to our office for correction and to do the settlement on the same day after the correction. However, since it was almost 2.45 pm, [Mr Prasad], Varo the settlement clerk from [Westpac] and I agreed to defer settlement to Friday 18 July 2014 in the morning.

(6) I contacted [Santaram's] office on Friday 18 July 2014 around 8.50 am to advise [Mr Prasad] that I was leaving for the office of Registrar of Titles for settlement. I was advised by [Mr Prasad] that Arpana Reshma Ram had instructed him not to do the settlement and he then transferred the call to one Ms Ram who I verily believe is the same person known as Arpana Ram who said to me abruptly over the phone that "the deal has been cancelled" and she slammed the phone on me.

[20] Ms Dutt further stated that Mr Prasad "specifically agreed to defer settlement to Friday 18 July 2014 in the morning".

[21] Affidavits on behalf of Santaram in opposition to the application for summary judgment were sworn by Arpana Reshma Ram, Property and Administration Manager of Santaram, and Vishal Shalvindra Prasad, both on 24 December 2014.

[22] Ms Ram stated (at paragraph 6(iv) of her affidavit) that the SPA lapsed on 8 January 2014, and "there was no further request from [Deep Sea] to extend the settlement date" but went on to state (at paragraph 9(i)) that "despite the delay of almost 6 months, the parties agreed

to settle this matter on 17th July 2014 at 12.00 pm at the office of the Registrar of Titles". She further stated that she had sent Deep Sea's solicitor, Westpac Bank, and "the other parties" an email (timed at 11.26 am) attaching a "settlement statement", "rates" and "CGT certificate" and stating:

We shall bring the above documents and TIN and Title etc to the Registrar Office at 12pm. Vishal Prasad of our office will attend to settlement.

According to the Sale and Purchase Agreement, the settlement was 3 months from date of contract. Our Directors have been very understanding with [Mr Chand's] situation however in the event the settlement does not take place today, they will withdraw the sale.

- [23] Ms Ram confirmed that she had arranged for the original Capital Gains Tax certificate to be delivered to Mr Prasad at the Registrar of Titles office, and that Mr Prasad had informed her that settlement had not eventuated. She stated that she advised Mr Prasad to bring all the documents back to the office and that if there were anything that other parties wished to discuss, they could contact her directly.
- [24] Ms Ram stated that Mr Naidu, the solicitor for Deep Sea, had telephoned her later on 17 July 2014 and advised that her that settlement had not been effected. She stated that she referred Mr Naidu to her email at 11.26 am, and informed him that the matter was no longer in her hands but for the Directors to decide. She reiterated that there was no assurance made by Santaram and/or its settlement clerk, or any indication given to Deep Sea or to Westpac Bank, that Santaram had agreed to defer the settlement date.
- [25] Mr Prasad stated that he had attended at the office of the Registrar of Titles Office at 12.30pm on 17 July 2014, and met the Westpac Bank settlement clerk. He said that Deep Sea's settlement clerk (Ms Dutt) did not arrive for some 20 minutes. He confirmed that he was told that the original Capital Gains Tax certificate was required, and he arranged for this to be brought from Santaram's office.
- [26] Mr Prasad further stated:
6. *After receiving the original CGT certificate, the documents were further verified and it was noticed that one of [Deep Sea's] documents had an error. Then I was*

informed by the staff of Westpac that we cannot proceed for settlement on the same day due to the error and the same could be re-scheduled to the next day. I advised them that I have to inform my Manager about this situation and cannot confirm anything.

7. *Then I called my Manager and informed her that the settlement did not eventuate and she advised me to bring all the documents back to the office and she told me to advise the other parties if there is anything further they need to discuss, they should call my Manager directly.*
8. *Upon receiving this instruction from my Manager, I advised the parties and took the documents and returned to my office.*
9. *That at no point in time, did I indicate or gave any assurance to the other parties (Westpac and Naidu Law) that the settlement date would be deferred and/or postponed on the following day which was the 18th July, 2014.*

[27] An affidavit in reply was sworn by Mr Chand on 5 February 2015. He referred again to the chain of emails prior to 17 July 2014 and rejected Ms Ram's assertion that the SPA had lapsed.

[28] It is pertinent to record that among the emails exhibited to Mr Chand's first affidavit were emails from Mr Saheed Khan, of Westpac Bank:

[a] At 5.02 pm on 17 July 2014, to Deep Sea and its solicitor, and Santaram:

Thank you for your efforts today to attempt to execute this. Please advise settlement time for tomorrow.

I recommend early morning, should there be any arrangements that needs taken care.

[Mr Naidu], I note from conversations with [Ms Ram], the discharge documents are ready which can be lodged at the same time of registration of our mortgage.

I note all are in order, lets get this done tomorrow morning.

[b] On 18 July 2014, at 9.46 am, to the same addressees:

I understand all parties have worked hard and things are all good to settle this morning.

Please advise on position. We are ready on our side with bank cheque as advised.

The Master's judgment

- [29] The Master delivered judgment on the application for summary judgment on 19 May 2015. He set out the parties' respective claims, defences and counterclaim, the laws and principles relating to the granting of summary judgment for specific performance, and counsel's submissions. He recorded that Deep Sea's claim against Santaram and application for summary judgment were on the grounds that Santaram was in breach of the SPA, having failed to attend settlement on 18 July 2014, and having refused to perform its obligations under the SPA.
- [30] The Master recorded that Santaram, when resisting the application for summary judgment, was required to establish that there was an issue or question in dispute with respect to the claim or part of the claim which ought to be tried, or that there ought for some reason be a trial of that claim or part. He also recorded that if Santaram failed to do so, then the court would enter summary judgment against it.
- [31] The Master recorded that he had carefully perused and borne in mind the affidavit evidence filed on behalf of the parties, counsel's submissions and the case law cited to him. He found that Deep Sea and Santaram mutually agreed in writing to settle the SPA on 17 July 2014,⁴ and that while Santaram had notified Deep Sea on 17 July 2014 of its intent to "withdraw the sale" if the SPA were not settled that day, the period of one day could not be interpreted as reasonable time in law.⁵ The Master found that there was "nothing wrong in deferring settlement to the following morning of the 18th July 2014".⁶
- [32] The Master concluded that Santaram did not have any defence to Deep Sea's claim, that Santaram had not satisfied the court that there was an issue or question in dispute which ought to be tried in court, and that the case was a proper case to grant summary judgment for specific performance in terms of Deep Sea's application.⁷

⁴ At paragraph 44 of the Master's judgment.

⁵ At paragraphs 46–48.

⁶ At paragraph 52.

⁷ At paragraphs 65–67.

The High Court judgment

[33] Santaram filed a Notice of Appeal to the High Court on 9 June 2015, setting out seven grounds of appeal. The grounds of appeal were repetitive and may be summarised as being that the Master erred in granting summary judgment for specific performance, by failing to give weight to Santaram’s evidence and submissions, finding that Santaram had no arguable defence and had not raised any issue or question which ought to be tried when there was a conflict in the evidence, and when Deep Sea had breached the SPA by failing to complete settlement within the prescribed time.

[34] The appeal was heard on 1 April and 31 May 2016. The High Court Judge did not deliver his judgment until 22 February 2021. The Judge offered no explanation for the time taken (four years and nine months) to deliver judgment. This Court must express its grave concern at the time taken to deliver judgment. Such a delay can only be described as excessive. Whatever the outcome of the appeal, the delay does not serve the interests of either party, or the interests of the administration of justice.

[35] The Judge set out the relevant legal provisions, and summarised the parties’ pleadings, the Master’s judgment, and the grounds of appeal. In his section headed “Analysis”, the Judge recorded that:⁸

The primary issue raised by [Santaram] is that the learned Master should not have decided this case in a summary matter since there are disputed facts which need to be tried on oral evidence. [Santaram] also claims that [Deep Sea] was in breach of its obligations under the [SPA] and accordingly, that [Santaram] has raised a meritorious defence.

[36] In addressing the facts of the case, the High Court Judge referred to clauses 3, 9, 11 and 12 of the SPA, and noted that under cl 3.01 of the SPA, three months from the date of the SPA (8 October 2013) would have expired on 8 January 2014. On this point the Judge said:⁹

⁸ At paragraph [19] of the High Court judgment.

⁹ At paragraphs [26]–[27].

Although settlement did not take place within the stipulated 3 months period [Santaram] did not move to rescind the [SPA] pursuant to Clause 11 of the [SPA] at that time.

Subsequently both parties had agreed in writing for settlement to take place on 17 July 2014. This is established by the email correspondence between the parties, which has been annexed to the Affidavit deposed to by [Mr Chand] and marked as AWC 8. The said email exchange indicates that the date of settlement has been extended in writing by the mutual agreement between the parties.

[37] The High Court Judge then addressed the parties' attempt to settle the SPA on 17 July 2014. He said:¹⁰

As agreed between the parties, on 17 July 2014, the representatives of [Santaram], [Deep Sea] and [Westpac Bank] attended the Office of the Registrar of Titles with the settlement cheques to effect settlement. However, the settlement could not be effected that day, due to the Clerical Staff of the Registrar of Titles picking up an error on the instrument of transfer during the registration process. As a result, all parties had agreed to defer settlement to the next morning so that the error could be rectified.

[38] With respect to the events of 18 July 2014, the High Court Judge said:¹¹

However, on the next morning, which was 18 July 2014, [Santaram] failed to attend to the settlement and advised [Deep Sea's] solicitor by telephone that the [SPA] had been cancelled, and thereby refused to perform its obligations under the [SPA].

[39] The High Court Judge identified the issues the Master was required to determine as follows:¹²

- (1) *Did the [SPA] lapse on 8 January 2014 or was the settlement date extended until 17 July 2014 by mutual agreement of the parties?*
- (2) *Did [Santaram's] representative agree to postpone or defer settlement from 17 July 2014 to 18 July 2014?*
- (3) *Was the rescission of the [SPA] by [Santaram] on 18 July 2014 valid in law?*

[40] The Judge referred to the Master's reasoning on each of the above points. Having done so he concluded:¹³

¹⁰ At paragraph [28].

¹¹ At paragraph [29].

¹² At paragraph [30].

¹³ At paragraphs [36] and [39].

Having examined [the Master's judgment], I am of the opinion that he has duly analysed all the issues relevant to the case prior to coming to his finding. I find no error of law or fact in his said finding.

...

Considering all the above, I see no reason to interfere with the finding of the [Master].

Appeal to this Court

[41] Santaram's Notice of Appeal to this Court set out 11 grounds of appeal. They were lengthy and repetitive, but were addressed in Mr Singh's submissions for Santaram under the following general issues:

- [a] Whether the High Court Judge erred in law in upholding the Master's judgment granting summary judgment for specific performance instead of recognising that there were triable issues, the determination of which ought to be left for trial (grounds 1, 5-9, and 10);
- [b] Whether the Judge erred in law in upholding the Master's judgment without giving his own reasonings and/or findings, and totally relying on the Masters without giving weight to the affidavits and submissions (grounds 2-4 and 11)

Did the High Court Judge err in law by not finding that there were triable issues?

Submissions

[42] It must first be recorded that Mr Singh did not pursue, on appeal, Santaram's contention before the Master and the High Court Judge that the SPA lapsed when it was not settled on 8 January 2014 (being three months after the SPA was signed). He accepted that by way of the exchange of emails, Santaram and Deep Sea agreed in writing to settle on 17 July 2014. This Court is not, therefore, required to consider whether there is any issue as to the SPA having lapsed for failure to settle by 8 January 2014.

[43] Mr Singh accepted that determination of these grounds of appeal centres on two inter-related matters:

[a] Whether the Master and the High Court Judge erred in law in finding that Santaram and Deep Sea agreed to defer settlement from 17 July 2014 to 18 July 2014 (such that there was no triable issue on that point requiring determination after trial); and

[b] Whether the Master and the High Court Judge erred in law in not finding that Santaram's email (from Ms Ram) at 11.26 am on 17 July 2014 was a settlement notice, such that Deep Sea was in breach by not settling on that day.

[44] As to the first matter, Mr Singh submitted that there was a clear conflict of evidence on the affidavits: Ms Dutt (Deep Sea's settlement clerk) stated that the parties agreed to defer and Mr Prasad (Santaram's settlement clerk) said they did not. Mr Singh submitted that in the circumstances, the conflict could only be resolved at trial, after oral evidence and cross examination. He submitted that the error of law by both the Master and the Judge was in their failure to look into the evidence, and their failure to give any weight to Mr Prasad's evidence. He submitted that both the Master and the Judge ignored Mr Prasad's evidence.

[45] As to Ms Ram's email at 11.26 am on 17 July 2014, Mr Singh submitted that Deep Sea's solicitors had not challenged it (or responded in any form). He also referred to emails from Deep Sea's solicitors which confirmed a deadline for settlement at 12 midday on 17 July 2014. He submitted that the SPA was at an end when it was not settled on 17 July 2014.

[46] In his written submissions, Mr Naidu contended on behalf of Deep Sea that four of the 11 grounds of appeal set out in Santaram's Notice of Appeal are issues of fact, not law. However, he addressed all of the grounds in his submissions.

[47] Mr Naidu submitted that the High Court Judge and the Master were entitled to conclude that it was clear on the evidence that Deep Sea, Santaram, and Westpac Bank agreed to defer settlement until 18 July 2014. He submitted that the emails from Westpac Bank (set out at paragraph [28], above) were sufficient support for Ms Dutt's evidence for the Judge and the

Master to conclude that there was no real dispute that the parties had agreed to defer settlement.

[48] Mr Naidu further submitted that whether or not the parties agreed to defer settlement to 18 July 2014 is irrelevant, as Santaram did not then, and has never subsequently, given notice pursuant to the SPA that Deep Sea failed to settle, and specified a time for it to do so. He submitted that Ms Ram's email at 11.26 am on 17 July 2014 was not a notice to settle, as it was sent before the specified settlement time, and did not comply with cl 11 of the SPA (as to default by the purchaser). He further submitted that Ms Ram's statements to Ms Dutt and himself on 18 July 2014 could not be accepted as amounting to a rescission of the SPA, as a rescission was required to be in writing.

[49] Accordingly, he submitted, neither the Master nor the Judge erred in concluding that Santaram had not established that there was a triable issue (either as to deferment of settlement to 18 July 2014, or as to whether Deep Sea was in breach of the SPA) which required determination by way of a trial.

[50] Mr Koya made brief reply submissions for Santaram. He submitted that when there is conflicting evidence, a claim can only be determined after a trial in which the evidence is heard, witnesses are able to be cross examined and re-examined, and the parties have the opportunity to make submissions. With respect to the issue of deferment of settlement to 18 July 2014, Mr Koya submitted that the Westpac Bank emails do not assist, as there was no sworn evidence from the writer of the emails. He further submitted that both the Master and the High Court Judge should have considered that even if those present on 17 July 2014 did agree to defer settlement until the following day, there was no evidence that such agreement was in writing, as was required by cl 3.01 of the SPA. He referred to Mr Naidu's submission that rescission of the SPA was required to be in writing and submitted that deferment of the settlement date was likewise required to be in writing.

Discussion

[51] The authorities as to determining applications for summary judgment, whether in ordinary proceedings or in actions for specific performance, have been well settled since the judgment of the New Zealand Court of Appeal in *Pemberton v Chappell*.¹⁴ They are well expressed in the judgment of his Honour Justice Greig for the New Zealand Court of Appeal in *Australian Guarantee Corporation (NZ) Ltd v McBeth*.¹⁵

The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made: The essence of the procedure is the plaintiff's own verification by affidavit of his own statement of claim and the allegations made in it: There has to be a balancing act between the right of the defendant to have his day in Court and to have his proper defence explored and the appropriate robust and realistic approach called for by the particular facts of the case: Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

(References omitted)

[52] The observations of his Honour Justice Heath in *Ngoi v Wen* are also of assistance:¹⁶

The summary nature of the procedure means that it is "wholly unsuitable for the determination of disputed questions of fact". Nevertheless, in assessing the strength of a claim, a Court need not accept uncritically evidence that is inherently lacking in credibility, for example where evidence is put forward that is inconsistent with undisputed contemporary documents, or inherently improbable in itself. Having said that, the Court should take a relatively robust approach to the determination of summary judgment applications, lest their utility be inappropriately undermined.

(References omitted)

[53] Reference may also be made to the judgment of this Court in *Carpenters Fiji Ltd v Joes Farm Produce Ltd*.¹⁷

¹⁴ *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

¹⁵ *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] 3 NZLR 54 (CA) at 58.

¹⁶ *Ngoi v Wen* [2014] NZHC 3027, at [5].

¹⁷ *Carpenters Fiji Ltd v Joes Farm Produce Ltd* [2006] FJCA 60; ABU 0019U,2006S (10 November 2006), at [21].

- [54] Both Ms Dutt and Mr Prasad stated in their respective affidavits that they attended at the office of the Registrar of Titles to effect settlement. While there is some difference between them as to who arrived at the office when, they are agreed that they and the settlement clerk for Westpac Bank were present when the transfer documents were presented for registration and the error in the Instrument of Transfer was picked up. They agreed that the error was required to be rectified. Ms Dutt clearly stated that it was agreed between the three clerks that settlement was to be deferred until the next day. Mr Prasad was equally clear in stating that there was no such agreement.
- [55] Neither the Master nor the High Court Judge referred in their respective judgments to the conflict in evidence, or set out any reason for accepting Ms Dutt's evidence. If they considered that it was clear on the evidence that Ms Dutt's evidence was to be accepted, and Mr Prasad's evidence should be rejected, then that should have been clearly stated, together with the basis on which they found that Mr Prasad's evidence was, for example, "inconsistent with undisputed contemporary documents", or "inherently improbable in itself". I have concluded that they both erred in this respect.
- [56] I note Mr Naidu's submission that the Westpac Bank emails lend support to Ms Butt's evidence, but Mr Koya made a valid point in his submission that there was no sworn evidence from Westpac Bank on the point.
- [57] If it had been accepted that there was an issue or question in dispute as to whether settlement was deferred until 18 July 2014, then following determination of that issue, a Court would be required to determine the consequences of settlement not having occurred.
- [58] Having reviewed the evidence before the High Court, and the parties' submissions, I have concluded that Santaram has established that the High Court Judge erred in finding that there was no issue or question in dispute which ought to be tried, and that the appeal should be allowed.

The High Court Judge's reasoning

Submissions

[59] In his written submissions for Santaram, Mr Singh submitted that most of the High Court judgment was either quoting or paraphrasing the Master's judgment, and it was not weighed against the arguments presented by Santaram. He submitted that reasoning is particularly important in summary judgment, as judgment should only be given where the case is plain and clear that there is no meritorious defence to a claim. Mr Singh did not elaborate on this submission in his oral submissions.

[60] Mr Naidu submitted that it is clear from the High Court judgment that the Judge took Santaram's submissions into account. He submitted that it was not necessary for the Judge to give any weight to the affidavits and submissions filed by Santaram. He submitted that the Judge's duty was to review the Master's judgment. He submitted that in doing this, the Judge made express reference to the affidavits filed by Santaram and Deep Sea.

[61] Mr Naidu further submitted that a Judge is not required to make an explicit finding on each disputed piece of evidence, or to decide every matter raised in argument or in a submission

Discussion

[62] In the light of my conclusion that both the Master and the High Court Judge erred in concluding that summary judgment should be granted, it is not necessary to dwell at length on the reasoning in the High Court judgment. It suffices to say that in a case where a Judge upholds a lower court's judgment, the Judge may not be required to go beyond setting out the essential grounds on which the judgment rests, as Mr Naidu submitted.

- [63] In the present case the High Court Judge referred to all of the material that was before the Master, he stated that he had considered it, and he set out his own conclusion. While I have concluded that he erred in that conclusion, I would not conclude that he erred in the manner in which he set out his reasoning for his conclusion.
- [64] However, as a result of the Judge's error in finding that there was no issue or question that ought to be tried, I would hold that the appeal must be allowed. Save for the High Court order that the caveat should remain in force pending further order of that Court, the decision of the High Court to order summary judgment on Deep Sea's proceeding for orders for specific performance against Santaram should be set aside, and the proceeding referred back for determination in the High Court by way of trial. It would be in the interests of justice for the parties to ensure that the proceeding is progressed without further delay.
- [65] It must be stressed that the issues or questions to be tried in the High Court are as to whether the parties agreed to settle the SPA on 18 July 2014 and as to Ms Ram's email of 11.26 am on 17 July 2014 and her oral statements to Ms Dutt and Mr Naidu on 18 July 2018. There is no issue or question to be tried as to whether the SPA lapsed as from 8 January 2014.
- [66] It is necessary to refer to a further argument raised on appeal by counsel for Santaram. Mr Singh referred to evidence of discussions between Mr Chand (of Deep Sea) and Santaram after 18 July 2014. While these discussions were referred to in the affidavits filed on behalf of Deep Sea and Santaram, there was no pleading in relation to them, and they were not raised in the parties' submissions to either the Master or the High Court Judge. In this Court, counsel for Santaram put forward an argument that the discussions amounted to a waiver of any issue to the effect that the SPA was still "alive", as they demonstrated that Deep Sea was now seeking a new agreement.
- [67] This appeal was concerned with the judgment appealed against. As the discussions were not the subject of any pleadings and submissions in the High Court, they cannot be considered or taken into account in this Court.

ORDERS

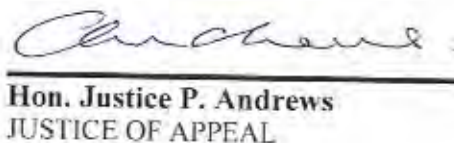
- (1) The appeal is allowed.
- (2) Deep Sea's proceeding seeking orders for specific performance of the SPA by Santaram is referred back to the High Court for determination by way of a trial.
- (3) Caveat No. B800804 registered against the Certificate of Title No. 6983 is to remain in place until further order of the High Court.
- (4) In the circumstances of this case, this Court makes no order as to costs.



Hon. Justice A. Qetaki
JUSTICE OF APPEAL



Hon. Justice W. Morgan
JUSTICE OF APPEAL



Hon. Justice P. Andrews
JUSTICE OF APPEAL