IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 540 of 2007

BETWEEN : **DIANA GIESBRECHT** of 25 Hutson Street, Suva in the Republic of Fiji Islands, Domestic Duties.

PLAINTIFF

AND : **ROWENA GRACE CROSS** (also known as Grace Bamlett) and **DOUGLAS BAMLETT** both of Ocean Pacific Road, Wainadoi, Navua in the Republic of Fiji Islands, both Company Directors.

DEFENDANTS

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Rayawa** for the Plaintiff
Mr. Fa S for the Defendant

Date of Hearing : **28th November, 2011**
Date of Decision : **7th June, 2013**

DECISION

A. INTRODUCTION

1. According to the amended statement of claim filed on 20th June, 2011 the Plaintiff is claiming US$ 66,877.80 as a sum of money as restitution for the loss in pursuant to an agreement between the Plaintiff and the 2nd named Defendants. In terms of the said agreement the money credited to the 2nd named Defendant was to be invested by the 2nd named Defendant as a trustee, subject to the provisions thereof, on behalf of the Plaintiff. The Defendants neither filed an amended statement of defence nor an affidavit in opposition to this application. In the statement of defence filed on 28th November, 2008 the

Defendants had admitted the receipt of the money stated in the statement of claim, **but denied that he was a trustee or fiduciary** for the Plaintiff. The Plaintiff filed the summons seeking summary judgment on 29th July, 2011 with an affidavit in support, despite the Defendants being granted opportunity to file affidavit in opposition they failed to file any. The summary judgment is mainly based on the premise that the 2nd named Defendant was a trustee for the money she had given for 'investment' in Blue Chip currency payment system of Global Digital Transfers Inc. of Port Vila, Vanuatu (GDT).

B. ANALYSIS

2. The summons filed by the Plaintiff dated 29th July, 2011 inter alia states as follows

> 'For an order that the Defendant's statement of Defense be struck out and the Summary Judgment be entered against the Defendants herein for the prayers contained in the Plaintiff's Amended Statement of Claim filed on 20th day of June 2011 and costs of this action.'

3. The said summons state that the application was made under Order 14 rule 1 and Order 18 rule 18. At the outset it should be noted Order 18 rule 18 contained several provisions which needed specific reference to the particular provision or provisions, that the Plaintiff is relying on. Presumably the Order 18 rule 18 was relied upon on the application to strike out the statement of defence, but without specifying which provision either in the summons or in the supporting affidavit leaves that application in limbo and I would not consider the said application for strike out of the statement of defence for lack of clarity and precision either in the summons or in the affidavit in support. This leaves only the issue of summary judgment for determination.

4. Order 14 of the High Court deals with application for summary judgment. Order 14, r.1 requires the plaintiff to satisfy the court that the defendant has no

defence. In Pemberton – v – Chappell [1987] 1 NZLR 1 at 3 the Court of Appeal said as follows:

> "In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no **bona fide defence**, no **reasonable ground of defence**, no **fairly arguable defence**."

At page 4:

> "On this the plaintiff is to satisfy the court; he has the persuasive burden. Satisfaction here indicates that the court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty."

And further at 4:

> "Where the only arguable defence is a question of law which is clear cut and does not require findings of disputed facts or the ascertained of further facts, the court should normally decide it on the application for summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence."

The Court also commented on the position where a defence is not evident on a plaintiff's pleading and said at 3;

> "If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case

> proceed to judgment without tendentious delay and a defendant's right to put forward without tendentious delay and a defendant's right to put forward a real defence."

5. A complete defence does not have to be shown by the defendant at the stage when summary judgment is sought: The *Cloverdell Lumber Co Pty Ltd – v – Abbott* [1924] 34 CLR 122 at 133 but if the defence is doomed to fail it should not be an obstacle to grant summary judgment for all or some of the claims of the Plaintiff as stated in Order 14 rule 1(1) of the High Court Rules.

6. In *Fancourt – v – Merchantile Credits Ltd* [1983] 154 CLR 87 the plaintiff had applied for summary judgment pursuant to order 18 of the rules of the Supreme Court of Queensland. The court said (at 99):

> "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

7. The following passage from the New Zealand Court of Appeal judgment in *Doyles Trading Company Limited – v – Westend Services Ltd* [1989] 1 NZLR 38 at 413 stated

> "While the desirability of eliminating the frustration and delays which can be caused by unmeritorious or tendentious defence needs no emphasis, it is important to pay proper regard to the defendant's interest and to be wary of allowing the rule to become an instrument of oppression or injustice in the laudable interest of expediting litigation. It is true that "*justice delayed is justice denied*", but not at the expense of a fair hearing for both parties, **unless the court is sure there is no real defence.** It is unlikely to reach this conclusion if the affidavits disclose disputed

questions of fact, the resolution of which depends on an assessment of credibility or reliability of witnesses."

8. Order 14 rule 1 states that summary judgment can be obtained '*....on the ground that defendant has no defence to a claim included in the writ, or to particular part of such claim, or has no defence to such claim or part ...*' and Order 14 rule 2 states as follows

> '2.(1) An application under rule 1 must be made by summons supported by and affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and **stating that in the deponent's belief there is no defence to that claim or part**, as the case may be, or no defence except as to the amount of any dames claimed.' (emphasis added)

9. The affidavit in support must state the deponent's belief that there is no defence to that claim or part: The Supreme Court Practice, 1999, Volume 1, paragraph 14/2/9 (at pg. 170s stated.

> "***This statement is an essential part of the affidavit****. The usual words in the affidavit are, "I verily believe that there is no defence to this action". This form is supported by the Irish decision in Manning v Moriarty (1883) 12 L.R.Ir. 372. Where however, the application relates to one of several claims or to part of a claim, the words in the affidavit should be correspondingly apt. e.g. "I verily believe that there is no defence to the claim" (identify or describe the same) or "to the following part of the claim"(identify or describe the same namely(identifying the part referred to).*
>
> **If the claim is for the damages, the deponent should swear to his belief that there is no defence except as to the amount of damages claimed (see <u>Dummer v Brown</u>**

[1953] 1 Q.B. 710; [1953] 1 All E.R 1158). (emphasis added)

10. There is no such averment in the affidavit in opposition. At the oral hearing the counsel for the Defendants did not raise this objection but the non compliance of the Order 14 rule 2(1) which is 'an essential part' according to the White Book, has to be considered as mandatory and non compliance is fatal for this application. Though I could dismiss the summons for summary judgment on said preliminary issue without discussion of the facts I would not inclined to do so considering the facts and circumstances of the case.

11. Even if I am wrong on the said determination regarding the non-compliance of the Order 14 rule 2(1) I would consider the facts averred in the affidavit in support of this application for completion as well as considering the efficiency and case management. Any refusal on preliminary issue would not preclude the same application being properly made subsequently; hence I decided to determine the main issue despite the determination in the preceding paragraph. The issue is whether the Plaintiff could obtain summary judgment for the said sum of money stated in the summons. The Defendants in their statement of defence admit the receipt of the money for the 'investment' in terms of the agreement marked 'DG3' where the Plaintiff had expressly taken the risk of the investment in terms of the said agreement, but Plaintiff states that 2nd named Defendant is a trustee in terms of the said agreement.

12. Supreme Court Rules (1999) p 163, 14/1/2 states as follows

> 'Application of Order 14- The scope of O.14 proceedings is determined by the rules and the Court has no wider powers than those conferred by the rules nor any additional statutory power to act outside and beyond the rules or any residual or inherent jurisdiction to grant relief where it is just to do so (see per Neil. L. J. in C. E Heath Plc v German Holding Co [1988] 1 W.L.R. 1219 at 228; [1989] 1 All E.R.

203 at 210 Parker L.J. made clear in Home and Overseas Insurance Co Ltd v Mentor Insurance Co (U.K) Ltd (In Liquidation) [1990] 1W.L.R. 153 at 158, that the **purpose of O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.** If the defendant's only suggested defence is a point of law and the court can see at once the point is misconceived (or, if arguable, can be shown shortly to be plainly unsustainable the plaintiff is entitled to judgment. O.14 **proceeding should not be allowed to become a means for obtaining in effect, an immediate trial of the action**, **which will be the case if the court lends itself to determining points of law or construction that may take hours or even days and the citation of many authorities before court is in a position to arrive at a final decision. It is only if an arguable question of law or construction is short and depends on few documents that O.14 procedure is apposite (**Balk Trading v Afalona Shipping, the Coral [1993} 1 Lloyd's Rep. 1. CA). See also Crown House Engineering Ltd v. Amec Products Ltd (1989) 48 B.L.R32.' (emphasis added)

13. The scope of summary judgment as stated in the White Book (1999) is when plainly there is no defence and it is not a substitute for trial where numerous documents and facts and circumstances needed to be proved as in the present case where the Plaintiff has produced voluminous documents containing two full- box files. The numerous documents are brought to the notice of the court by way of annexures in affidavit in support in summary judgment application which contain more than 72 paragraphs, to establish the contention of the Plaintiff that there was trust between the Plaintiff and 2nd named Defendant. The voluminous documents produced to court not only delayed this proceedings but also wasted the time of the court unnecessarily, where the action could have proceeded in the mean time if not for this misconceived summons annexing a considerable amount of documentary evidence in order to interpret

the agreement and circumstances between the Plaintiff and 2nd named Defendant. In the circumstances it is evident that the summary procedure is not appropriate in this instance.

14. The evidence produced before me are numerous and sometime the averments contained in the affidavit in support do not exactly correspond with the document or they do not indicate what was averred in the affidavit. I think that it is a waste of time to refer to all such instances, but where relevant to this decision I will state so and this again had led to unnecessary delay .

15. The main contention of the Plaintiff is that the Defendants are trustees to the money she had 'invested' as per the agreement marked "DG3" to the affidavit in support of this summary judgment application. The Plaintiff had entered in to an agreement with the 2nd named Defendant for the said purpose of investments. The relevant paragraph, which the Plaintiff relied was found at the end of page 3 of the said agreement dated 4th May, 2006, marked 'DG3'. It stated as follows

> 'Douglas Bamlett acknowledges that the funds invested by Diana Giesbrecht pursuant to this letter of agreement are held by Douglas Bamlett as trustee for Diana Giesbrecht **but subject to the provision hereof.'**(emphasis is mine)

16. The aforesaid provision while stating that the Plaintiff's funds invested were held in trust also stated that said 'trust' was subjected to the provisions of the agreement, which brings back to square one. This is the plain reading of the said provision and cannot be considered final interpretation without considering the all evidence. The same agreement refers to the defaults of guaranteed returns or failure or refusal to pay the returns and or the principal sum in same page prior to the abovementioned provision, at page 3 (3rd paragraph from top of the page) as follows

> 'Diana Giesbrecht fully acknowledges that here **funds are at risk to the extent** of GDT's ability to perform and the

> value of assets GDT Inc. has elected to secure her funds against. Further **Diana acknowledges that she may also be at risk for any professional fees or related disbursements required to recover her principle and/or earnings should <u>GDT fail to perform as guaranteed</u>.'**(emphasis added)

17. The Plaintiff knew the risks that she was taking in this form of 'investment' and also the consequences of that in a default situation. The contention of the Plaintiff was that in order to secure her risks she insisted the clause regarding the 'trust', but that provision regarding 'trust' is subject to the same provisions of the agreement. The evidence before me is that GDT had failed to perform the guaranteed, and the recourse of the Plaintiff in such an instance is found in page 2 of the said agreement marked 'DG3' which states as follows

> '**The only promise or guarantee of earnings and /or protection of principal that ate enforceable** with this arrangement are the ones that GDT Inc. has made. They guarantee minimum 20 percent return plus the return of principal. **Should GDT Inc. fail to perform as promised the only recourse Diana Giesbrecht has for recovery of funds will be through the due process of recovery of those funds by Douglas Bamlett or his nominee acting to recover them from GDT Inc.** This shall be undertaken by Douglas Bamlett **on a best effort basis**.'(emphasis added)

18. According to the said agreement any default or failure to pay the guaranteed return and or the principal is through due process and for the 2nd named Defendant is required to undertake the said recovery on behalf of the Plaintiff '**on best effort basis'**. What was meant by 'best effort basis' is not clear and not defined in the contact and will depend on the facts and circumstances which cannot be decided on summary judgment application.

19. The clause which confers trusteeship to the Defendant also mentioned that the said 'trust' was subject to the provisions of the said agreement. Prima facie the clauses in the agreement overrides any obligations as a trustee, but I cannot arrive at a firm conclusion as to the interpretation of the trusteeship of the 2nd named Defendant without considering the factual matrix in this agreement. The agreement is vague and not clear on this point of trusteeship of the 2nd named Defendant.

20. I am not at all inclined to interpret the agreement without considering the 'factual matrix' considering the circumstance and complexity and also novelty of the issues before me. The agreement is also not clear on the said issue of trusteeship allegedly conferred to the 2nd named Defendant. Any clause in a contract must be construed having regard to is context within the contract, which must in turn be set in its surrounding circumstances or 'factual matrix'. The general principles are to be found in the case of *Investors Compensation Scheme Ltd* *v* *West Bromwhich Building Society* [1998] 1 WLR, 896, where rules of interpretation were summarized by Lord Hoffmann (at pages 912 H to 913E) as follows:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having* ***all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> *(2)The background was famously referred to by Lord Wilberforce as the "**matrix of fact**", but this phrase is, if anything, an understated description of what the background may include.* ***Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next****. It includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) ***The law excludes from the admissible background*** *the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) ***The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words.*** *The meaning of its words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see* *<u>Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd</u>* *[1997] AC 749).*

(5) ***The "rule" that words should be given their 'natural and ordinary meaning' reflects the common sense proposition*** *that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does to require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he*

said in <u>Antaios Compania Neviera SA v Salen Rederierna AB</u> [1985] 1 AC 191. 201;

"…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

If one applies these principles, it seems to me that the judge must be right and , as we are dealing with one badly drafted clause which is happily no longer in use, there is little advantage in my repeating his reasons to greater length. The only remark of his which I would respectfully question is when he said the he was "doing violence" to the natural meaning of the words….

21. Considering the facts of this case where there are conflicting provisions in the agreement the facts and circumstances are needed to interpret the agreement and without the interpretation of the agreement the summary judgment cannot be granted as no 'trust' can be established on the pain reading of the said agreement annexed 'DG3' since the trust was subjected to the other provisions of the said agreement where the Plaintiff had taken the 'risks' associated with the said 'investment'.

22. The Plaintiff in the affidavit in support at paragraph 8 annexed the document 'DG1' and stated that it evidenced to the fact that an assurance was given by the 2nd named Defendant that in the event of death of 2nd named Defendant, her funds could be recovered from the estate of the 2nd named Defendant, but closer look of the said document proves otherwise.

23. The Plaintiff had 'invested' her money in accordance with the agreement marked 'DG3' and the Plaintiff is relying summary judgment in terms of the said agreement to prove that 2nd named Defendant was a trustee in terms of the said agreement. The clause with entrusts the trusteeship also state that such obligations are subject to the provisions of the same agreement and the

provision regarding the recovery of the principal and the return in a case of default is through the 2nd named Defendant who has only to demonstrate that he made an effort on 'best effort basis', which is not clear by plain reading of the agreement.

24. The contention of the Plaintiff is that the 2nd named Defendant was a trustee, in regard to money she had 'invested'. The investment is not clear and some names are used as 'blue chip' and 'diamond'. The said investments were neither in fact blue chip (shares of a reputed company) nor in Diamonds, but the said names were being used to lure the prospective 'investors'. The agreement allows the money 'invested' by the Plaintiff to be invested through the 2nd named Defendant's account with the GDT (Global Digital Transfers Inc. of Port Vila, Vanuatu). No further description of the said GDT is presumably available and the Plaintiff had allowed her money to be invested in unknown entity for unknown instruments through the 2nd named Defendant's account with the GDT. There are reputed investment institutions which are periodically rated either locally and or globally by reputed rating agencies (e.g. Fitch, S & P) and the investments are being made in known instruments like shares, bonds, gold etc but in this instance the Plaintiff had expressly taken 'risks' as stated in the agreement and knowingly allowed the 2nd named Defendant to 'invest' her money thorough the 2nd named Defendant's account with the GDT in blue chip portfolio, which is unknown and risky investment expecting more than usual returns for 'investment', and now seeks to obtain summary judgment in terms of the said agreement which is vague as well complex to interpret.

25. The Plaintiff also alleges misrepresentation by the 2nd named Defendant to the effect that he was an approved investor by the Reserve Bank of Fiji and has also done due diligence regarding the GDT before soliciting investors and also alleges fraud. This even complicates the issues more and even raises an issue as to the validity of the agreement marked 'DG3'. In such a scenario, no trust can be established in terms of the said agreement, allegedly executed due to misrepresentation and or fraud. While such serious issues are before the court one cannot seek summary judgment.

C. CONCLUSION

26. The application for summary judgment is misconceived. The issues before me are extremely complex and novel and needs to be determined through a trial. The voluminous documentations presented to the court for summary judgment itself justifies a trial rather than summary judgment. The issues before the court are too complex to be dealt in summary judgment. The application for summary judgment is dismissed. Considering the circumstances of the case I will not award costs. Without prejudice to that the application for summary judgment has not complied with Order 14 rule 4 (2) and can be dismissed.

D. FINAL ORDERS

a. The summons seeking summary judgment and strike out of the statement of Defence is dismissed.

b. No costs.

Dated at **Suva** this **7th day** of **June, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva