

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 147 of 2010

BETWEEN : **MATRIX INVESTMENTS LIMITED** a limited liability company having its registered office at HLB Crosbie & Associates, Top Floor, HLB House, Cruickshank Road, Nadi Airport and **WILLIAM ERNEST JAMES CROSBIE** of Nadi, Company Director.

Plaintiffs

AND : **BRETT LLOYD CONNOLLY** of 190 Oraha Road, Kumeu, Auckland 0810, New Zealand.

Defendant

R U L I N G

1. The background to this case is reported in two earlier Rulings, the first dated 18 November 2016 and the second dated 05 December 2016.
2. The Order made on 05 December 2016 was that Professional Real Estate Agent be engaged to list and sell the property in question and that the Deputy Registrar is to execute all documents necessary with regards to the engagement of PREA.
3. Following the above, Vijay Naidu & Associates would file a Notice of Change of Solicitors on 11 January 2017 to take over for the Plaintiffs from K Law.
4. At the earliest opportunity after their appointment, Vijay Naidu & Associates, through counsel Mr Victor Sharma, would make a presentation on 16 January 2017 to suggest to the Court, either that the property be valued first by a Professional Valuer before it is listed for sale, or that his client be given the first option to buy the property.
5. On 24 January 2017 a summons was filed by Vijay Naidu & Associates seeking the following orders:

1. That a proper valuation be carried out by a registered valuer prior to the subject property is put up for sale.
 2. That the Plaintiffs be allowed first opportunity buy the property at the valued price.
 3. That the funds of the sale (buy out) be deposited into the High Court interest bearing account for the parties to be heard on the issue of accounts.
 4. An ORDER that costs of this application be in the cause.
 5. ANY OTHER ORDERS the Court deems just and equitable.
6. Upon the filing of this Summons, I granted a Stay of the previous Orders on 03 February 2017 until I have heard the arguments.
7. On 10 February 2017, I ordered that the previous orders be suspended till further orders and adjourned the case to 13 March 2017 for the appointment of a Valuer.
8. On 13 March 2017 the parties were talking settlement so I adjourned the case to 20 April 2017.
9. On 20 April 2017, Mr Sharma advised that the parties were talking settlement.
10. It appears that in the interim, Vijay Naidu & Associates in between these dates, was making some offers on behalf of the plaintiff to AK Lawyers to buy out the defendants half share interest in the property. These were not accepted by the defendant.
11. On 15 June 2017, Messrs Vijay Naidu & Associates filed a Summons seeking the following orders:
1. An Order that the Defendant do forthwith pay his share of mortgage/Loan repayments (arrears and continuing) for the property until the mortgage is discharged. Further the Defendant to pay all interest as applied by the Mortgagee due to the arrears.
 2. That the Defendant and/or his servants and/or his agents together with the appointed real Estate Agents provide a list of all the items and chattels (inventory list) in the property and condition on the date they took possession and the condition on what it is now.
 3. That the Defendant do contribute towards the upkeep and outgoings (insurance, body corporate rates, water and electricity bill and so forth) of the property.
 4. Any other Orders the Court deems just and equitable.

12. That Summons was supported by an Affidavit of Mohammed Harun sworn on 13 June 2017 wherein he deposes as follows:

1. That I am an Accountant and the Managing Director of the 1st named Plaintiff Company and I am duly authorised to depose the affidavit on behalf of the Plaintiffs.
2. That the Directions and the Ruling dated the 5th of December, 2016, this honourable Court delivered Order in terms of the summons dated the 5th of April, 2012.
3. That professionals West Reality Fiji Ltd was appointed as the Real Estate Agent to sell the property.
4. That that since the property management and upkeep was terminated by us on the end of April, 2017, we advised that the Defendant do jointly share the expenses and maintenance of the Property. That the Defendant agreed on the same. The Defendant further recommended that the Real Estate agent (PREA) manage the property. On the 17th of May, 2017 we agreed that PREA can manage the property subject to conditions as follows:

1. *Agree to appoint Professionals Real Estate (PREA) to act as property managers.*
 2. *A written scope must be provided to PREA to act as property managers to avoid any disputes.*
 3. *PREA must provide a quote for property management.*
 4. *Once the above is agreed, our client will conduct a site visit with PREA, we will prepare an inventory list and complete the Listing agreement for signing.*
 5. *In the meantime, the Defendant needs to pay his half share for mortgage repayment please do advise him – as the payments are in default already.*
- Annexed hereto and marked "MH1" is a copy of the exchange of emails.

5. That on the 26th of May, 2017 we visited the house and discovered that the locks has been changed and Professionals have already listed the property. Upon enquiry with Carol West of Professional she confirmed that Brett has obtained a court order to change the door locks and Court has signed the listing authority. We were not aware of the above and when the Defendant took possession and changed the keys however, we were not advised the same.
6. That it was our understanding that and we accept that the failure to sign the listing agreement would entail the Deputy Registrar to sign off on our behalf, however there was never any orders that the Defendant and PREA were to have exclusive access to the property or orders that the Defendant may change the locks whereby refusing access to us.
7. That on the 30th of May, 2017, our solicitors wrote to the Defendant's Solicitors and inter alia, sought the removal of the changed locks or that the Defendant provides a copy of the keys to us. We further sought that the Defendant do make the necessary mortgage repayments and provide a list of all the inventory. Annexed hereto and marked MH2 is a copy of the notice. Further concern we have is when the door locks were changed and access given to PREA, there is no inventory signoff and no records are kept. The approximate value of the furniture would be around \$15,000. The

Defendant has indicated that a copy of the keys will be provided by PREA, we will take the same, as soon as they provide a copy of the list of inventory.

8. That the Defendant through his Solicitors replied to our letter dated the 31st of May, 2017. Annexed hereto and marked MH3 is copy of the letter.
9. That we responded to the Defendant's letter on the 2nd of June, 2017. Annexed hereto and marked MH4 is copy of the letter.
10. That the Defendant has not responded to the request as set out in our letters. We are now seeking the same through his application. The actions of the Defendant has prejudiced the Plaintiffs immensely as:
 - a. We have had no access to the property since the Defendant changed the locks (although there was no orders for the Defendant to have exclusive access to the property).
 - b. The Defendant has not been paying the mortgage repayments to the mortgagee and now our account is in arrears and we fear that the Bank may apply further interest or penalties.
 - c. The inventory list was not taken or provided by the Defendant, and now we are not aware as to what inventory the Defendant took, or if the items have been damaged or misplaced and/or otherwise.
11. That I humbly pray to this Honourable Court for an Order in Terms of this Summons filed herein.

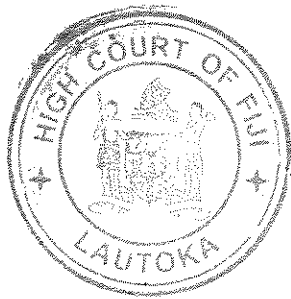
13. An affidavit of Mohinesh Maharaj sworn on 18 September 2017 was filed in Opposition.
14. It appears that the Real Estate Agent appointed by the Court has found a buyer who is willing to pay for the property at \$1.95 million and for which a sale note has been signed.
15. Apparently, that was communicated to the defendant's solicitors who then came up with another offer for another real estate agent at \$1.96 million.
16. The difference is \$10,000.
17. In Court today, Ms Tavakuru appeared and sought an order that the property be sold to the buyer found by the real estate agent.
18. Mr Narayan meanwhile has sought the Court to order that PREA proceed with the Sale to the buyer for \$1.95 million.
19. He has prepared the following the terms and urges the Court to grant Order in terms:
 1. The property be sold for \$1.95m to the purchaser secured by PREA.

2. AK Lawyers prepare a standard Sale & Purchase agreement to lead to settlement to be provided to Vasantika Patel acting for the Purchaser.
 3. The DR or PREA sign the Agreement on behalf of the Vendors.
 4. The Purchaser to pay 10% deposit into the trust account of AK Lawyers pending settlement.
 5. The sale includes the inventory the inventory list provided to the Plaintiff.
 6. The balance of the purchase price is to be paid on settlement.
 7. Settlement is to take place at titles office within 30 days from the Agreement date subject to extension to obtain the CGT clearance and settling within 5 business days of the CGT clearance being granted.
 8. At settlement the Purchaser shall hand over four bank cheques, one payable to ANZ to obtain a discharge of the mortgage over the property, the second being the commission payable to PREA, the third being any balance (in excess of the funds held in the trust account of AK Lawyers) amount payable to FRCS for CGT and the fourth being the balance to the High Court to be held by the Court pending settlement of accounts by the Parties.
 9. AK Lawyers be authorised to provide an under taking to FRCS to pay the CGT on completion from the deposit held in the trust account.
 10. AK Lawyers to pay any balance of the deposit held in their trust account after settling CGT assessed by FRCS to the High Court as in 8 above.
 11. AK Lawyers costs of the transaction on behalf of the parties be shared equally by the parties.
 12. AK Lawyers to report to the Court and the Plaintiffs on completion of the sale.
-
20. I agree with Mr Narayan's proposed Terms.
 21. I agree that the counter-offer secured by the Plaintiffs Reals Estate Agent is, but an attempt to gazump the offer secured by the Court – appointed PREA, which at the end of the day, would not result in any substantial

saving. Whilst Fiji does not yet have any anti gazumping laws, in the circumstances of this case, the difference of \$10,000 between the two competing offers is not substantial enough to make it worthwhile to consider the higher offer.

I say that because, if the higher offer was to be considered, then the Plaintiff would have to also bear the costs of their real estate agent's 4% commission as well as the 4% commission of PREA.

I endorse and sanction Mr Narayan's proposed terms.



Anare Tuilevuka
JUDGE
30 October 2017