IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No: HBC 198/2019

BETWEEN	:	**WAN TAI HOLDINGS COMPANY PTE LIMITED**
		Plaintiff
AND	:	**DENERAU WATERS PTE LIMITED**
		Defendant

Before	:	A G Stuart - J
Appearance	:	Mr A Narayan & A Narayan for the Plaintiff
	:	Mr N Kumar for the Defendant
Date of Hearing	:	25 November 2019
Date of Judgment	:	3rd December, 2019

JUDGMENT

1. On the 23rd September 2019 I gave a decision in this matter in favour of the plaintiff against the defendant in the plaintiff's claim, commenced by Writ of Summons issued on 1 August 2019, as follows:

   i. Making a declaration that the defendant's termination of the sale and purchase agreement between the plaintiff as purchaser, and the defendant as vendor, was unlawful and in breach of the agreements

   ii. Entering judgement for the plaintiff in the sum of $1,650,000 against the defendant

   iii. Costs for the plaintiff.

2. That decision was given in the absence of the defendant. This was because although the defendant had filed a notice of intention to defend the plaintiff's claim, it had not

filed a statement of defence. The plaintiff therefore filed an ex parte application for judgment, part of which I acceded to. Hence the orders referred to.

3. The plaintiff then applied for and was granted a garnishee order on the basis of the monetary judgment. This sought release of a sum of $1.15m held by Neel Shivam Lawyers as stakeholder under the agreements between the parties. An order garnishee nisi was issued on 11 October 2019, and was made absolute on 1 November 2019 directing that the money be released to the plaintiff's solicitors. That order was subject to a condition that the money was not then to be released by the plaintiff's solicitors for a period of 14 days from the date of the order (1 November), or until the first call of any purported application brought within that time by the defendant challenging the payment, whichever was the later.

4. On 15 November 2019 an amended summons was filed by the defendant (amending an earlier summons dated 8 November) seeking:

   i. An order to set aside the judgment by default entered against the defendant on 23 September 2019.

   ii. That execution of the judgment be stayed

   iii. That the sum of $1,150,000 released into AK Lawyers Trust Fund be transferred into Court until the determination of the application to set aside judgment.

   iv. Giving leave to the defendant to defend the substantive proceedings unconditionally.

   This summons was supported by an affidavit sworn on 7 November 2019 by Mr Madhu Rao, who is a manager of the defendant company, and by a supplementary affidavit sworn on 13 November 2019 by Mr Kamini Naicker.

5. The defendant's amended summons of 15 November came before me on 21 November, having been served by the defendant only the day before. The matter was adjourned until 25 November in the hope that the parties were able to work out between themselves a satisfactory interim solution to the issue of how the funds were to be held pending the hearing of the application to set aside judgement. Unfortunately agreement could not be reached, and I then heard argument from the parties about whether the court should make an order as sought in paragraph 4(iii) above, pending a decision on the application to set aside judgment (which has been listed for hearing on 4 February 2020, with appropriate directions for filing affidavits in reply and response).

6. Mr Narayan, counsel for the plaintiff, has responsibly given his undertaking to the Court that the funds referred to will remain in his firm's trust account (where it is held in the name of the plaintiff) until the court delivers a ruling on the issue of retention of the money.

7. I note that the $1.15m which is the subject of the defendant's application has been properly paid to the trust account of the plaintiff's solicitors in terms of the garnishee order absolute made by the 'Master on 1 November. The money is now in the plaintiff's possession, and an application for orders restraining the use or disposition of this money is therefore an application for orders under Order.29, r.2 . of the High Court Rules. At the hearing of the defendant's application the discussion was about the criteria for a Mareva injunction. Strictly speaking what is sought is not a Mareva injunction, because the application relates to the subject matter of the proceedings, not to other assets that the plaintiff owns, but the criteria for a Mareva injunction and for an order under O.29, r.2 are the same:

- The applicant must have a good arguable case on its substantive claim
- There are assets within the jurisdiction/the subject matter of the proceedings to which the orders can apply
- There is a real risk that the assets will be dissipated in a way that means that the defendant, if it is successful in its claim, will be unable to recover the fruits of its judgment.

8. I am particularly mindful in this case that the plaintiff has not yet had the opportunity to file an affidavit in response to those filed by the defendant/applicant. I also note that the amended summons of 15 November, while it seeks a restraining order against release of the funds from the trust account, does not set out any basis for that application (i.e. which rules or principles of law are relied on), nor do the affidavits filed by the defendant in support of the application cover in any adequate way the grounds on which the court needs to be satisfied before making the orders sought.

9. It is nevertheless clear from the court file, and from material contained in the pleadings or otherwise filed by the plaintiff that although incorporated in Fiji the plaintiff is a non-resident entity to which section 6 of the Land Sales Act 1971 applies. The defendant/applicant has expressed concern – not supported by any evidence on the issue - that if the money currently held by the plaintiff's solicitors is paid out, there may be no means by which the defendant can recover any amount to which it is found to be entitled. The plaintiff has not had any reasonable opportunity to answer this concern.

10. On an application made without proper notice to the respondent, and without adequate supporting evidence, the defendant therefore is asking the court to make orders, essentially on the basis of assumptions about what might happen to the deposit money

if the status quo continues. However, I am mindful of the terms of O.2, r 1(1) which states:

> *Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner form or content or in any other respect, the failure shall be treated as an irregularity, and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgement or order therein.*

and that the purpose of the rules is to ensure that justice is done. On an interim basis (until the plaintiff has had a proper opportunity to respond) I am willing to accept the proposition that the potential harm to the defendant of allowing the money to be paid out outweighs the harm to the plaintiff of delaying its entitlement to the benefit of its judgement.

11. However, I am also mindful of the apparent weakness of the defendant's case. It argues that it is entitled to damages for breach of contract, and has brought a claim to that effect against the plaintiff in separate proceedings seeking damages of $4.8m for breach of the sale and purchase agreement. The difficulty it has with that claim is the decision of the Court of Appeal in **DB Waite (Overseas) Ltd v Wallath** [1972] 18 FLR 141, in which the court held that where an agreement for sale required the prior consent of the (then) Native Land Trust Board, unless that consent was obtained, the agreement is void and of no effect, and a claim for damages based on the agreement cannot succeed. The same principle applies to an agreement that requires the prior consent of the Minister under section 6 of the Land Sales Act 1971.

12. A more promising basis for the defendant's claim may be the well-recognised right of a vendor to forfeit any deposit paid when an agreement fails because of the default of the purchaser. However, the particular terms of the agreement between the parties in this case allow forfeiture only in limited circumstances that don't appear to apply here (i.e. where the purchaser has failed to provide information and support for an application for the Minister's consent to the sale).

13. I acknowledge that there may be more sophisticated arguments available to the defendant relying on implied terms etc., and that there may also be disputed issues of fact relating to the circumstances in which the defendant says it was entitled to terminate the agreements following the wrongful repudiation of them by the plaintiff. But even allowing for these, nothing that I have so far seen or heard about the defendant's position suggests to me that it meets the threshold of being a 'good arguable case' that it is entitled to forfeit the plaintiff's deposit.

14. Another concern is about the defendant's financial position. The affidavit of Mr Rao filed in support of its application to set aside judgement and for retention of the funds

says at paragraph 50 that as a result of the termination of the sale agreement with the plaintiff, the defendant has *ceased construction works and demobilized from the construction site* and that as a result it has lost the $5.8m spent to date in developing the site. In correspondence annexed to the affidavit there is evidence of earlier delays in the development, and of uncertainty about whether the development would ever reach the point where the sections that the plaintiff had contracted to buy (in the fourth stage of construction) would ever be completed. There is also evidence that the defendant asked for release of part of the deposit paid by the plaintiff/purchaser to help the vendor in meeting the construction costs of the development. This material suggests that there is a real doubt about whether, assuming that the plaintiff is entitled to the full refund of its deposit as per the judgement entered against the defendant on 23 September, the defendant is able to repay the balance of the deposit, i.e. the $500,000 that the plaintiff agreed to release.

15. Order 29, Rule 2(4) say that any order made under that rule may be made on such terms as the Court thinks just. Taking into account:

- that the application to set aside judgement has been listed for hearing on 4 February,
- the possibility that if the deposit money is not safeguarded the defendant, if it is successful in its application to set aside judgement and ultimately in its claim may have no means of recovering payment.
- that the defendant has already received and presumably spent the $500,000 of the deposit previously released by the plaintiff.
- that the plaintiff already has judgement for the full refund of the deposit, but the prospect of recovering the $500,000 seems questionable.
- if the fund that will be a source of recovery if the defendant succeeds in its claim is safeguarded by the making of the order it seeks, it seems fair that the plaintiff's position is similarly safeguarded by requiring the defendant to pay or provide security for the balance of the deposit, pending the final outcome of the proceedings.

I am satisfied that it is appropriate to make the orders that the defendant seeks, but only on the basis that the plaintiff's right to recover the balance of its judgement (should the judgement be ultimately sustained) is similarly protected.

16. Accordingly I make the following orders:

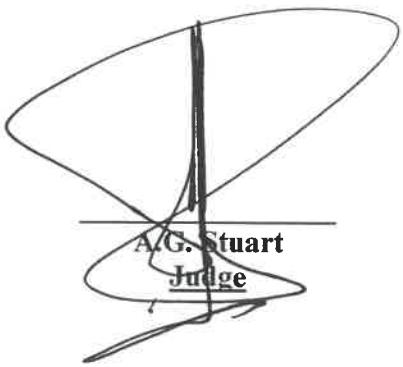
i. The fund of $1.15m received by AK Lawyers from Neel Shivam Law pursuant to the order of the Court in this matter dated 1 November 2019 is to be held by AK Lawyers in the firm's trust account (on interest bearing deposit).

ii. The order in (i) above will cease to have effect if the defendant fails by 20 December 2019 (or such later date as the court orders on an application for extension made by the defendant before that date – I would expect such an application only in circumstances where the defendant expects to be able to comply with the order, but needs more time to do so) to comply with the orders made in (iii) below.

iii. On or before 20 December 2019 the defendant is to pay the sum of $500,000 (or is to provide security for that amount in a manner and on terms that are reasonably satisfactory to the plaintiff, taking into account the purpose of the security) into the trust account of the defendants solicitor, where it is to be held in the name of the plaintiff (on interest bearing deposit) pending further order of the Court.

iv. Leave is given to either party to apply to revoke or vary the orders made above. In any case the orders are subject to review following the outcome of the application to set aside judgement.

v. Costs on this application and the making of these orders are reserved.



A.G. Stuart
Judge

At Lautoka this 3rd day of December, 2019

SOLICITORS:

AK Lawyers, Nadi - Plaintiff
Krishna & Co, Lautoka - Defendant