

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC 302 of 2015**

**BETWEEN** : **PACIFIC BUILDING SOLUTIONS LIMITED** a limited liability company  
having its registered office at 9-12 Nukuwatu Street, Wailada  
Industrial Subdivision, Lami.

**PLAINTIFF**

**AND** : **TENGY CEMENT (FIJI) COMPANY LIMITED** a limited liability company  
having its registered office at Lot 1, Nakavu, Veisari, Lami.

**DEFENDANT**

**BEFORE** : Justice Riyaz Hamza

**COUNSEL** : Mr. Gavin O'Driscoll for the Plaintiff  
Ms. Shoma Devan for the Defendant

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**RULING**

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**INTRODUCTION AND BACKGROUND**

[1] The Plaintiff instituted these proceedings by way of a Writ of Summons, which was issued on 4 September 2015. As per the Statement of Claim attached thereto the Plaintiff, inter alia, states as follows:

1. The Plaintiff was at all material times the intended purchaser for valuable consideration of the Defendant's property comprised and described in Crown Lease No. 18237, for the sum of \$3,300,000.00.

2. The Defendant was at all material times the lessee of the property comprised and described in Crown Lease No. 18237.
3. On or about 3 October 2014, the Plaintiff as purchaser and the Defendant as vendor entered into an Agreement for sale and purchase of the said Crown Lease No. 18237 subject to consent from the Director of Lands.
4. As one of the terms of the Agreement, the Plaintiff paid a conditional deposit of \$165,000.00, which was refundable under certain other conditions of the Agreement, particularly Clause 3.2 thereof.
5. The condition precedent of the Agreement was that the consent of the Director of Lands should be granted within 150 days and if it was not, the Agreement would be null and void. The Plaintiff submits that since consent has not been obtained, the deposit remains the Plaintiff's money. On a strict interpretation of the 150 days provision, the time limited for obtaining consent before the Agreement would become void was 2 March 2015.
6. On or about 21 November 2014, the Plaintiff lodged the requisite consent application to the Director of Lands, together with other material in support of the application.
7. On 27 February 2015, just before the 150 days allowed by the Agreement was to expire, the Lands Department sent an email to the Plaintiff's Solicitors seeking further materials it required to process the consent. The same was supplied by a letter dated 27 February 2015, delivered on 2 March 2015.
8. On 9 March 2015, the Plaintiff had instructed its Solicitors to write to the Defendant's Solicitors so as to notify them that the Plaintiff would not be proceeding with the transaction and seeking a refund of the deposit paid. However, to date, the Defendant has failed to refund the deposited money.

9. It is said that the Defendant's Solicitors have been in correspondence with the Plaintiff's Solicitors and are refusing to release the funds held to the Plaintiff.
10. In spite of further demands made by the Plaintiff for the refund of the deposit, the Defendant has failed to do so.
11. The Plaintiff contends that the Sale and Purchase Agreement became null and void and of no effect on or about 2 March 2015, when 150 days passed from the date of signing the Agreement.

[2] Accordingly, the Plaintiff claims the following reliefs:

- i) Judgment for the sum of \$165,000.00;
- ii) Interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Chapter 27), from 9 March 2015, being the date the money was sought to be refunded, until paid in full at the rate of 8% per annum;
- iii) Costs on a full indemnity basis;
- iv) Such further and other reliefs and orders as are deemed fit in the circumstances.

[3] On 6 October 2015, the Defendant filed a Statement of Defence and Counterclaim. By way of Counterclaim, the Defendant states that no active steps were taken by the Plaintiff to procure the necessary consent for several months so as to enable parties to proceed with the Agreement. The Plaintiff failed to notify the Defendant or its Solicitors of the reasons for the delay in obtaining the necessary consent and did not seek an extension of time in writing from the Defendant to obtain the necessary consent, which was a contractual option available to the Plaintiff under the said Agreement. In the premises, the Plaintiff's action to wilfully wait for the 150 days to expire was designed to wrongfully terminate the Agreement.

[4] The Defendant claims that as a result of the breach of the Agreement by the Plaintiff in failing to obtain the necessary consent from the Director of Lands, the Defendant

has suffered loss and damages and the said loss and damages are of a continuing nature.

- [5] On 28 October 2015, the Plaintiff filed a Reply to the Statement of Defence and Defence to Counterclaim.
- [6] On 19 August 2016, a Notice of Motion was filed by the Defendant seeking the leave of Court for the Defendant to file and serve a Reply to the Plaintiff's Defence to Counterclaim. Having been granted leave, the Defendant filed a Reply to the Plaintiff's Defence to Counterclaim.
- [7] On 23 June 2016, the Plaintiff filed a Summons for Trial of Preliminary Issue. The said Summons is supported by an Affidavit of Robert Peter Semaan, Company Director of the Plaintiff Company.
- [8] This application is said to be made pursuant to Order 33, Rule 3 of the High Court Rules 1988.
- [9] On 8 December 2016, Hong Yong Li, General Manager of the Defendant Company filed an Affidavit in Reply. Therein he states that the Preliminary issue should be decided in favour of the Defendant and the matter progressed to trial so that the Defendant could prove its counter claim against the Plaintiff.
- [10] This matter was taken up for hearing before me on 17 January 2017. Both Counsel for Plaintiff and Defendant were heard. The parties also filed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

#### **THE SUMMONS FOR TRIAL ON PRELIMINARY ISSUE**

- [11] In the Summons filed for Trial on Preliminary Issue the Plaintiff states:

That this is an application on the part of the Plaintiff to determine a preliminary issue; namely whether Clause 3.2 of the agreement for sale and purchase dated 3<sup>rd</sup> October 2014 is sufficiently clear in its terms to

determine the within action in its entirety. In the event that the preliminary issue is determined in favour of the Plaintiff the following Orders are sought:

- (i) That the Defendant's Statement of Defence and Counterclaim be dismissed;
- (ii) That Judgment be entered in favour of the Plaintiff on its Statement of Claim; and
- (iii) That the Defendant pay the Plaintiff's costs of this application.

### **THE AFFIDAVIT FILED IN SUPPORT OF THE SUMMONS**

[12] The Summons is supported by an Affidavit of Robert Peter Semaan, Company Director of the Plaintiff Company. Therein he states, the reason why the Plaintiff is seeking a trial on the preliminary issue.

[13] Attached to the Affidavit is the relevant Sale and Purchase Agreement entered into between the parties, on 3 October 2014 [As Annexure "B"].

### **LEGAL PROVISIONS AND ANALYSIS**

[14] This application has been made in terms of Order 33, Rule 3 of the High Court Rules. Order 33, Rule 3 provides:

*"3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."*

[15] As per the Sale and Purchase Agreement, Tengy Cement (Fiji) Company Limited, the Defendant in the present application, is referred to as *"the Vendor"*; and Pacific Building Solutions Limited, the Plaintiff in the present application, is referred to as *"the Purchaser"*.

[16] In Clause 1 (*Covenant to Sell and Purchase*) of the Agreement, it is stated that the Vendor agrees to sell and the Purchaser agrees to purchase the Property for the purchase price and upon and subject to the Terms and Conditions stipulated in the Agreement.

[17] Clause 2 sets out the amount of the *Purchase Price and the Deposit* in the following terms:

*The Purchase Price for the Property shall be the sum of **\$3,300,000.00** (Three Million and Three Hundred Thousand Fijian Dollars) plus VAT, if applicable (hereinafter referred to as "**the Purchase Price**") which shall be paid by the Purchaser to the Vendor as follows:-*

- (i) A deposit in the sum of **\$165,000.00** (One Hundred and Sixty Five Thousand Fiji Dollars) shall be paid upon execution of this Agreement (hereinafter referred to as "**the Deposit**"). The Deposit shall be on account of the Purchase Price, and shall be held by the Vendor's Solicitors Neel Shivam Lawyers of Suva in their trust account to the authority of the Vendor and which sum shall be released by Neel Shivam Lawyers to the Vendor on the Date of Settlement (as hereinafter defined) hereof without reference to the Purchaser.*
- (ii) The balance of the Purchase Price in the sum of **\$3,135,000.00** (Three Million One Hundred and Thirty Five Thousand Fiji Dollars) plus VAT, if applicable (hereinafter referred to as "**the Balance**") shall be paid by the Purchaser to the Vendor on the date of settlement.*
- (iii) All payments of money under this Agreement shall be made without any deductions whatsoever.*

[18] Clause 3 of the Agreement sets out certain *Conditions Precedent* in the following terms:

- 3.1 This Agreement is subject to Consent to Transfer of the Property being obtained from the Director of Lands.*
- 3.2 If Director of Lands consent is not obtained within **150 days** from the date of execution of this Agreement, or such other date as maybe mutually agreed to by the parties in writing then this Agreement shall be null and void.*

[19] Clause 4 of the Agreement, which deals with *Settlement Date* reads as follows:

4.1 *The Date of Settlement shall be on or before **sixty (60) days** from the date of endorsement of consent by the Director of Lands to the Transfer Document of the Property.*

4.2 *The Date of Settlement shall not be modified or extended unless otherwise such modification and such other date is mutually agreed between the parties in writing.*

[20] The said Agreement contains several other Clauses as well including those dealing with *Indemnity; No Encumbrances; Warranties; Purchaser's Default and Vendor's Default* etc.

[21] As per Clause 17 (*Further Assurances*), it states:

*Each party shall sign, execute and do all deeds, acts, documents and things as may reasonably be required by any other party effectively to carry out and give effect to the terms and conditions of this agreement whether before or after the date of settlement.*

[22] Clause 20 of the Agreement stipulates that *Time shall be of the essence in the performance of terms subject to time requirement in the Agreement.*

[23] The Plaintiff submits that Clause 3 of the Agreement is unambiguous. As per Clause 3.1, the Agreement is subject to Consent to Transfer of the Property being obtained from the Director of Lands. In terms of Clause 3.2, the Agreement If Director of Lands consent is not obtained within 150 days from the date of execution of the Agreement (which was on 3 October 2014), or such other date as maybe mutually agreed to by the parties, in writing, then the Agreement shall be null and void.

[24] Computing 150 days from the date of execution of the Agreement would be 2 March 2015. According to the Plaintiff, on a strict interpretation of the 150 day provision, the Agreement became null and void on the 2 March 2015, as no consent had been received from the Director of Lands as at that date, nor had the parties mutually agreed in writing to extend the date.

- [25] The Plaintiff asserts that even if a more flexible interpretation was to be given to the provisions of Clause 3.2 of the Agreement, and the 150 day time frame is computed from the date the Plaintiff lodged the requisite consent application at the Office of the Director of Lands (which was on 21 November 2014), yet again the Agreement would have become null and void on 10 April 2015, as no consent had been received from the Director of Lands as at that date, nor had the parties mutually agreed in writing to extend the date.
- [26] The Plaintiff further submits that if the 150 day time frame is computed from the date the additional material was supplied to the Office of the Director of Lands, as requested by them (which was on 27 February 2015), then again the Agreement would have become null and void on 30 July 2015, as no consent had been received from the Director of Lands as at that date, nor had the parties mutually agreed in writing to extend the date.
- [27] The Defendant counters this position and submits that Clause 3.2 of the Agreement cannot be read in isolation, and must be interpreted taking into consideration other relevant Clauses of the Agreement as well.
- [28] The Defendant states that it is the accepted practice in Fiji for the Purchaser (in this case the Plaintiff) to apply for and obtain the consent from the Director of Lands. As per Clause 20 of the Agreement time was of essence, and as such the Plaintiff was contractually obligated to expedite matters towards the settlement in terms of the Agreement.
- [29] In terms of Clause 17, the Plaintiff was also bound to “...*sign, execute and do all deeds, acts, documents and things as may reasonably be required by any other party effectively to carry out and give effect to the terms and conditions of this agreement whether before or after the date of settlement.*”



[30] In this matter, the Defendant has filed a Counterclaim against the Plaintiff. By way of Counterclaim, the Defendant states that no active steps were taken by the Plaintiff to procure the necessary consent from the Director of Lands for several months so as to enable parties to proceed with the Agreement. Further, the Plaintiff failed to notify the Defendant or its Solicitors of the reasons for the delay in obtaining the necessary consent and did not seek an extension of time in writing from the Defendant to obtain the necessary consent, which was a contractual option available to the Plaintiff under Clause 3.2 of the Agreement.

[31] Considering all the above factors, I too am of the opinion that Clause 3.2 of the Sale and Purchase Agreement, dated 3 October 2014, cannot be interpreted or considered in isolation. It is important that the said Clause be interpreted taking into consideration other relevant Clauses of the Agreement as well. This could be best achieved during a proper hearing of this matter, where all relevant issues concerning both the Plaintiff and the Defendant could be adjudicated upon.

[32] Therefore, I hold that the Summons filed by the Plaintiff for Trial on Preliminary Issue is without merit and should be dismissed.

[33] Accordingly, I make the following Orders:

#### **ORDERS**

1. The Summons for Trial on Preliminary Issue is dismissed.
2. The Costs in this Application shall be costs in this cause.

Dated this 20<sup>th</sup> day of February 2019, at Suva.



Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**