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
APPEARANCES	:	Mr A Narayan for the plaintiff/respondent Mr N Kumar for the defendant/applicant
DATE OF HEARING	:	10 August 2020
DATE OF JUDGMENT	:	8 October 2020

DECISION

1. On the 23rd September 2019 in the absence of the defendant (it having filed an acknowledgement of service, but no statement of defence) I gave a decision 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.

   The defendant applied by Amended Summons dated 15 November 2019 for a number of interlocutory orders, including an application to set aside the judgment entered as set out above. The other aspects of the Amended Summons have been dealt with separately, and the application to set aside judgment was eventually heard by me on 10 August 2020. This is my decision in that application.

2. The parties have filed and served the following affidavits:

   In support of the defendant's application to set aside judgment:

   - sworn on 7 November 2019 by Madhu Rao (a manager of the defendant company), '
   - a supplementary affidavit sworn on 13 November 2019 by Kamini Naicker (a director of the defendant).

- an affidavit in reply by Ananth Aviram Reddy sworn on 3 August 2020.

By the plaintiff in opposition to the application:

- Sworn on 11 March 2020 by Poonam Pritika Nand Sharma, a director of the plaintiff company.
- Sworn on 11 March 2020 by Krishneeta Devi, a solicitor formerly employed by the defendant

Background

3. The statement of claim alleged that the plaintiff is a company incorporated in Fiji to engage in the business of property development and investment. The defendant is also incorporated in Fiji, and was said to be the developer of an Integrated Tourism development located at the south end of Denerau Island known as Denerau Waters. The land on which Denerau Waters was being developed is on a parcel of land comprised in protected Crown Lease No. 16923.

4. In an agreement dated 16 December 2016 Mr Hin Man Ngai agreed to purchase 24 lots on the fourth residential finger of the proposed Denerau Waters development for a total of F$16.5m. On or about 16 December 2016 he paid a deposit of F$1.65m which was held in the trust account of a stakeholder/solicitor.

5. The original agreement was superseded (in December 2017) by two agreements between the plaintiff (in substitution for the original purchaser) as purchaser and the defendant as vendor, on predominantly the same terms as the original agreement referred to above. The deposit paid by the purchaser under the original agreement was applied to the subsequent agreements.

6. At about the time they entered into the replacement agreements the parties agreed that F$500,000 of the deposit could be released by the stakeholder to the defendant for use in the course of the development work. Otherwise the terms of the replacement agreements remained the same as the original agreement in all respects relevant to this proceeding.

7. The sale and purchase agreements provided (by clause 1.2(b) of the Condition Precedent section of the agreements) that they were not to become agreements for the acquisition of land until the condition precedent was satisfied. Until the condition precedent was satisfied, the only obligations that the parties had under the agreements were those recorded in the condition precedent, and to pay the deposit. These obligations require the vendor to obtain the approvals required for the agreement to become an agreement for the sale and purchase of land. The only obligations that the purchaser had at this initial stage of the agreements were:

   i. to pay the deposit,

ii. at the request of the vendor – to provide to the vendor all necessary information for, and reasonable assistance with obtaining the necessary approvals.

iii. Not to withdraw any application for, or do anything to compromise the obtaining of the approvals.

There is no suggestion that the plaintiff/purchaser was in any way in breach of these obligations.

8. Under the Conditions of Sale section of the agreements (which according to the terms referred to above did not begin to apply until the Conditions were satisfied (i.e. the approvals were obtained)) clause 3.4 provided:

> ***No target date for Settlement:*** *The Vendor gives no warranty to the Purchasers as to when the Lease Title will issue, or as to when the Purchaser will be able to register a memorandum of transfer for the lot to the Purchaser. The Purchaser acknowledges that any anticipated or projected date for Settlement given by the Vendor or its agents prior to or after signing this agreement are indicative and approximations only and are not binding on the Vendor or to give rise to any claim for compensation by the Purchaser. The vendor will, however, approve the release of deposit and any accrued interest to the Purchaser and allow the Purchaser to terminate agreement if Lease Title is not ready to be issued within 24 months of the signing of the agreement unless the delay in completing the Subdivision and obtaining the title is a result of Force Majeure and the Vendor in its reasonable opinion, determines that it can still complete the Subdivision within an extended period of time. The Vendor will notify the Purchaser of its intention to complete the Subdivision and obtain the title and parties will endeavour to agree on a reasonable extended timeframe to allow the Vendor to complete the Subdivision and obtain title. If parties agree to terminate the Agreement and refund the Deposit to the Purchaser, neither parties will have a claim against each other save for any monies released in advance by the purchaser to the Vendor to assist with the subdivision.*

Whether, and how this clause might apply to the issues that arose and led to the purported cancellation of the agreement by the defendant in May 2019, are obviously matters for argument, but I note that 24 months since the agreements were signed (although the new agreements were entered into in December 2017, they were back-dated to 17 December 2016, and were presumably intended to take effect from that date) had already expired, and the invitation that the defendant had made to the plaintiff – some time before May 2019 - to cancel the agreements suggests that it recognised that completion of at least the latter stages of the development would not be achieved within a reasonable timeframe, or possibly at all. No evidence has been presented to suggest that *force majeure* might have been a factor in the delays.

9. Nevertheless, the vendor, by letter dated 23 May 2019, relying on actions and statements apparently made by the plaintiff and its agents which were said to evidence an intention on the plaintiff's part not to complete its obligations under the agreements, purported to cancel the agreements and forfeit the deposit. The plaintiff alleged in its statement of claim that this termination and forfeiture contravened the terms of the agreements, but the plaintiff nevertheless accepted the defendant's cancellation of the agreements and demanded that the defendant repay the deposit. It did not do so, hence the plaintiff's claim seeking a declaration

that the agreement was at an end, and judgment for the full amount of the deposit, i.e. $1,650,000.

10. Because no defence was filed, the plaintiff's assertions in its statement of claim were uncontested. After the time for filing a statement of defence had expired the plaintiff applied for judgment, which I gave on 23 September as set out in paragraph 1 above.

Evidence in support of the defendant's application

11. The affidavit of Mr Rao provides the factual basis for the defendant's application to set aside the judgment entered on 23 September. Mr Rao sets out the history of the parties' agreements (as outlined above) and annexes copies of the agreements. Apart from annexing copies of the defendants cancellation letter of 23 May 2019 and the response from the plaintiff's solicitors, Mr Rao provides only a brief attempt to explain or justify the defendant's decision to cancel the agreements. His evidence about crucial conversations that are said to have taken place between the defendant's real estate agent and representatives for the plaintiff is mostly hearsay, an example of which is as follows:

> 45. *Mr Philip Toogood advised the Defendant that in his meeting with the Plaintiff on 8 March 2019 the Plaintiff advised him that it did not want to proceed with the Sale and Purchase Agreements.*

and is unsupported by copies of any of the correspondence referred to in the letter of cancellation that is said to have amounted to repudiation by the purchaser, prompting the cancellation by the vendor. There is no affidavit from Mr Toogood. While I accept that section 3(1) Civil Evidence Act 2002 means that hearsay evidence is not itself objectionable, and that for interlocutory matters O.41, r5(2) of the High Court Rules allows statements in affidavits of information and belief provided that sources for the information are given, I would have expected on an issue as crucial as this to the defendant's application that Mr Toogood would have given evidence himself of what was said, when and by whom and in what context. It is clear from the defendant's own correspondence that the defendant had previously (in late 2018) offered the plaintiff the opportunity to cancel the contracts, and have its deposit returned, although the defendant says that the offer had been declined and had lapsed. The defendant had also sought to persuade the plaintiff/purchaser to accept properties in the first and second stages of the development, in lieu of those in the fourth stage as per the agreements, a proposal that the plaintiff was not interested in, but which raised doubts in the plaintiff's mind about the ability of the defendant to complete the project. With this background I am not persuaded that a text from the plaintiff to the defendant's real estate agent stating:

> *Philip*
> *pls inform developer to cancel contract and return our deposit asap, thks a lot. Barry*

amounted to repudiation on the part of the plaintiff (an unequivocal rejection of its contractual obligations) as the defendant alleges. Drawing this conclusion from the

plaintiff's conduct is further complicated by the fact that many of the discussions that took place were apparently via an interpreter, with all the potential that carries for misunderstandings to arise.

12. Mr Rao says that the defendant was entitled to forfeit the deposit, and also has a counterclaim for $5.8m in damages arising from the plaintiff's repudiation. A draft statement of defence and counterclaim is annexed to his affidavit. Unfortunately this says nothing about how the damages arise or are calculated apart from this paragraph in Mr Rao's affidavit:

> *50. The Defendant has ceased construction works and demobilized from the construction site incurring costs in the sum of $5,800,000. ... to develop the site.*

Although the amount claimed is impressive, the absence of any explanation for how this damage results from the plaintiff's actions (assuming that they constituted repudiation as the defendant alleges) is not very convincing. A further difficulty, at least for any counterclaim by the defendant for damages for breach of contract, appears to lie in the decision of the Court of Appeal in **DB Waite (Overseas) Ltd v Wallath** [1972] 18 FLR 141. In that case the court held that where an agreement for sale requires the prior consent of the (then) Native Land Trust Board, unless and until that consent is obtained, the agreement is void and of no effect, and a claim for damages that is dependent on the validity and breach of the agreement cannot succeed. The same principle applies to agreements that require, as in this case, the prior consent of the Minister under section 6 of the Land Sales Act 1971.

13. 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 appear to allow forfeiture only in limited circumstances that don't 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). Such evidence as there is about the plaintiff's conduct suggests that the defendant might struggle to show that there has been any default which would justify cancellation and forfeiture.

14. As I acknowledged in my decision of 3 December (on the defendant's application for a stay of execution):

> *there may be more sophisticated arguments available to the defendant relying on implied terms etc., and ... 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 ... that it meets the threshold of being a 'good arguable case' that it is entitled to forfeit the plaintiff's deposit.*

In making these comments I was referring to the same affidavits as the defendant now relies on in support of the present application.

Preliminary issues

15. In addition to the evidence provided by Mr Rao about the merits of the defendant's defence and counterclaim, the defendant also argues that judgment was irregularly granted, or that the plaintiff's opposition to the application to set aside judgment should be disregarded, for the following reasons:

i. the plaintiff failed to provide full disclosure to the court when it applied ex parte in September 2019 for judgment.
ii. Counsel appearing for the plaintiff at the hearing of the application for judgment had a conflict of interest.
iii. The affidavit evidence by Ms Krishneeta Devi (part of the plaintiff's response to the application to set aside judgment) was in breach of solicitor/client privilege and should not be admitted.

16. The first of these complaints can be quickly dealt with. Although the application by the plaintiff for judgment in September 2019 took place in the absence of the defendant, it was not an *ex parte* application in the sense that it carried with it the obligations of disclosure that apply to a party making, for example, an ex parte application for interim injunction. The distinction lies in the fact that whereas the applicant for an ex parte injunction is seeking orders without the defendant having the opportunity to oppose them and present its case, or even being aware that an application has been made, in the case of a default judgment the defendant has been served with the proceedings and has failed to take up the opportunity to file a defence. In the former situation there is an inherent unfairness to the defendant, and the applicant for orders has an obligation to mitigate (to the extent possible) that unfairness by providing to the court all the information that the defendant might have provided if it had had the opportunity to do so.

17. In the case of an application for judgment where the defendant has not filed a defence, there is no inherent unfairness. The defendant has been served with the proceedings, and has therefore had the opportunity to file a defence to the assertions made by the plaintiff in its statement of claim. In the absence of a defence, those assertions are taken to be admitted. As I made clear in giving my judgment of 23 September 2019, the plaintiff is not entitled to make additional claims (i.e. claims not encompassed by the proceedings that have been served) by presenting evidence, but it is entitled to such judgment as arises from the uncontested statement of claim. Because the defendant has had, but has not taken, the opportunity to file a defence to the claims, the plaintiff has no responsibility (apart from a duty not to mislead the court) to disclose to the court information it has about what the defendant might have raised, had it taken the opportunity to do so.

18. From the evidence provided in the affidavit of Mr Rao it appears that in 2017/18 the defendant instructed AK Lawyers of Nadi to undertake legal work for it in connection with a number of matters unrelated to the specific issues between the plaintiff and the defendant in this case. This work included (as described by Mr Rao):

(a) *Tendering advice and setup documentation of Denerau Body Corporate Limited, the body corporate governing entity for the Denerau Waters Development, which is where the subject lots are located.*

(b) *Tendered advice and assisted on lease titles issuance of the 1st stage development.*

(c) *Prepared and registered Restrictive Covenants on the titles issued for stage 1 for the defendant.*

(d) *Advised the Board of Directors of the Defendant on the Sale and Purchase Agreement in relation to its rights and its risks of cancellation and termination under clause 3.4 of the Sale & Purchase Agreement.*

(e) *Represented the Defendant during discussions with Denerau Corporation Limited on body corporate documentation points at the time of performance of the Memorandum of Understanding between the Defendant and Denerau Corporation Limited.*

(f) *Represented the Defendant during Denerau Corporations Limited's trade mark objection. The objection was raised by AK Lawyers on the Defendants behalf, forbidding Denerou Corporation Limited from registering their brand which carried the name Denerau.*

(g) *Engagement of setting up the Body Corporate Entity, the Articles of Association and the rules of the Body Corporate that manages the project. AK Lawyers are still engaged with the Defendant in this matter.*

19. Apart from reciting this list of work carried out by AK Lawyers for the defendant, Mr Rao does not provide any evidence to suggest that in the course of carrying out this work (none of which relates specifically to the dealings between the plaintiff and the defendant) AK Lawyers obtained information from or about the defendant such that it would be an actual or potential breach of its obligations of trust and confidence for AK Lawyers now to act for the plaintiff in connection with the current dispute. The evidence suggests that the plaintiff engaged AK Lawyers to assist it on receipt of the defendant's letter of 23 May 2019 purporting to cancel the agreements and forfeiting the deposit. AK Lawyers responded to that letter on 3 June 2019 on behalf of the plaintiff. There is no evidence that objection was taken by the defendant at that point to AK Lawyers acting for the plaintiff.

20. The Rules of Professional Conduct and Practice (Schedule to the Legal Practitioners Act 2009) provide, in Chapter 1 Relations with Clients:

> *1.1 A practitioner shall not abuse the relationship of confidence and trust with a client.*
>
> *1.2 A party shall not act for more than one party in the same matter without the prior consent of all parties.*
>
> *1.3 On becoming aware of a conflict of interest between clients a practitioner shall forthwith:*
>
> *(a) advise all clients involved in the matter of the situation.*
>
> *(b) continue acting for all clients only with the consent of all clients and only if no actual conflict has occurred.*
>
> *(c) decline to act further for any party where so acting would disadvantage any one or more of the clients.*
>
> *1.4 Information received by a practitioner from or on behalf of a client is confidential and shall not be communicated to others save with the client's consent or where so required by law.*

21. AK Lawyers is clearly not acting *for more than one party in the same matter*. Taking the list of work provided by Mr Rao as a guide, the matters upon which AK Lawyers were, or are, acting for the defendant are different matters from those that arise in this proceeding. The issue here, if there is one, can relate only to the acquisition of

information by AK Lawyers in the course of acting for and advising the defendant on the matters listed by Mr Rao, and whether now acting for the plaintiff results in an actual or potential communication of or use of that information by AK Lawyers to or for the benefit of others in breach of Rule 1.4. I cannot immediately see how this is a possibility, and Mr Rao's affidavit does not provide any details of information that he says the lawyers have that might be misused. In particular, in connection with the present application, there is no evidence that AK Lawyer has communicated or used any information belonging to the defendant in the course of representing the plaintiff.

22. The concern about the affidavit of Ms Devi relates to the same type of issue of confidentiality and privilege. Ms Devi is a solicitor who was employed by the defendant at the time this proceeding was commenced by the plaintiff, and a writ of summons was served on the defendant. In his affidavit in support of the application to set aside judgment Mr Rao says of Ms Devi's conduct at this time:

> *22. The officer in carriage of these proceedings was in-house Counsel, Krishnita (sic) Devi.*
> *23. The in-house Counsel failed to file a Statement of Defence and resigned on 25 September 2019 effective immediately without a proper hand-over. The Defendant's directors were unaware that a defence was not filed.*
> *24. The Defendant's in-house counsel did not inform the directors of the Defendant company that a Statement of Defence ought to be filed within 14 days and had not been filed.*
> *25. The in-house Counsel then resigned from employment without giving proper notice or handing over files including the file in these proceedings.*

23. Ms Devi became aware of these assertions by the defendant, and on 11 March 2020 she swore an affidavit in response to them. In the affidavit she responded to the evidence of Mr Rao relating to her employment, to the effect that Mr Rao had lied in correspondence to the plaintiff's solicitors about the termination of her employment by the defendant (in a letter dated 26 September 2019 – in the course of seeking an extension of time to respond to an application by the plaintiff in proceedings commenced against it by the defendant - Mr Rao told AK Lawyers that Ms Devi's *employment with us was terminated with immediate effect at [close of business] yesterday)*. Ms Devi's evidence is that she had resigned from her job with the defendant (rather than having her employment terminated as Mr Rao says in his letter) because she was not being paid, and because her employer was not accepting or acting on her legal advice. She goes on to say:

> *7. The allegation that the Defendant's directors were not aware that a defence had to be filed is also rather misleading and false. I had advised both the Manager and the Managing Director that a defence had to be filed. I required instructions on what the Defendant's purported defence would be in order to attend to the filing and service of the relevant document. The Defendant was always aware of this action and the need to file a defence within the period prescribed. The Defendant (through its Managing Director and Manager) purposively chose to avoid filing a defence with the aim of delaying the matters as they had no real defence to this action. ...*
> *8. In addition to the above, the Managing Director of the Defendant is a law graduate and has numerous actions pending at the High Court both for the Defendant company and himself personally. [He] is well versed with the obligations of filing defences and so forth. Despite my*

express advice and follow ups (both in writing and verbally) regarding the filing of a defence, the Defendant (through its Managing Director) deliberately avoided filing the defence.

Annexed to the affidavit is a copy of a text to her (in response to her suggestions for a statement of defence and counterclaim in the plaintiff's action) in which Mr Ananth Reddy (who I assume is the 'Managing Director' referred to by Ms Devi, although he does not so describe himself in his affidavit – see below) says on 8 August 2019:

> *We will raise conflict to their writ so no need to file defence and counterclaim. We will respond to the defence raised for our writ ... though. SoC are meant to be brief. More importantly it should be concise by divulging only facts relevant to showing the cause of action. Further detailing of facts (e.g. breakdown of payment, etc) are matters for trial.*

This response tends to corroborate what Ms Devi says about Mr Reddy's experience and knowledge about litigation procedure.

24. In an affidavit in reply dated 3 August 2020 Mr Reddy responded to Ms Devi's evidence. In doing so he also objected to the evidence on the basis that her status as either employee and solicitor meant that she is *debarred from divulging any information without the consent of the Defendant*.

25. Although I question the proposition by Mr Reddy that the obligations of loyalty of an employee can be equated with the duty of trust and confidence that a lawyer has to his/her client (the principles behind the two types of duty are quite different) I agree that in normal circumstances the employer of an in-house lawyer is entitled to the same privilege in relation to communications with the legal advisor as it could expect with an outside solicitor, and the lawyer owes the same duty of confidentiality. The privilege that a person is entitled to for communications between them and their lawyer for the purpose of giving and taking legal advice is founded on the public interest in ensuring that people have the opportunity to get and to act on legal advice. It is more conducive to orderly society that people know what the law requires, and comply with it, than that they behave in ignorance and defiance of the law. For this principle to work effectively, it is important that the legal advice be given and taken in confidence. The reasoning for this is articulated in the decision of Lord Taylor of Gosford CJ in the House of Lords in ***R v Derby Magistrates' Court ex p B*** [1996] 1 AC 487. After a review of the authorities Lord Taylor concluded at 507D that:

> *The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.*

26. But this privilege that a party is entitled to enforce is not absolute or unqualified. Unlike the privilege that applies to communications and concessions in the course of settlement discussions, solicitor/client privilege can be unilaterally waived by the client. In **Benecke v National Australia Bank** (1993) 35 NSWLR 110 the court held

that privilege had been lost because the claimant herself had put in issue the content of the communications in question. Gleeson CJ said at 111F-112A:

> *It would be inconsistent with the reason for the existence of the privilege to permit it to operate in the manner for which the appellant contends. But for her own actions, the privilege would have enabled the appellant to insist that nobody should be able to give evidence of the confidential communications between the appellant and her senior counsel about the settlement of the first proceedings, without the consent of the appellant. However, it did not enable the appellant to make public her version of those communications and, at the same time, to enforce silence on the part of others who disagreed with that version. The law permits the search for the truth in legal proceedings to yield, in certain circumstances, to the public interest in preserving the secrecy of communications between lawyer and client. In the present case, however, the appellant herself lifted the veil of secrecy by giving her version of the communications. Thereafter, there was no reason in principle why the pursuit of the truth should not take its course, or why the court should be inhibited in seeking to ascertain the true facts concerning those communications.*

This decision has been applied recently by the Court of Appeal of England & Wales in **Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd and another** [2020] All ER (D) 69.

27. This reasoning applies to the situation here. The defendant has put in issue the reason for its failure to file a statement of defence. It blamed its employee Ms Devi, both for her failure to file a statement of defence, and for her failure to advise that it was necessary to file one, or of the time within which it needed to be done. Having raised the issue the defendant cannot by insisting on its privilege stop its version of events from being contested.

28. What is also clear from the evidence on this issue is that the dismissal/resignation of Ms Devi on 25 September was not, contrary to what the defendant says, a reason for its failure to file a statement of defence. The time for filing a defence expired on 29 August 2019, almost a month before Ms Devi resigned. It is apparent from the text sent by Mr Reddy on 8 August (see paragraph 22 above) that he instructed Ms Devi that a statement of defence and counterclaim should not be filed, apparently because the defendant intended to object to the fact that AK Lawyers was acting for the plaintiff. It is simply untrue to suggest (as Mr Rao does in his affidavit of 7 November 2019 – see paragraph 21 above, supported by Mr Reddy) that the resignation of Ms Devi in September, and the absence of a *proper hand-over* was a factor in the failure of the defendant to file a defence.

The Law

29. Order 19, r.9 HCR states:

> *The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.*

As the commentary to this rule makes clear, where judgment has been properly entered (i.e. where there is no suggestion of irregularity of judgment) the court, in the exercise of its discretion to set the judgment aside, will have regard to the following:

- whether the defendant has a substantial defence
- is the delay in filing a defence reasonably explained
- will the plaintiff will suffer irreparable prejudice if the judgment is set aside.

But it is clear that these are guidelines only, not rules that must each be thoroughly satisfied. As the Federal Court of Australia noted in **Davies v Pagett** (1986) 10 FCR 226 at 232 after a comprehensive analysis of the cases:

> *The fundamental duty of the Court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways: for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions hearings or other pre-trial procedures which enable the Court to supervise progress - and, more pertinently, non-progress - in all actions*

In **Evans v Bartlam** [1937] AC 473 Lord Atkin said (at p.477):

> *I agree that both rules ... give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matter to which the Court will have regard in exercising its discretion. If there was a rigid rule that no-one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment on the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.*

And in the same case Lord Wright said (at p.489):

> *The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the court will not prima facie desire to let judgment pass on which there has been no proper adjudication ... The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose.*

30. These are well recognised extracts that have been followed often by the Courts in Fiji. I have quoted from them at length because I think that these quotations capture

the essence of the court's jurisdiction and how it should be exercised. In the final analysis it is not a matter of applying rigid rules. The question that the court must answer is what does the need to do justice between the parties require? The considerations listed in the previous paragraph are a useful starting point in answering that question, but no more. Regardless of the circumstances in which judgment has been able to be entered by default, it will seldom accord with justice (in which the process by which decisions are reached is as important as the decisions themselves – *Not only must justice be done, it must also be seen to be done*[1]) to refuse a party the opportunity to present an arguably meritorious defence. Of course (since we are resorting to aphorisms) another important principle is *justice delayed is justice denied,* and the delay caused by the need to set aside judgment and rehear a case is certainly a factor to be weighed, usually in connection with the issue of prejudice. But if – as Lord Wright suggests in the passage quoted above – the award of costs are a sufficient punishment of the applicant and compensation for the respondent, prejudice from delay alone will not be a factor in the decision to set aside judgment.

Analysis

31. In this case, working backwards through the considerations listed in paragraph 28 above, I do not think that there is any prejudice to the plaintiff, if judgment is set aside, that cannot be compensated by an award of costs. The plaintiff has now recovered most of the deposit it paid (other than the $500,000 that it agreed might be paid out by the stakeholder to the defendant for use on the development project), and if judgment is set aside, an award of costs against the defendant on this application, and on the application in September 2019 for judgment, would put the plaintiff in the same position as it would have been if the defendant's statement of defence had been filed on time.

32. On the defendant's explanation for the delay in filing a statement of defence I am by no means satisfied that it is a good one, or indeed a truthful one, for the reasons set out in paragraphs 21-27 above. It reflects no credit on the defendant that its criticism of Ms Devi was maintained in both its evidence and its submissions in support of this application as the main foundation of its case when it seems apparent that the company management had made a decision to rely on technicalities (an objection to the plaintiff's lawyers – an argument that I consider quite misconceived, but which is illustrative of the defendant's mindset) rather than filing a substantive defence which, even if it was not ultimately sustainable, would have prevented the entry of judgment by default. However, for the reasons explained by Lord Atkin in **Evans v Bartlam** in the passage quoted above, I am not convinced that this tactical miscalculation on the part of the defendant, or its selective presentation of evidence to shift the blame onto someone else, are necessarily good enough reasons, by themselves, to refuse its application to set aside judgment. Burdening the defendant with liability for a claim to which it has a

[1] Lord Hewart CJ in **R v Sussex Justices, ex parte McCarthy** [1924] KB 256 (talking in that case about the recusal of judges where there might otherwise be a perception of bias or predetermination)

good defence (and thereby rewarding a plaintiff with an award it is not entitled to) is a heavy and disproportionate penalty for such conduct, and is not 'just'.

33. Which brings me to the remaining, and most important issue, the substance of the defendant's defence. It is unfortunate that in counsel's submissions in support of the defendant's application, the main focus was on the technical issues referred to above, and very little was said about the substance of the defendant's defence. This is in spite of the fact that in both my judgment of 23 September 2019, and in my ruling of 3 December 2019 (on the defendant's application to restrain the disposition of the deposit by the plaintiff's solicitor) I referred to the difficulties presented for the defendant's case by the decision of the Court of Appeal of Fiji in **DB Waite (Overseas) Ltd v Wallath** referred to in paragraph 11 above. I also commented on the possible difficulties for the defendant of the terms of the sale and purchase agreements in so far as it [the defendant] sought to argue that it was entitled to forfeit any deposit. In view of these comments I would have expected at least something in submissions on these issues. Having elected (whether justifiably or otherwise) to cancel the agreements the only defences raised by the defendant in response to the plaintiff's claim for the return of its deposit are that it was entitled to forfeit the deposit, and/or is entitled to set- off against the deposit the amount of its counterclaim for damages for breach of contract. On an application to set aside judgment the applicant has to show, at least (it might be argued that the threshold is higher, but it is certainly not lower) that on the facts said to apply, it has a sustainable defence/counterclaim. I am not satisfied that it has done so, partly because it has not provided evidence (apart from assertion) to justify its election to cancel the contracts, and partly because it has not shown by submissions how the facts asserted might amount to a defence/counterclaim.

34. However, although I am not persuaded, for the reasons set out, and given the almost complete absence of supporting evidence or submissions from the defendant on the subject, that the defendant can sustain either:

- a claim that the plaintiff's conduct amounted to repudiation, entitling the defendant to cancel the contracts and forfeit the deposit, or
- a claim for damages for breach of an agreement that is void and of no effect because of the absence of Ministerial consent,

if that is a claim that the defendant wishes to make in fresh proceedings I do not think that there is any reason in principle why it should not be allowed to do so.

35. The only aspect of the judgment in the current proceeding which might interfere with any such new claim by the defendant is the declaration I made on 23 September 2019 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.*

On reflection, I think that that declaration was unnecessary to the claim by the plaintiff for the return of the deposit (which was being partly held by a stakeholder). It was probably sufficient to conclude that, given the termination of the agreements by the defendant/vendor, and in the absence of any argument by the defendant (given the lack of a statement of defence) that it was entitled to forfeit the deposit, the plaintiff was entitled to the return of its deposit. Particularly now that the plaintiff has recovered the part of the deposit held by the stakeholder, and has judgment for the balance against the defendant, I have decided to vary the judgment of 23 September by vacating the declaration as to the unlawfulness of the defendant's cancellation of the agreement. This will enable the defendant to initiate fresh proceedings seeking the damages that it argues it is entitled to. The variation of the judgment in this way is not intended to interfere with the entry of judgment for the amount of the deposit (which I regard as a different issue, and as to which I am not persuaded – applying the criteria referred to - that judgment should be set aside), or with the plaintiff's right to enforce that judgment in whatever way it can and chooses to do.

36. The defendant having sought and been granted an indulgence, the plaintiff is also entitled to costs on this application which I fix summarily at $2500.00.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 8th day of October, 2020

SOLICITORS:
AK Lawyers, Nadi, for the Plaintiff
Krishna & Co, Lautoka, for the Defendant