RITA COMMISSO v ESTATE MANAGEMENT SERVICES LTD and Anor

HIGH COURT — CIVIL JURISDICTION

FATIAKI J

1 March 2002

[2002] FJHC 282

Practice and procedure — applications — summary judgment — failure to fulfill obligations under agreement — absent notice of intention to defend — third party deemed to admit any claim — High Court Rules 1988 Os 14, 16, rr 5(1)(a), 7(1), 7(2).

Plaintiff sought summary judgment against Defendant company. Plaintiff alleged numerous failures on the part of the Defendant in fulfilling its obligations under the "Agreement". Defendant denied liability and claimed indemnity from the third party.

Held — (1) While there has been an inordinate delay on the Defendant's part in fulfilling its obligations under the "Agreement", the Plaintiff through inactivity, must be taken to have acquiesced in that delay to some extent.

(2) The third party is deemed to admit any claim stated in the third party notice and shall be bound by any judgment or decision in the action absent a notice of intention to defend.

Application dismissed.

Cases referred to

Bowen-Jones v Bowen-Jones [1986] 3 All ER 163; *Thomson v Swan Hunter and Wigham Richardson Ltd* (1954) 2 All ER 859, cited.

Minami Taiheyo Kaihatsu Kabushiki Kaisha v Peter Eyre and Estate Management Services Ltd Civ App No 26U/97S; *Public Service Commission v Beniamino Naiveli* Civ App No 52U/95S; *Wallingford v Mutual Society* (1880) 5 App Cas 685, considered.

S. Valenitabua for the Plaintiff

S. Saumatua for the Defendant

No appearance for the 3rd Party

Judgment

Fatiaki J. This is an application under O 14 of the High Court Rules 1988 for summary judgment against the Defendant company. More particularly the Plaintiff's summons seeks "judgment in terms of reliefs 1, 2 & 4 as sought in the Plaintiff's statement of claim filed herein".

The Plaintiff's claim as pleaded is in two parts, the first seeks the return of the purchase price paid (relief 1) under a Sale and Purchase Agreement together with interest thereon (relief 2) and indemnity costs (relief 4) and second, general damages for breach of contract.

The brief background to the claim may be summarised as follows — the plaintiff entered into a sale and purchase agreement with the defendant company (under its former name "Pacific Hotels and Developments Limited") on 21 March 1974 to purchase a lot in a proposed subdivision that was to be carried out at Pacific Harbour in Deuba (hereafter referred to as the "Agreement").

In terms of the "Agreement" extensive development and other subdivisional works were required to be carried out on the subdivision "with all reasonable speed having regard to the all relevant factors" with a proviso that the vendor would not be liable to compensate the Plaintiff for any delay unless it was willful. In this latter regard I note, without comment, that almost twenty-eight (28) years have elapsed since the "Agreement" was entered into.

In the statement of claim filed on 26 April 2000 the Plaintiff alleges numerous failures on the part of the Defendant company in fulfilling its obligations under the "Agreement" including a failure to have the land surveyed and a failure to provide the Plaintiff with a registrable transfer of the plot the subject matter of the "Agreement".

The Defendant company for its part, filed a rather unhelpful statement of defence in which it admitted essentially all of the factual background to the Plaintiff's claim but denied "having breached any of the conditions under the Agreement … and the Plaintiff is put to strict proof thereof". The Defendant also denied that the Plaintiff had suffered any damage.

As required under the High Court Rules, before filing its statement of defence the Defendant company issued a "Third Party Notice" claiming an indemnity from the third party on the basis of a deed of settlement dated 20 March 1990 entered into by the Defendant and the third party wherein it is claimed the third party indemnified the defendant against any and all claims of any nature arising out of the defendant's failure to complete its obligations under the "Agreement". No mention however is made of the deed of settlement in the defendant's statement of defence nor is it alluded to or annexed (as it should have been) to the affidavit of the secretary of the defendant company opposing the present application. In *Wallingford v Mutual Society* (1880) 5 App Cas 685 Lord Blackburn said of the nature of the affidavit required from a Defendant in opposing an Or 14 application (at 704):

> *I think when the affidavits are brought forward to raise (a) defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear "I say I owe the man nothing".*

I am satisfied that the Defendant's affidavit in this case entirely fails to "condescend upon (numerous) particulars" that are pleaded in the statement of claim and deposed in the affidavit in support of the Plaintiff's application. What is more in my considered opinion it is not enough merely to refer in the affidavit showing cause, to a statement of defence without deposing to the truth of its contents especially where the statement of defence itself merely puts the Plaintiff to "strict proof" without advancing an affirmative defence to the claim.

Needless to say an indemnity, be it contractual or otherwise, cannot be invoked by the person indemnified unless and until liability has been admitted or established against that person and/or he has paid the claim against which he is indemnified. In short, there can be no indemnity without liability or payment but, in either event, no defence is afforded to the Plaintiff's claim which seeks to establish the very liability for which the Defendant company claims to be indemnified by the third party.

In his written submissions Plaintiff's counsel helpfully drew the court's attention to two (2) unreported decisions dealing with almost identical pleadings and facts as in the present case. The first was a decision of this court (per Byrne J), and a judgment of the Court of Appeal in *Minami Taiheyo Kaihatsu Kabushiki Kaisha v Peter Eyre and Estate Management Services* Appeal No: 26

of 1997, and Counsel submits that "on the basis of the precedent set (in both cases) summary judgment should be granted together with an order of indemnity in favour of the Defendant against the Third Party".

Defence counsel relying on the same decisions and without in any way seeking to avoid the Plaintiff's application, "requests that a simultaneous order be made (against the third party) in the event summary judgment is made against the Defendant".

In light of the foregoing I am satisfied that the Defendant has raised "no (arguable) defence" to the Plaintiff's application and accordingly judgment is entered against the Defendant company for the sum of $20,400, together with interest thereon at 8.5% pa with effect from 26 April 2000 until the date of judgment and thereafter at a rate of 4% pa until final payment.

In so far as the Defendant's "third party" claim is concerned while accepting that in the absence of a notice of intention to defend, the third party is "deemed to admit any claim stated in the third party notice and shall be bound by any judgment or decision in the action" (see: O 16 r 5(1)(a)), nevertheless, in the absence of an appropriate summons or motion by the Defendant pursuant to O 16 r 7(1) of the High Court Rules, I am unable to grant the "simultaneous order" requested by defence counsel. Such an order would in any event be incapable of being executed "until (the Defendant's) liability (to the Plaintiff) has been discharged": see: O 16 r 7(2).

The plaintiff also seeks "indemnity costs" without advancing any arguments or grounds in support. In *Public Service Commission v Beniamino Naiveli* Civil Appeal No 52 of 1995 the Court of Appeal considered the exceptional nature of "indemnity costs" and said (at pp 6/7):

> *… neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable — see the examples discussed in Thomson v Swan Hunter and Wigham Richardson Ltd* (1954) 2 All ER 859 and *Bowen-Jones v Bowen-Jones* (1986) 3 All ER 163.

and, in upholding an award of "indemnity costs" in the case the Court of Appeal said (at 7):

> *We are satisfied that there was oppressive or vexatious conduct by the Commission.*

In the present case while there has been an inordinate delay on the Defendant's part in fulfilling its obligations under the "Agreement" the fact remains that the Plaintiff through inactivity, must be taken to have acquiesced in that delay to some extent. What is more the Defendant cannot be accused of "reprehensible conduct" in so far as since 1989 it had effectively contracted out of its responsibilities under the "Agreement" to the third party notwithstanding that the Plaintiff was not informed. In all the circumstances I am satisfied that the Defendant's conduct in this matter was neither "vexatious" or "oppressive" and I refuse the claim for "indemnity costs".

Having said that however, the Plaintiff is entitled to have the costs of this application which are summarily fixed at $500.

Application dismissed.