

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 138 of 2009L**

BETWEEN : **QUADRANT DEVELOPMENTS FIJI LIMITED**

Plaintiff

AND : **BRUCE WILLIAM DAVIS**

1st Defendant

AND : **BURROWES INVESTMENTS LIMITED**

2nd Defendant

INTERLOCUTORY JUDGMENT

Of: Inoke J.

**Counsel Appearing: Ms T. Draunidalo for the Plaintiff
Mr B. Singh for the Defendants**

**Solicitors: Tupou Draunidalo Law for the Plaintiff
Babu Singh & Associates for the Defendants**

Date of Hearing: 25 September 2009

Date of Judgment: 30 September 2009

INTRODUCTION

[1] This is a building dispute between the contractor, **Quadrant Developments Fiji Limited ("Quadrant")**, and the owner, **Burrowes Investments Limited ("Burrowes")**. The First Defendant, **Bruce William Davis ("Davis")**, purchased the land in respect of which this dispute is concerned, Lot 26 Marina Point at Denarau Island, Nadi.

[2] Burrowes is a New Zealand company and Davis is also a New Zealander who is a resident in Fiji for some years. Quadrant is a Fiji company.

[3] The parties entered into a building contract in **September 2008** pursuant to which Quadrant was to construct a substantial building on Lot 26 for Davis (the "**Contract**"). The contract document used was the New Zealand "National Building Contract General 2003", used by the Institute of Architects.

[4] On **22 July 2009**, Davis served a notice on Quadrant terminating the Contract with immediate effect pursuant to clause 84 of the Contract and reclaimed possession of Lot 26.

[5] Quadrant now brings these proceedings to recover outstanding Progress Payment No 8 and special and punitive damages for the purported termination of the Contract and other relief.

THE BACKGROUND

[6] The Contract expressly provided in **clause 92** that:

"The Contract is issued in New Zealand. The laws of New Zealand apply to it. Any arbitration or Court proceedings that arise in relation to the Contract or the Contract Works must be brought and heard in New Zealand."

[7] **Clause 88** of the Contract also provided that "if a dispute arises between the Contractor and the Principal about anything in relation to the Contract or the Contract Works" then the parties were to go through a process of mediation and arbitration.

[8] The Writ of Summons and Statement of Claim was filed on 11 August 2009. Quadrant also filed on the same day an inter parte Motion for interim relief for orders for immediate payment of Progress payment No 8

(\$75,422.81) and injunctions restraining the Defendants from continuing with the Contract Works. This is one of the applications now being considered.

[9] The application was supported by 4 affidavits by Mr Truscott, one of the Directors and Shareholders of Quadrant, filed on 11 August 2009 and 24 September 2009. The Defendants also filed a Summons to strike out the Plaintiff's claim which was made returnable for hearing on the same day as the Plaintiff's application. The Defendants relied on 3 affidavits filed on their behalf.

[10] Before, I can consider the merits of both applications there are two preliminary points that I must decide. The first is whether this Court has jurisdiction to hear the matter because of clause 92 which purports to give jurisdiction to the New Zealand Courts. The second is whether the dispute should be referred to mediation and arbitration pursuant to clause 88 of the Contract.

THE JURISDICTION QUESTION

[11] According to the Defendants' affidavits¹, they interviewed potential building contractors in Fiji including Quadrant in April 2008 following which interviews contract documents were distributed. After a process of some months during which Quadrant studied the contract documents and the Defendants sought further explanation of Quadrant's tender, Quadrant signed the Contract. The Defendants signed the Contract in New Zealand on **15 September 2008** and Quadrant signed the Contract in Fiji on **19 September 2008**. Quadrant returned the signed Contract to the Defendants in New Zealand by letter dated 22 September 2008.

[12] It is not disputed that the Contract Works is wholly carried out in Fiji, payment is made in Fiji and Lot 26 is in Fiji.

¹ Para 5 of Paul Burowes affidavit filed 10 September 2009.

[13] Mr Truscott disputes the application of New Zealand law and jurisdiction on the basis that had his attention been drawn to the relevant Contract provisions he would not have agreed to them. I am not able to accept such an explanation as vitiating the Contract or as grounds for severing these provisions from the Contract. It is akin to a claim for “*non est factum*” which I do not think applies to him as an educated and experienced business man.

[14] However, I find that it is not factually correct that the Contract was “issued in New Zealand” and therefore grounds jurisdiction in New Zealand. If the word “issued” was meant to be “entered into” then I disagree that the Contract was entered into in New Zealand. I find that as a matter of fact Quadrant’s tender was accepted in Fiji and therefore as a matter of law the Contract was entered into in Fiji. The normal rule is that the contract will arise when the tender is accepted: **Chitty on Contracts**, Vol1 No 1 27th edn para 2-013. The tender documents were not annexed to the Defendants’ affidavits, they having the onus to show that this Court does not have jurisdiction and there being no evidence, the normal rule is not displaced. It is trite law that the parties cannot by contract make true what is untrue.

[15] Mr Singh, Counsel for the Defendants, cited several cases but for present purposes the New Zealand High Court case of **World Good Way Inc v Wasan International Co Ltd and Anor** HC AK CIV 2007-404-000634 [2008] NZHC 463 (8 April 2008) sets out the law which I respectfully adopt and quote:

“In considering forum non conveniens issues I adopt the statement of principles extracted by Justice Wallace in **Oilseed Products v HE Burton Ltd** (1987) 1 PRNZ 313. He relied on the House of Lords decision in **Spiliada Maritime Corporation v Cansulex Ltd** [1986] 3 All ER 843 and the specific requirements which Rule 220 directs consideration to be taken of. He said at page 316:

- a. The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all parties and the ends of justice.

- b. In general the burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant a stay.
- c. The burden resting on the defendant is not just to show that the country in which the proceedings have been issued (ie New Zealand) is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate. If, however, the connection of the defendant with the New Zealand forum is a fragile one, it should be all the easier for the defendant to prove that there is another more clearly appropriate forum.
- d. The "natural forum" is that with which the action has the most real and substantial connection. So it is for connecting factors in this sense that the Court must first look. These will include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside and carry on business.
- e. If the Court concludes at this stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.
- f. If, however, the Court concludes at this stage that there is some available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the Court will consider all the circumstances of the case. One such factor can be the fact, if established effectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction. On this inquiry the burden of proof shifts to the plaintiff."

[16] I am not convinced that this Court is not the natural or appropriate forum. Even if the appropriate law is that of New Zealand, there is no significant difference, if any, between our law and New Zealand law on contract. Therefore a stay of this action on this ground has not been made out.

THE ARBITRATION CLAUSE

[17] The next question concerns the Scott v Avery clause. Clause 88 of the Contract provides:

"If a dispute arises between the Contractor and the Principal about anything in relation to:
(a) The Contract, or
(b) The Contract Works
the Principal or the Contractor must notify the other of the disputed matters."

The clause then sets out the steps that the parties are to follow in the resolution of such disputes.

[18] The word “dispute” is not defined in the Contract. There is no express exclusion of the Court’s jurisdiction. In fact clause **88.6** shows the contrary and provides that:

“However, the Principal and the Contractor are entitled to bring court proceedings to:
(a) Recover any undisputed payment due under the Contract; or
(b) Seek urgent injunctive or declaratory relief.”

[19] Thus, it is clear that clause 88 does not exclude the jurisdiction of the Court to hear contractual disputes. The claims here are for payment of Progress Claim No 8 amount of \$75,422.81, which the Contractor says is undisputed, and injunctive relief so they fall within clause 88.6 and therefore can be brought before this Court.

PROGRESS CLAIM NO. 8

[20] It is therefore necessary for me to decide whether Progress Payment No 8 is disputed or not.

[21] By Certificate of Payment No 8 dated **28 May 2009**, the Contract Manager and Principal’s representative, Matz Architects, certified payment of \$75,422.81. The Certificate states:

“This is to certify that in accordance with the terms of the contract referred to herein, the contractor is entitled to payment from the employer in the sum of: Seventy Five Thousand and Twenty Two Dollars, and Eighty One Cents only (Fijian Currency) As Progress Payment.”

[22] The Certificate has an explanatory note at the bottom which states:

“Under the terms of the Contract the Employer is required to pay the Contractor the amounts certified by the Matz Architects. These payments must be made within seven (7) working days of the date of the Certificate of Payment. Neither this Certificate nor the payments made as a consequence of it shall constitute an approval

by Matz Architects of the quality of work, materials or services provided under the Contract.”

[23] The relevant Contract Payment provisions are in clauses 71 to 74. Clause 71 states that the Contractor is entitled to give to the Principal a claim for progress payment. Clause 72 says the Principal must assess the claim and in assessing take certain factors into account and make deductions from the claim. Clause 73 then says:

“The Principal must pay the amount assessed by the Principal within 7 Working Days of receiving the Contractor’s claim. If the Principal fails to pay on time, the Principal must pay interest compounding monthly.

73.1 The interest rate is the Contractor’s average Trading Bank overdraft rate payable, or which would be payable, by the Contractor over the period during which the amount was outstanding until it is paid, multiplied by 1.25.

73.2 The Principal must pay the accruing interest with the assessed amount (whether the Contractor is in overdraft or not).”

[24] The Certificate for Quadrant’s claim No 8 was given by Matz Architects as the Principal’s representative. It has been given unconditionally in that all allowable deductions have been made. I note that in Mr Matz’s affidavit, the only complaint was that Quadrant’s claim was for a higher amount than that which was certified and he admits that it was a part certification. Therefore under the terms of the Contract the Principal must pay within 7 working days from the date of the Certificate (28 May 2009), which on my calculation the last date for payment fell on **8 June 2009**. Whatever claims that Burrowes, Matz Architects or Davis now raise as defences or excuses for non payment are matters to be decided at trial. They do not justify the withholding of payment under Certificate No 8.

CLAIMS FOR INJUNCTIONS

[25] As for the injunctive relief that Quadrant now seeks, I do not think that damages are not an adequate remedy so I will refuse it.

COSTS

[26] The Defendants' application failed on all counts and Quadrant has partially succeeded in its application so I award costs to Quadrant in the sum of \$800.

ORDERS

[27] The Orders are therefore as follows:

1. The Defendants Summons filed on 10 September 2009 is dismissed.
2. The Defendants shall pay to the Plaintiff **within 3 days** the sum of **\$75,422.81** together with **interest thereon**, calculated according to Clause **73** of the Contract from **9 June 2009** to the date of payment.
3. The Defendants shall pay to the Plaintiff costs of **\$800** within 14 days.
4. The Defendants shall file their Defences within 28 days and the matter shall take its normal course.

.....
Sosefo Inoke
Judge

