IN THE FIJI COURT OF APPEAL

Civil Appeal No. 9 of 1986

Between:

VIJENDRA PRATAP
s/o Ram Sumer — Appellant

- and -

SASHI LATA
d/o Kuar Jee — Respondent

Mr. M. Krishna for the Appellant
Mr. A.M. Kohli for the Respondent

Date of Hearing: 9th March, 1987
Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

O'Regan, J.A.

This appeal had its genesis in a contract for the sale and purchase of a parcel of Crown leasehold land, entered into on 22nd June, 1983. The agreement recorded that a deposit of $3,000 had been paid on the date of execution and provided that the balance of purchase money be paid on or before 31st December, 1983.

The provisions relating to the obtaining of the consent of the Director of Lands to the transactions were as follows:-

> "3. WITH the agreement the parties shall execute an application for consent to transfer, transfer and Bill of Sale in respect of the said land and all of the same shall be submitted to Crown Land or Lands Department for its consent.
>
> 4. NEITHER party hereto shall any way interfere with the granting of otherwise of consent to this agreement and any act or thing done in contravention of this clause shall be deemed to be a breach of this Agreement."

On 4th July, 1983 an application for consent was submitted to the Director of Lands. It was on a printed form in two parts one of which was signed by the respondent, the other by the appellant.

On 9th August, 1983 the Divisional Surveyor Northern, wrote to the Solicitors who had presented the application advising that the lessee was in breach of covenant in that she had sub-let the shop on the land without consent. He went on to say that the application for transfer could not be considered until the breach was rectified. The sub-tenancy was to the respondent's brother.

Prior to that letter, the Solicitors acting for the respondent had, on 30th July 1983, written to the Lands Department requesting on her behalf that consent be with-held as she claimed she had misunderstood its terms. On 15th August, 1983 she herself wrote stating that she was no longer in breach of covenant and also requesting that the Director not give his consent to the transfer.

There was no evidence of any representations or requests having been made on behalf of the appellant for the expedition of the consent.

Consent has neither been refused nor granted. The application, apparently was left lying fallow. The evidence of the Divisional Surveyor of the Northern Division who had the initial oversight and carriage of the matter, was that the consent was not given because, as he put it, "of no follow up".

On 27th October 1983, the appellant commenced an action against the respondent. In his statement of claim, after averring the contract and the payment of the deposit he claimed, in paragraph 4:-

> " The defendant is now in breach of the said agreement, in that, she has refused to do everything in her power to effect a transfer of the said property."

This cause of action is obviously meant to be founded on paragraph 4 of the agreement for sale and purchase, set out above, although it is expressed in terms different from those provisions.

He next alleged that the respondent had breached the agreement in that she had refused to sell the property to him. (Paragraph 5).

His claim was:-

> "(a) for an order of specific performance against the defendant and damages in the sum of $5,000 as provided under Clause 7 of the said agreement or in the alternative for an order for damages in the sum of $5,000 and for a return of the $3,000 deposit made by the plaintiff - - - - - - - - - - - - - - - - -."

It is not clear precisely what order for specific performance was sought. The prayer is in the widest terms and must, we think, be taken apply to both the causes of action - that is the claims in paragraphs 4 and 5 of the statement of claim.

Clause 7 of the agreement referred to on the prayer provided as follows:-

> "7. IF either party hereto upon the granting of consent failing to complete this sale and purchase then the other may either cancel this agreement and sue for damages for specific performance with or without damages and for the purposes of this agreement shall be agreed between the parties in the fixed sum of $5,000.00."

This Clause is not grammatical but, reading it at its best, it would not sustain an action for specific performance and for damages in the sum recited.

The most important feature of the statement of claim is the prayer for refund of the deposit of $3,000.00 paid by the appellant. It is implicit in that prayer that the appellant has repudiated the contract including his right to press for consent. The deposit was refunded by the respondent on the 11th August, 1983. In making that payment the respondent has, by implication, accepted the repudiation.

We digress to record that, on 5th September 1985 the appellant filed an amended statement of claim, paragraphs 4 and 5 of which were identical with those bearing the same numbers in the original statement of claim. In it, however, the prayers for specific performance and for the return of the deposit do not re-appear.

In our view, the fact that the claim for return of the deposit is no longer part of the claim does not deminish in any way the effect of its inclusion in the original statement of claim - see Greaves & Co. (Contractors) Ltd. v. Beynham Meckle & Partners (1975) 3 All E.R. 99 per Lord Denning M.R. at p. 104e-g. It is a fact of history that on 27th October, 1983 the appellant laid formal claim for the return of the deposit and the legal effect of such a claim survives the amended statement of claim.

The effects flowing from that claim and from the respondent's repayment of the deposit were that the terms of the contract between the parties as yet unperformed no longer subsisted - in particular those parts of it touching the land and in respect of the sale and purchase of it.

The learned Judge held that the appellant's claim in respect of that part of the contract - the cause of action pleaded in paragraph 5 - could not succeed. He then went on to say:-

> "The plaintiff could in my view and on the authority of D.B. Waite (overseas) Ltd. v. Sidney Leslie Wallath (18 F.L.R. 141) could have proceeded against the defendant for the enforcement of the promise to apply for consent after the breach had been verified, but he has chosen not to do that."

The respondent of course, did apply for consent. To that extent the passage contains an error of fact. Whilst it is strictly true to say that the appellant did not proceed to enforce the promise to apply for consent,

the fact of the matter is that he did, by virtue of paragraph 4 of the statement of claim institute a claim for breach of the provisions of clause 4 of the contract. That breach preceded the repudiation of the contract and the right of action survived such repudiation. We accordingly agree with the learned Judge that such a cause of action was available to the appellant.

The appellant contended that if he succeeded in that cause of action he could be entitled to damages in the sum of $5,000 in accordance with paragraph 7 of the contract. The learned Judge held that Clause 7 could have no application in a cause of action based on Clause 4 of the contract. He so held for the reason that it applied only to "a failure to complete" the sale and purchase "upon the granting of consent" - "upon" being construed in the context as meaning "after". We entertain reservations about the applicability of Clause 7 and provisions like it but our reservations are not germane to this case. We content ourselves by saying that if the Clause were to apply at all, it would apply only in the circumstances stated by the learned Judge. It follows that if the appellant had succeeded in the cause of action, his damages would be limited to those flowing from the breach.

Whilst we are of the opinion that this cause of action was open and available to the appellant we are satisfied that the evidence could not sustain a verdict in his favour. The averment was that the respondent "refused to do everything in her power to effect a transfer of the said property- - - -". The reality is that she applied for consent and when the obstacle as to consent arose she caused it to be removed to the

satisfaction of the proper officer of the Lands Department. On the other side of the coin she did request the Lands Department on two occasions not to grant consent but there is evidence that the department paid no regard to those letters. The consent was never refused. The appellant signed the part of the application form prescribed for purchases of crown land but, that apart, he did nothing to further its progress. To succeed in this cause of action the plaintiff had to establish that the respondent refused to do everything within her power to effect a transfer of the property to the appellant and that such refusal was the effective cause of the property not being transferred to him. Though the cause of action was stated in wide terms the matter hinged on the absence of consent. The proper officer of the Lands Department said that consent had not been forthcoming because of lack of "follow up". Follow up could just as readily have been undertaken by the appellant as by the respondent and, as we have seen, he did nothing. It was perhaps the lure of Clause 7 and its potential yield that dictated his reaction. And, at the end of the day, it was the repudiation of the contract by the appellant and the acceptance of that repudiation by the respondent which put the effective end to their sale agreement.

In our view, the plaintiff could not succeed on this cause of action.

We have canvassed all matters necessary to determine both grounds of appeal. The first ground was that:-

> "The learned Judge erred in fact and in law when he held that the action for damages under the agreement made between the parties would offend against Section 13(1) of the Crown Laws Act."

As we have seen there were two causes of action which must be dealt with separately.

As to the cause of action based on paragraph 5 of the agreement, we think the learned Judge was right in holding it did so offend. We say that notwithstanding the fact that we have held the action failed on another ground.

As to the cause of action based on paragraph 4 of the statement of claim, we think it did not offend Section 13(1) but we have held that on the merits it could not be sustained.

The second ground was that:-

> "The learned Judge erred in law and in fact in holding that the damages claimed by the plaintiff only accrue if there is any failure to complete the sale after consent has been obtained because the respondent had breached the agreement, inter alia, in asking the Director of Crown Lands not to grant consent."

This ground is inelegantly drafted. We think it suffices to say that the damages referred to in Clause 7 of the contract relate only to breaches of contract subsequent to consent.

Both grounds of appeal fail. The appeal is dismissed with costs which, if not agreed upon, are to be taxed.

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Vice-President

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Judge of Appeal

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Judge of Appeal