
IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0122 OF 2005S
(High Court Civil Action No. HBC 358 of 2004L)

BETWEEN: MOHAMMED NASIR KHAN AND
KHAN BUSES LIMITED

Appellants

AND: JANARDHAN
CHEN BUNN YOUNG

First Respondent

Second Respondent

Coram: Powell, JA
Hickie, JA
Lloyd, JA

Hearing: Monday, 27th October 2008, Suva

Counsel: N. Khan for the Appellants
S. Maharaj for the First Respondent
B.C. Patel for the Second Respondent

Date of Judgment: Friday, 7th November 2008, Suva

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal from a judgment of Coventry J sitting in the High Court of Fiji at Lautoka. Judgment was delivered on 7 November 2005. The proceedings before the trial judge concerned alleged breaches of an agreement dated 11 September 1995 for the sale of the 1st respondent's interest in Crown lease No. 7893 to the appellant Mohammed Khan ('Khan'). The 1st respondent ('Janardhan') was at all

~~material times a sugar cane farmer actively farming most of the land the subject~~
of the subject Crown lease. The 2nd respondent ('Young') is a partner in the firm of solicitors Young and Associates who acted for the appellant Khan on the purchase and who drafted the subject sale and purchase agreement. Janardhan had no solicitor acting for him at the time he entered into the sale and purchase agreement with Khan. The appellant Khan owned land nearby the cane farm of Janardhan and his apparent purpose in acquiring his neighbour's land was to facilitate the business of his bus company, including the parking of buses.

- [2] When the proceedings were commenced in the High Court by Janardhan the appellant Khan was named as 1st defendant and his company Khan Buses Limited ('Khan Buses') was named as 5th defendant. The sale and purchase agreement had named Khan as the sole purchaser. Khan some years later assigned his rights under the contract to his company Khan Buses, the second appellant in these proceedings. In this judgment unless indicated otherwise no distinction will be made between Khan and his company Khan Buses Limited.
- [3] There were four other defendants named in the High Court proceedings. In his judgment of 7 November 2005 the trial judge dismissed Janardhan's claim against each of those four other defendants and there is no appeal from those dismissals. The nature of the proceedings against those four other defendants is irrelevant to the disposition of these appeals and will not be referred to in this judgment.
- [4] In the High Court proceedings the trial judge found in favour of the vendor Janardhan and made orders validating the rescission of the sale and purchase agreement by Janardhan together with some consequential orders having the effect of forfeiting all moneys paid by Khan under the contract to Janardhan up until the time of the High Court hearing. The trial judge dismissed Khan's counter claim against Janardhan, which counter claim, in effect, sought specific performance of the sale and purchase agreement and damages. Janardhan's claim against solicitor Young (a claim in tort, negligence and breach of fiduciary duty) was also dismissed by the trial judge and there is no appeal from that dismissal.

[5] The two appellants now appeal many of the findings of fact made by the trial judge and the orders he made adverse to their interests. Their Notice and Grounds of Appeal lists some 28 separate Grounds of Appeal. In effect, they assert that the trial judge should have found that the sale and purchase agreement had not in law been validly rescinded, was still extant at the time of the hearing in the High Court and that Janardhan was still required to perform his obligations under the agreement in transferring his interests in the Crown lease to the appellants. They also appeal the trial judge's failure to order solicitor Young to indemnify the appellants for any losses they have suffered flowing from the judgment in the High Court. Although it is not apparent from the Notice of Appeal, but clarified by counsel for the appellants at the appeal hearing, the appellants continue to seek performance of the sale and purchase agreement.

The Brief Facts

[6] In 1995 Janardhan was a sugar cane farmer who for many years had farmed cane on 3.66 hectares of land in the Ba District near Lautoka. Janardhan had the right to occupy the land as lessee under the terms of Crown lease number 7893 for a period of 15 years, which period was to expire on 31 December 1995. Janardhan had obtained approval from the relevant authorities to renew the Crown lease for another 20 years to date from 1 January 1996. During 1995 Janardhan and his wife were desirous of obtaining funds to educate their growing children and so, with the agreement of his wife, Janardhan agreed to sell his rights under the Crown lease (and the right to renew the Crown lease) to his neighbour Khan. Khan is a businessman who runs a bus company on land neighbouring that of Janardhan through his company Khan Buses.

[7] By way of sale and purchase agreement dated 11 September 1995 Janardhan agreed to sell to Khan for the price of \$170,000.00 his leasehold interests in the land under the subject Crown lease (together with improvements and a sugar cane contract). The clauses of the agreement of most relevance to this appeal are set out below.

[8] Clause 2 of the contract stated:

"The full purchase price for the said property and the improvements thereon shall be the sum of \$170,000.00 (One hundred and seventy thousand dollars).

The said sum shall be paid and satisfied by the Purchaser to the Vendor as follows:-

(a) *A sum of \$5,000.00 (Five thousand dollars) shall be paid as deposit and part payment into the Trust Account of Messrs. Young and Associates, Solicitors of Lautoka for the Vendor upon execution hereof.*

The said sum shall be paid out to the Vendor upon settlement.

(b) *The balance sum of \$165,000.00 shall be paid free of interest on the date of settlement as hereinafter provided".*

[9] Clause 6 of the contract relevantly stated:

"The date of settlement shall be the 8th day of December, 1995 or such other date as may be mutually agreed in writing between the parties...."

[10] Clause 17 of the contract stated:

"If the Purchaser makes default in payment of any monies hereby agreed to be paid such default shall continue for the space or fourteen (14) days from the due date then and in such case the Vendor without prejudice to any other remedies available to him may at his option exercise all or any of the following namely:

(a) *May enforce this present contract in which case the whole of the purchase monies unpaid shall become due and at once payable; or*

(b) *May rescind this Contract of sale and thereupon all monies theretofore paid shall be forfeited to the Vendor as liquidated damages; or*

(c) *May resell the said land either by public auction or private contract subject to such stipulations as he may think proper and any deficiency in price which may result and all expenses of attending to a re-sale or attempted re-sale shall be made good by the Purchaser and shall be recoverable by the Vendor as liquidated damages the Purchaser receiving credit for any payment made in reduction of the purchase money. Any excess in price after deduction of expenses shall belong to the Vendor; or*

[11] Clause 21 of the contract stated:

"21. The Vendor hereby expressly acknowledge that Messrs Young and Associates have acted only for the Purchaser in connection with this Agreement and the transaction contemplated hereby and the Vendor has been expressly advised to obtain separate legal advice and representation."

[12] Other clauses in the contract made the sale subject to the consent of the Director of Lands (clause 4), subject to the consent of the Fiji Sugar Corporation and/or Sugar industry Tribunal (clause 10); allowed the purchaser possession of the land only on settlement (clause 7); entitled the vendor to the benefits of any standing crops on the land (clause 9) and all costs relating to the preparation of the agreement were to be borne by the purchaser. It is to be noted that the sale and purchase agreement made no provision for interest to be paid on any part of the purchase price. No doubt this was because the agreement on its face provided for settlement to take place just three months after the date of its execution. Apparently Janardhan is still in possession of the majority of the land and still farms the land with sugar cane.

[13] A live issue at trial was whether Khan's solicitors Young and Associates represented not only Khan but also Janardhan on the sale and purchase transaction. In accordance with clause 21 of the contract set out above both Khan and Young insisted Young and Associates acted only for Khan while Janardhan insisted Young and Associates acted for him also. After hearing from various witnesses and after considering a number of exhibits of relevance to the issue the trial judge found as a fact that at no time did Young and Associates act for Janardhan and no duty of care was owed by this firm to Janardhan. The trial judge also found that there was no evidence whatsoever to show that the respondent Young was himself in any way involved in any aspect of the coming into being or performance of the sale and purchase agreement. Having reviewed the entirety of the evidence and the trial judge's notes we are in agreement with

the factual findings of the trial judge on this issue. These findings have some relevance to Khan's current appeal against Young and we will return to this issue later in this judgment.

[14] Despite the terms of Clause 6 set out above requiring settlement in the first instance on 8 December 1995, this in fact did not take place and it seems that Janardhan accepted payments from Khan towards the purchase price on various dates and for various amounts from December 1995 until mid 2004. The initial deposit of \$5,000.00 appears to have been paid as required on the execution of the agreement but only a further \$5,000.00 paid on the 8 December 1995, the initial date fixed for settlement as per the written terms of the agreement. Nevertheless, uncontested documentary evidence was adduced by the appellants at trial showing some 39 receipted payments towards the purchase price made by Khan in the period 1995 to mid 2004 totalling \$94,300.00 and additional to the initial \$5,000.00 paid as the deposit. The last documented payment was in the sum of \$2,000.00 paid by Khan to Janardhan on 2 July 2004. So by early July 2004 Khan had paid to Janardhan \$99,300.00 of the \$170,000.00 owing on the sale. This represents approximately 60% of the purchase price. In his judgment the trial judge makes no clear finding as to the correct legal description to be placed on the various instalment payments made by Khan to Janardhan between 1995 and mid 2004. We are of the view that despite the payments being described in documentary exhibits as both 'deposits' and 'part payments of the purchase price' the later description is the proper categorisation of the payments.

[15] The reasons given for the delay in payments by Khan to Janardhan contrary to the written terms of the sale and purchase agreement were the subject of much debate and conflicting evidence at the trial in the High Court. But apart from the issue of costs we do not feel a lot hangs on the various reasons given for the delay by either Janardhan or Khan or the trial judge's findings in this regard. Quite clearly, prior to September 2004 for whatever reason Janardhan did not insist on the strict performance of the contractual terms relating to payment and he was unarguably accepting partial payments of the purchase price from time to

~~time between December 1995 and early July 2004. The legal ramifications of these facts will be discussed below.~~

[16] Undoubtedly and perhaps understandably unhappy with the slow pace of part payments dribbling in, on 13 September 2004 newly instructed solicitors for Janardhan wrote to Khan's solicitors Young and Associates. Pointing to the terms of clause 6 of the agreement and raising the delay in Khan effecting settlement the newly instructed solicitors on behalf of their client purported to rescind the sale and purchase agreement relying on the terms of clause 17(b) and confirmed the forfeiture of all moneys paid by Khan to that date (\$99,300.00) under the same clause. By way of this letter Janardhan also demanded he be given vacant possession of the land. Contrary to the terms of the agreement but with the apparent tacit consent of Janardhan, Khan had occupied at least part of the land for many years as part of the operations of his bus company. On 12 October 2004 and after obtaining instructions from their client Khan, Young and Associates replied to Janardhan's solicitors rejecting the existence of any grounds for rescission of the contract and proffering payment of the full balance of the purchase price. This offer was rejected by Janardhan and shortly thereafter the current complex and lengthy litigation commenced.

[17] It is also relevant to note that earlier in May 1998 Janardhan had instructed solicitors to send a similar letter to that sent by Janardhan's new solicitors in September 2004. On receipt of the letter in 1998 Khan and some of his associates spoke to Janardhan and he was persuaded to take the matter no further and he continued to accept part payments of the purchase price from time to time.

The legal issues and grounds of appeal

[18] Counsel for all parties appearing on this appeal have helpfully refined the issues of relevance to the determination of the grounds of appeal. The essential issues are as follows (together with the numbered grounds of appeal relating to each issue);

[19] 1. Was time made of the essence to the contract on execution or at any later

time (1)?

2. Was sufficient notice given to make time of the essence of the contract (2)?
3. Was sufficient notice to complete given (2)?
4. Was the vendor estopped from relying on the terms of clauses 6 & 17 by, inter alia, waiver of the strict application of these clauses (3, 4, 5, 16, 17 and 18)?
5. Was Janardhan's consent to extend the settlement date obtained by misrepresentations by Khan and, if so, what effect did this have on the contract and its terms (6, 7, 8, 9, 17 and 19)?
6. Failure to rule on relief from forfeiture and rectification (23, 24, 25 and 26)?
7. Various adverse findings of fact by the trial judge (6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22 and 27)?
8. Indemnity for Khan against solicitor Young (28)?

We will now deal with each of the above issues.

Was time made of the essence of the contract on execution or at any later time?

[20] It is trite law that time for completing a contract for the sale of land is not of the essence of the contract unless made so by the parties. The consequence of this is that if the purchaser fails to complete the contract on the day fixed by the contract for completion then neither party can use the non payment as a ground for rescinding the contract. It is also trite law that the parties to a contract for the sale of land can expressly provide that time shall be of the essence. Such a clause is frequently found in contracts for the sale of land but no such clause is to be found in the agreement between Janardhan and Khan. Further, time can also be made of the essence by implication from other terms in the contract and from the surrounding circumstances generally.

[21] From an examination of the judgment of the trial judge it does not appear that he made any finding as to whether the original agreement made time of the essence. From an examination of the terms of clauses 6 & 17 of the contract and the fact that settlement was initially to take place some three months after the date of execution of the contract with no interest for late payment being

~~stipulated we find that the agreement as executed made time of the essence to~~
the performance of the contract.

[22] But such a finding is of no great moment to the determination of this appeal, because it is again trite law that parties to a contract can at any time waive or vary the terms of the contract and can do so by their words or conduct. That appears to have happened in this case. It is crystal clear that for whatever reason when the 11th September 1995 arrived Janardhan did not insist on a strict application of the terms of clauses 6 and 17 of the agreement and accepted only part payment of the purchase money thereby waiving any right he had to rescind the contract under the terms of clause 17. It must be said that the facts of this case highlight once again the foolishness of parties to important commercial agreements not receiving independent legal advice prior to the execution of and at all important stages during the carrying out of such agreements. We deal below with the issue of whether time was made of the essence at any later point in time.

Was sufficient notice given to make time of the essence of the contract?

[23] In his judgment the trial judge found that Khan must have known time was of the essence on receipt of the letter from the firm of solicitors Singh & Fatiaki sent in May 1998 after Janardhan had earlier orally told Khan he wanted settlement and which letter purported to rescind the sale and purchase agreement. But it was not in dispute that reliance on this letter was later waived by Janardhan. The trial judge made no further finding of time becoming of the essence, other than to ultimately find that the letter from Janardhan's new solicitors dated 13 September 2004 validly rescinded the agreement, a finding to which we will return shortly.

[24] During the hearing of this appeal, when asked by the Court to point to any acts on the part of Janardhan possibly making time of the essence in 2004 (apart from the letter of 13 September 2004), counsel for Janardhan could point only to a conversation between Khan and Janardhan's wife Vijay Lakshmi which took place over the phone shortly before Khan made the last recorded part payment of \$2,000.00 on 2 July 2004. According to the trial notes of the trial judge, Vijay Lakshmi said to Khan *'been a long time [since] you made payment and not*

~~settled. If [you] don't pay in 2 weeks time I will seek another lawyer'. It was a~~
few days after this that Janardhan accepted the further part payment of \$2,000.00.

- [25] We do not feel that the conversation between Khan and Janardhan's wife quoted in full above could possibly have been categorised in law as making time of the essence. In order for a notice to make time of the essence in respect of a contract for the sale of land (or an interest therein) the notice requiring performance must inform the party to whom it is given that the party giving it will treat the contract as at an end if the notice is not complied with within a reasonable time (see *Balog v Crestani* (1975) 132 CLR 289 at page 296 per Gibbs J and *Hollows v Schofield* [2004] FJHC 514 at page 5 per Connors J). Apart from the problem that the quoted conversation was with a person not party to the sale and purchase agreement, in its very terms it did not go anywhere near what was required of a valid notice making time of the essence.

Was sufficient notice to complete given?

- [26] It is clear from our above remarks that no sufficient notice to complete was given. The letter from Janardhan's solicitors to Khan's solicitors dated 13 September 2004 was not a letter giving notice to complete. It was a letter purporting to rescind the sale and purchase agreement in reliance on clause 17 of the agreement and demanding that the purchaser remove himself and his belongings from the land. Further, the purported rescission was not accepted by Khan's solicitors who in a letter of reply dated 12 October 2004 offered to immediately pay the balance of the purchase price owing to Janardhan. This offer was rejected by Janardhan.

Was the vendor estopped from relying on the terms of clauses 6 & 17 by, inter alia, waiver of the strict application of these clauses?

- [27] It follows from what we have said above that as at 2 July 2004 when he continued to accept part payment of the purchase price Janardhan had once again waived any reliance he could place on clauses 6 and 17. Of course, if he had taken the proper steps to do so he could once more have made time of the essence of the agreement. But for the reasons stated by us above what took place

~~thereafter did not in law have this effect and the agreement remained on foot~~
with the purchaser apparently ready, willing and able to perform his side of the bargain.

Was Janardhan's consent to extend the settlement date obtained by misrepresentations by Khan and, if so, what effect did this have on the contract and its terms?

[28] In his judgment the trial judge makes it quite clear that he was firmly of the view (and so found) that Khan made a number of deliberate misrepresentations and omissions over a lengthy period of time in order to delay settlement. As the trial judge found, postponement of settlement suited Khan. But as the trial judge also found, Janardhan and his wife were naive in these matters and trusting of Khan. But the cavalier, recalcitrant and dilatory conduct of Khan does not in our opinion negate Janardhan's waiver of reliance on his rights under the sale and purchase agreement or in any way negate the need for him to take all steps required of him in order to properly rescind the sale and purchase agreement. But as will be seen below we feel it only right that Khan's unmeritorious conduct be reflected in consequential orders to be made by us in the disposition of this appeal.

Failure to rule on relief from forfeiture and rectification

[29] As is obvious from all the above we cannot agree with the finding of the trial judge that the letter of 13 September 2004 from Janardhan's solicitors to Khan's solicitors constituted lawful rescission of the sale and purchase agreement. In law, and for the reasons stated above, it simply could not have had this effect. As a result we are of the view that at all material times the sale and purchase agreement was on foot and had not at any time been lawfully rescinded. As a result of this finding there is no need for us to examine the issues of forfeiture and rectification.

Various adverse findings of fact by the trial judge

[30] The appellants point to numerous findings of fact made by the trial judge that they suggest are wrong in law or were not supported by the evidence adduced at trial. To decide this appeal it is not necessary for us to revisit the trial judge's

findings, save for his finding on the proper legal effect of the letter of 13 September 2004, on which finding we have commented above.

Indemnity for Khan against Solicitor Young

[31] Given the ultimate orders that we make in the disposition of this appeal which are set out below it is not necessary for us to consider this issue, save for the determination of an appropriate costs order which we will deal with below.

Conclusion

[32] It follows from all that we have said above that we would allow the appeal and set aside the orders made by the trial judge in the High Court save for those orders concerning the 2nd, 3rd, 4th, 6th and 7th defendants which orders we confirm.

[33] We order that the 1st respondent Janardhan take all steps required of him to bring about settlement of the sale and purchase agreement dated 11 September 1995 within 90 days of the date of the handing down of this judgment.

[34] The general rule for the awarding of costs in appellate proceedings is that costs should follow the event. However, Courts of Appeal such as this Court have a wide discretion to depart from the general rule whenever justice and the circumstances of a case so require. This is one of those cases where we do not intend to follow the general rule.

[35] We do feel it appropriate to order that the appellants pay the 2nd respondent's costs of this appeal as agreed or taxed.

[36] But given the unmeritorious conduct of Khan over a number of years as detailed by the trial judge in his judgment (with which findings we agree), including a finding of Khan telling untruths in official documents to suit his own purposes, we do not feel it appropriate to order Janardhan to pay the appellants' costs of either this appeal or of the proceedings in the High Court (and see *Ultraframe (UK) Ltd & Ors v Fielding & Ors* [2007] 2 All E R 983). Accordingly, the appellants should pay their own costs of this appeal and of the action in the High Court. When we raised the likelihood of such an order with counsel for the

~~appellants on the hearing of this appeal counsel could give no reason as to why we should not make such an order.~~

[37] As for the costs of Janardhan, although Janardhan is the losing party in this appeal, we were minded at first to take the unusual step of ordering that the successful appellants pay Janardhan's costs of this appeal. We were so minded for the reasons referred to by us in the previous paragraph. But given the appellants' willingness to pay the full purchase price prior to litigation commencing and given their willingness to settle for the same sum plus interest before the hearing in the High Court commenced (as we were informed by counsel during the hearing of the appeal) we have decided that Janardhan should pay his own costs for the proceedings both in this Court and in the action before the High Court.

[38] Finally, given the unmeritorious conduct of Khan as found by the trial judge, and given that Khan delayed settlement for a period of nine years from September 1995 until September 2004 we feel it only fair and just to Janardhan in all the circumstances of the case that we order the appellants to pay to Janardhan compound interest at the rate of 10% per annum on the unpaid balance of the purchase price (the sum of \$70,700.00) from 8 December 1995 (the date originally fixed for settlement) until the date of final settlement. We order that such a sum is to be paid by Khan to Janardhan at the time of settlement. Such an order also reflects the application to the facts of this case of the rule in Birch v Joy ((1852) 3 HLC 565 at 590-591) that, absent express agreement to the contrary, a purchaser who obtains possession of the subject-matter of the contract before the payment of the purchase price must pay interest on the purchase money from the date when he gets possession until the date of payment (see also International Railway Co v Niagra Parks Commission [1941] 2 All E R 456). We are told that Khan took possession of part of the land around 1997.

[39] For the avoidance of doubt, we also indicate that pursuant to clause 9 of the sale and purchase agreement Janardhan is entitled to the standing crops on the subject land and any profits derived therefrom or any proceeds due or to

~~become due therefrom from the date of execution of the sale and purchase agreement (11 September 1995) until the date of settlement.~~

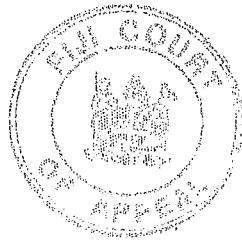
Orders

[40] This Court orders that:

- (1) The appeal be allowed;
- (2) The orders made by Coventry J in the High Court dated 7 November 2005 be set aside save for orders 2 and 3 concerning the 2nd, 3rd, 4th, 6th and 7th defendants, which orders are confirmed;
- (3) The 1st respondent Janardhan to take all steps required of him to bring about settlement of the sale and purchase agreement dated 11 September 1995 entered into between the appellants and the 1st respondent, such settlement to take place within 90 days of the date of the handing down of this judgment;
- (4) The appellants to pay the 2nd respondents costs of this appeal as agreed or taxed.
- (5) The appellants and 1st respondent, to pay their own costs of this appeal and of the action in the High Court.
- (6) The appellants to pay to the 1st respondent compound interest at the rate of 10% per annum on the sum of \$70,700.00 from 8 December 1995 until the date of settlement of the sale and purchase agreement dated 11 September 1995 entered into between the appellants and the 1st respondent.

Raman Powell

Powell, JA



[Signature]

Hickie, JA

[Signature]

Lloyd, JA

Solicitors:

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