IN THE COURT OF APPEAL, FIJI ISLANDS

CIVIL APPEAL NO. ABU 0042 OF 2008

BETWEEN:

YOGESH CHANDRA aka NAVIN MORARJI

Appellant

AND:

STEPHEN PATRICK WARD

Respondent

Coram: Hon. Justice Izaz Khan, Justice of Appeal
Hon. Justice William Marshall, Justice of Appeal
Hon. Justice Kankani T. Chitrasiri Justice of Appeal

Counsel: Mr V. Mishra for the Appellant
Mr C.B. Young for the Respondent

Date of Hearing: Tuesday, 28 September 2010

Date of Judgment: Thursday, 18th November 2010

JUDGMENT

Izaz Khan, JA

1. On 6th January, 2005, the respondent, Stephen Patrick Ward ('vendor') entered into a written sale and purchase agreement with the appellant, Yogesh Chandra aka Navin Morarji ('purchaser') to sell his freehold land at Denarau Island for $595,000. The land is more particularly described as lot 18 in Certificate of Title 35620 and known as Lot 18, Marina Port, Denarau Island ('property').

2. A number of clauses of the contract which are relevant and worthy of note are as follows:

Pursuant to clause 4, completion was to take place within 30 days of the date of contract unless otherwise agreed and 30 days after the date of contract fell on 4th March, 2005.

Time was of the essence in conjunction with clauses 15 and 16.

Clause 15 was the purchaser's default clause. It provided:

> *"If the purchaser shall make default in the payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of 30 days from the due date then and in any such case the Vendor without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:"*

Then clause 15 goes on to list various remedies available to the vendor including rescission and specific performance.

Clause 16 is headed **VENDOR'S DEFAULT** and provides:

> *"If the Vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor's part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then in any such case the Purchaser without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies:"*

Among the remedies listed under clause 16 are rescission and specific performance.

3. It was common ground between the parties that settlement was due on 4th March, 2005 and time was of the essence in that respect.

4. By clause 5 (a), the vendor agreed to hand over a registrable transfer to the purchaser. Normally the purchaser prepared the Transfer for the vendor to sign and to hand it over to the purchaser on settlement in return for the balance of the purchase price in the form of a Bank Cheque in keeping with conveyancing practice. Thus, Parshotam & Co, the purchaser's solicitors wrote to Mitchell Keil & Associates, the vendor's solicitors on 26th January, 2005 and said:

> *"We now enclose a form of Transfer for your perusal. Please confirm if it is in order so that we may forward a hard copy to you for signing by your client."*

5. On 2nd March, 2005 Parshotam & Co again wrote to Mitchell Keil & Associates and said:

> *"We refer to our letter of 26/1/05 and to our (Subhas/Walton) phone discussions in connection.*
> *We understand that as part of the settlement process, our client is required to enter into a 'Deed of Commitment' with the property developer. We further understand that you have a form of such a Deed with you.*
> *Please forward the same to us for our perusal so that we may present the same to our client with our advice for signing.*
> *We also note that we are awaiting receipt of the signed transfer."*

There is no provision in the contract about the requirement of a Deed of Commitment but there does not appear to be any dispute between the parties that such a Deed was required to be furnished by the purchaser.

6. On 10th March, 2005 Mitchell Keil & Associates sent an email to Parshotam & Co stating the following:

> *"We refer to our recent telephone conversations in this matter. Our client has now informed us that he would agree to an extension for settlement in this matter to the 24th March, 2005. Please confirm by return.*
>
> *We advise that we are in possession of an executed Transfer and Land Sales Act Declaration. Please forward us your cheque in the sum of*

$11,300.00 in favour of the Commissioner of Stamp Duties so that we can attend to stamping of the Transfer.

We also attach Commitment Deed. Please print out two copies of the Deed and have the Deed signed by your client and return to our office for completion of execution and stamping. Please include your cheque in the sum of $11.00 stamp duty on the Deed when returning the documents."

7. On 21st March, 2005, Mitchell Keil & Associates sent Parshotam & Co an email in which they said:

"We refer to our email to you dated 10th March, 2005.
We have not had your response nor have we received the stamp duty.
There is therefore no agreement to extend the settlement date.
We withdraw the earlier offer. Our client reserves his rights."

8. On 7th April, 2005, Parshotam & Co wrote to Mitchell Keil & Associates and said:

The writer – who has been personally handling this matter – had been ill for 8 days and has only resumed office. Our client had in the meanwhile, remitted funds to us for payment of stamp duty and seeks to proceed with the transaction. In this respect, we enclose our Trust Account cheque for $11,990.00 drawn in favour of 'The Commissioner of Stamp Duties' for payment of stamp duty on the Transfer.

Our client's funding is also in place and settlement can be proceeded with immediately upon the Transfer being stamped.

In any event, our client relies on Paragraph 15 of the Sale and Purchase Agreement."

9. Mitchell Keil & Associates wrote to Parshotam & Co on 7th April, 2005 and gave notice of rescission of the contract in the following terms:

"In consequence of your client's default under the said agreement in completing the purchase in accordance with the requirement to complete on or before the 4th March, 2005 we on instructions and on behalf of the Vendor hereby give you notice that the said sale is hereby rescinded and in pursuance of the agreement for sale the Vendor will proceed to re-sell the said property reserving his rights against your client for any other remedies available to him."

10. The purchaser lodged a caveat against dealings with the vendor's title on 8th April, 2005 and commenced action in the High Court at Lautoka on 23rd November, 2005 for an order for specific performance, an injunction restraining the vendor from reselling the property and an order extending or reinstating the caveat. The vendor filed a defence which included a counter claim by which the vendor claimed ***inter alia*** damages for loss of chance to make a profit as well as for the wrongful lodgement of the caveat and an order for the cancellation of the caveat.

11. The case was heard by her Ladyship Gwen Phillips, who gave judgment on 6th June, 2008.

12. The first issue that her Ladyship considered was whether the email of 10th March 2005 from Mitchell Keil & Associates to Parshotam & Co extended the settlement date from 4th March, 2005 to 24th March, 2005.

13. Her Ladyship took the view, correctly in my view, that there was no valid extension as the purchaser had failed to give his assent to the offer of extension made by the vendor. At paragraph [14] of her judgment her Ladyship said:

> *"In my view the email of 10th March, 2005 could only have comprised an offer to extend the settlement date from 4th March 2005 to 24th March 2005. Clearly, Mr Parshotam's earlier request for extension to 16th April, 2005 was not accepted. The most cogent interpretation one can place on the words "Please confirm by return" is that the defendant's lawyers had put the plaintiff's lawyers on notice that confirmation of the offer to extend the settlement date to 24th March, 2005 was required and anticipated."*

14. Clearly, the correct interpretation of the vendor's offer of 10th March, 2005 to extend the settlement date to 24th March, 2005 is that it was subject to the purchaser's acceptance of that offer. As there was no acceptance of the vendor's offer, there was no valid extension to 24th March, 2005.

15. The next issue discussed by her Ladyship was whether the vendor's rescission of the agreement by his solicitors' letter of 7th April, 2005 was valid.

16. She held that the purchaser himself was not ready able and willing to settle by failing to tender the stamp duty money until 7th April, 2005, the vendor had been absolved from that requirement: see paragraph [17]

17. She went on to hold at paragraph [21] that the purchaser was not entitled to specific performance because he had failed to tender the purchase price. She said:

> *"In not tendering the purchase price on the settlement date the plaintiff forfeited his right to specific performance of the agreement. And in these circumstances the defendant cannot be shown to have breached the contractual obligation to convey the property given that there had not been a proper tender of the purchase price by the plaintiff. Moreover in the absence of the tender of the purchase price, the defendant cannot be shown to have exhibited an inability or unwillingness to deliver the Title and other documentation required in terms of the agreement. At the very best what can be gleaned from the plaintiff's evidence is that he had a perception that the defendant could not settle. I am in agreement with Mr Young that that is not a criteria in any event. It is important to note that by 7th March 2005 the defendant was in receipt of the transfer and land sales declaration. This was after 4th March 2005 settlement date. However I have upheld the submission that the plaintiff cannot complain about this because the defendant had 14 days to remedy the default and the plaintiff himself had not paid the stamp duty until 7th April 2005."*

18. Her Ladyship dismissed the vendor's counterclaim upon the basis that the vendor had failed to have the purchaser's caveat removed within the time stipulated in the condition in the new contract, not because a caveat had been lodged; see paragraph [26].

19. Accordingly, her Ladyship held:

    1. Time for settlement of 4th March, 2005 had not been validly extended to 24th March, 2005.

2. The vendor's rescission was valid.
3. The purchaser was not entitled to specific performance and
4. The vendor's counterclaim was dismissed.

20. The purchaser has filed an appeal against her Ladyship's decision and we heard the appeal on 28th September, 2010 when Mr Mishra appeared for the appellant purchaser and Mr Young appeared for the respondent vendor.

21. There were seven grounds of appeal. Paraphrasing them, in essence they were as follows:

1. The trial judge erred in holding that the purchaser's failure to furnish the stamp duty until 7th April 2005 absolved the vendor from the requirement to be ready willing and able to settle.

2. The trial judge erred in holding that the evidence established that the vendor was ready able and willing to settle on 3rd April, 2005

3. Her Ladyship erred in holding that 4th March 2005 continued to be the settlement date; that 30 days default requirement in clause 4 expired on 3rd April 2005 and that the appellant could not be shown to have been unable or unwilling to deliver title as the appellant failed to tender the purchase price.

4. The trial judge fell into error in relying on the decision in **Bahramitash v. Kumar [2006]** 1 NZLR and in holding that the appellant had forfeited his right to specific performance by not tendering the purchase price.

5. She erred in holding that the appellant had failed to establish on the evidence his readiness to settle by showing that he had sufficient funds to settle and

6. The trial judge should have awarded damages to the appellant.

22. Thus, the issues raised in this appeal for determination by this court are:

1. Was the settlement date extended from 4th March, 2005 to 24th March, 2005?
2. Was the respondent's rescission of the contract on 7th April, 2005 valid? The determination of this issue will necessarily include the question whether the respondent himself was ready able and willing to settle at the time of his rescission.
3. If the court finds that the rescission was invalid, is the purchaser entitled to damages and if so, in what quantum?

Was the settlement date extended from 4th March, 2005 to 24th March, 2005?

23. The email by which the vendor sought an extension was dated 10th March, 2005 and it said:

> *"Our client has now informed us that he would agree to an extension for settlement in this matter to the 24th March 2005. Please confirm by return".*

24. In my judgment the construction of this offer of extension of the settlement time is as follows :

1. The offer of extension of time was clearly indicative of the fact that the vendor regarded the contract as still being on foot.

2. The offer could have been withdrawn by the vendor at any time before its acceptance by the purchaser.

3. A proper interpretation of the second sentence of clause 4 quoted below required a written notification of an acceptance by the

purchaser for an extension to be effective. Only that way there would have been a mutual agreement in writing as the clause stipulated. Clause 4 says :

> *"Settlement shall take place within 30 days of the date of signing of this Agreement if the date is not stipulated on page 1. This date can be extended if mutually agreed to in writing by both the Vendor and Purchaser."*

4. As the purchaser did not give such a notice of acceptance, the vendor was entitled to withdraw his offer which he did by email dated 21st March, 2005 from his solicitors.

So the settlement date remained the 4th March, 2005 and time remained essential. Clause 15 which was set out before assumes great significance in the proper interpretation of the date on which rescission could have been validly effected.

25. It appears to me that the effect of clause 15 is that the Vendor was not entitled to rescind the contract until thirty days after the purchaser had committed a radical default in terms of settlement because the vendor's remedies are only activated after the purchaser's default has continued for thirty days. In my view, on the proper construction of clause 15, the essential settlement date was 4th March, 2005 but the vendor could only act on the default by the purchaser if it persisted for thirty days.

26. Thus, the position regarding the settlement date was that 4th March, 2005 was the essential settlement date and either party who failed to settle on that date was in breach of the contract but the vendor could not act on the breach until thirty days had expired. Here, the vendor gave notice of rescission on 7th April, 2005 which was at a time beyond the thirty days required for rescission by Clause 15. Therefore, ***prima facie***, the vendor's rescission was valid but the matter does not end there.

Was the vendor ready, able and willing to settle the contract himself on 4th March, 2005?

27. Generally, a vendor-purchaser contract imposes mutual and concurrent obligations on both parties: the vendor must convey title and the purchaser must pay the purchase price. Foran v. Wight (1989) 168 CLR 385 is a decision of the Australian High Court where the issue of the rescinding party's readiness was squarely raised.

28. In that case, 22nd June was fixed for settlement and was of the essence by a stipulation in the contract. A special condition required the vendor to register a right of way before settlement. Two days before settlement, the vendor told the purchaser that he would not be able to settle on the due date because the right of way had not been registered. Neither party attended settlement. On 24th June, the purchaser gave notice of rescission and the vendor argued that the purchaser could not validly rescind as he himself was not ready to settle because of proven lack of funds.

29. Thus the issue of the rescinding party's readiness became very relevant in the determination of the case.

30. The High Court affirmed the principle that as a vendor-purchaser contract imposed mutual and concurrent obligations on both parties, one could not rescind the contract when he could not have performed his obligations on the due date.

31. However, although on the facts of Foran v. Wight, the purchaser's rescission would have been invalid because he could not have settled on the due date due to a lack of funds, the High Court upheld the validity of the purchaser's rescission because on the facts it held that the purchaser had been absolved from the requirement to be ready by the vendor's representation that he would

not be able to settle on the due date. Thus the vendor was estopped from insisting that the purchaser had to show readiness.

32. Brennan J opened a discussion of this topic with these words:

> *"The obligation of a vendor to deliver a conveyance and the obligation of a purchaser to pay the price on completion are mutually dependant and concurrent obligations in the absence of any contrary stipulation; each obligation is to be performed in exchange for the other: Palmer v. Lock [1945] Ch 182 at 184, 185. Where the respective obligations of parties to a contract are mutually dependent and concurrent, the primary rule is that neither party who fails to perform his obligation when the time for performance arrives can rescind for the other party's failure at that time to perform his obligation. Each party's obligation is conditional on performance by the other; neither can complain of non-performance by the other when the condition governing the other's obligation goes unfulfilled. But if one party intimates to the other that it is useless for the other to fulfil his obligation and the other acts on the intimation, the party to whom the intimation is given is dispensed from nugatory tender of performance."*

33. Dean J expressed similar views at p. 433 as follows:

> *"In the ordinary case of a contract for sale of land, the contractual obligations of the parties to complete the sale are concurrent and conditional in the sense that the vendor is not obliged to convey the land and the purchaser is not obliged to pay the purchase price otherwise than upon concurrent performance by the other party. Neither vendor nor purchaser will be guilty of breach of contract if he fails to complete within the time or upon the day fixed by the contract unless the other party tenders performance of his concurrent obligations. The position is, however, different if one party has unambiguously informed the other party that he will not perform his obligation within the time made of the essence of the contract. In such a case, the refusal to perform constitutes intimation to the other party that the tender of performance of his concurrent obligation will be nugatory and futile."*

34. Thus, it becomes necessary to investigate the respondent's readiness to settle on 4th March 2005. In assessing this question, I direct my attention to the letter written on 2nd March, 2005 by Parshotam & Company to Mitchell Keil and Associates which was set out earlier.

35. No reply was received to this letter by Parshotam & Company before 4th March 2005. Mitchell Keil and Associates sent an email to Parshotam & Company on 10th March, 2005 which is quoted above and by which they sought an extension of settlement date to 24th March, 2005 and advised that they were in possession of executed Transfer and Land Sales Declarations. They also sought a cheque for $11,900.00 in favour of the Commissioner of the Stamp Duties so that they could attend to stamping of the transfer. The Commitment Deed was also attached as had been requested earlier by Parshotam & Company.

36. It is clear from the letter on 2nd March, 2005 and the email of 10th March, 2005 that the respondent was not ready to settle the contract on 4th March, 2005 for these reasons :

1. The fact that Parshotam & Company requested a signed Transfer from the vendor two days before the essential date for settlement and the fact that Mitchell Keil & Associates in their email requested the extension of the settlement date to 24th March, 2005 is indicative of the fact that the vendor could not have settled on 4th March, 2005.

2. A further indication of the vendors inability to settle is the fact that the Transfer had not been stamped on 4th March, 2005 as indicated by the request for it in the email of 10th March, 2005 by which a request was made for the sum of $11,900.00 in favour of the Commissioner of Stamp Duties for paying the stamp duty.

3. In evidence, the vendor himself considered that he would not have been able to settle on 4th March, 2005 (see pages 368 &369 of Vol II of the record) because he had only received the Land Sales Declaration in New Zealand on 4th March, 2005 and he knew that he had to pay Land Sales Tax as he was a foreign resident. He agreed in cross examination that he would not have been able to settle on 4th March, 2005.

In the light of these matters, I find that the vendor himself was not ready able and willing to settle the contract on 4th March, 2005, the due date, and therefore on the application of the principles discussed in **Foran v. Wight** clearly the vendor's rescission on 7th April, 2005 was invalid.

37. A further ground upon which I hold the vendor's rescission to be invalid is on the basis that the vendor elected to affirm the contract by his email of 10th March, 2005 when he clearly intimated that the contract was still on foot by seeking an extension of the settlement date, and requesting the remittance of $11,900.00 in favour of the Commissioner of Stamp Duties for the payment of stamp duties on the Transfer and stating in that he had the executed Transfer and Land Sales Declaration in his possession. Clearly, the purchaser must have understood from the email that the contract was still on foot because he not only despatched the stamp duty money requested by the vendor but also proceeded to prepare and execute the Commitment Deed, thus, incurring detriment in direct response to the vendor's conduct intimating that the contract was still on foot.

38. The applicable principle relating to election was explained in **Sargent v. A.S.L Developments Limited** [1974-75] 131 CLR 634 at p.641 by Stephen J in the following way:

> *"It is not by mere delay that it is said that the right of rescission was lost but rather by conduct evincing an intention to keep the contract on foot at a time when the alternative, but inconsistent, right of rescission had become available. The vendors having two inconsistent rights were, it is said, bound to elect as between them and having elected to treat the contracts as subsisting they were thereafter bound to the election and thus forfeited their rights of rescission."*

On page 642 his Honour went on to observe on:

> *"For the doctrine to operate there must be both an element of knowledge on the part of the elector and the words of conduct sufficient*

to amount to the making of an election between the two inconsistent rights which he possesses."

39. In this case, clearly, the vendor intimated in his email of 10th March, 2005 that the contract was on foot by not only requesting an extension of the date for settlement but also requesting for certain action to be taken by the purchaser, namely, the remittance of $11,900.00 for stamp duties. The email of 10th March, 2005 was sent at a time when the essential date for settlement had expired and the vendor had gained the right to rescind the contract at the expiry of 30 days from that date.

40. The vendor must be taken to have known that after the purchaser had failed to complete the contract on the essential date of 4th March, 2005, he had acquired the right to rescind the contract within 30 days of that date. Accordingly, upon the application of the principles discussed in **Sargent v. A.S.L Development Limited**, the vendor must be taken to have affirmed the contract by his conduct and thereby lost his right to rescind.

41. In the light of the foregoing, I conclude that the vendors rescission of 7th April, 2005 was invalid and the contract was still on foot giving the purchaser a right to terminate the contract or seek specific performance. However, at the beginning of this appeal, it was announced in court by the respondent's counsel, Mr Young, that the property had been resold to another buyer and specific performance was no longer possible.

42. This raises the question whether any other remedy such as damages is available to the purchaser.

43. In my view, the purchaser cannot claim common law damages because he did not rescind the contract. He could have done so on the basis that the vendor had repudiated the contract by his wrongful rescission see: **Ogle v. Comboyuro Investments Pty Ltd** [1976] 136 CLR 444 at page 453.

For termination to have occurred for the vendor's repudiation there has to be an express or implied acceptance: see Heyman v. Darwins Ltd [1942] AC 356.

As the purchaser never accepted the vendor's repudiation arising from his wrongful rescission, the contract must be regarded as being on foot after the vendor's wrongful rescission of 7th April, 2005.

The question is what appropriate remedy can be awarded to the purchaser in the circumstances of this case. In my view, since the enactment of the ***Judicature Act***, this court, like most courts in the common law jurisdictions has concurrent jurisdiction at law and in equity. I am of the view that this is an appropriate case for this court to award the Appellant equitable damages in lieu of specific performance.

44. Equitable damages can only be given if the court would have granted that remedy see **Harvey v. Powell** (1888) 39 Ch D. 508. In my view, had specific performance been possible, I would have granted that remedy to the purchaser.

45. Having decided that equitable damages were available to a party to whom the remedy of specific performance was no longer possible without any fault of his own, the House of Lords in **Johnson v. Agnew** [1980] AC 367 at page 400 went on to discuss how damages were to be assessed in the following passage:

> *"The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach . . . But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.*
>
> *In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would appear to me more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise then by his default) the contract is lost . . .*

In the present case if it is accepted, as I would accept, that the vendor's acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendor's fault) should logically be fixed as the date on which damages should be assessed."

46. The purchaser in this case did everything he could to perform his obligations under the contract. But specific performance is no longer possible as the property has been resold. In my view, the most appropriate date from which damages should be assessed is 18th November 2010 being the date of handing down of judgment.

47. The appeal should be allowed and the orders in the Court below set aside. The purchaser should be awarded equitable damages to be assessed by the Master as at the date of handing down of judgment. The respondent should pay the appellants costs here and below assessed at $2,500.

Post Script

48. In this case the word 'rescission' has been used throughout. Rescission, however, is strictly more apt to describe the cancellation of a contract from the very beginning, for example, for misrepresentation or mistake where the parties were not ***ad idem***.

Thus in strict terminology, when a contract is said to be rescinded, it is rescinded ***ab initio,*** where a contract is cancelled for breach, the correct terminology is termination. But it has become common practice for courts nowadays to use the word rescission when termination is intended. As the words are used interchangeably by the courts these days I have taken the view that it would be convenient to continue using the word rescission which the party's had chosen.

William Marshall JA

49. I agree.

Kankani Chitrasiri JA

50. I agree.

The orders of the Court

Izaz Khan JA

51. The orders of this Court are:

(1) The appeal is allowed and the orders in the Court below set aside.

(2) The appellant is awarded equitable damages to be assessed as at 18th November 2010 by the Master.

(3) The Respondent do pay the appellants costs here and below assessed at $2,500.

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Hon. Justice Izaz Khan
Justice of Appeal

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Hon. Justice William Marshall
Justice of Appeal

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Hon. Justice Kankani T. Chitrasiri
Justice of Appeal