

**IN THE HIGH COURT OF FIJI AT LAUTOKA
[CIVIL JURISDICTION]**

CIVIL ACTION NO : 35 OF 2008

BETWEEN : **BRETT WILLIAM WHITTAKER** of Denarau, Nadi in Fiji, Businessman.

PLAINTIFF

AND : **JOHN JOSEPH BYRNES** of 223 Soldiers Point Road, Salamander Bay,
New South Wales, 2317, Sydney, Australia.

DEFENDANT

Counsel

Mr Peter Lowing for the Plaintiff

Mr Kunal Singh for the Defendant

Date of Trial : 08 April 2013

Date of Written-Submissions : 16 April 2013

Date of Hearing : 19 April 2013

Date of Judgment : 08 May 2013

J U D G M E N T

1. The plaintiff instituted this action against the defendant seeking damages on the basis of a Sales and Purchase Agreement dated 03 February 2006 (the agreement) had between them over an immovable property at Lot 19 comprising an extent of 1650 Square Meters at Denarau in Nadi (the property).
2. The plaintiff agreed to purchase and the defendant agreed to sell the property for a sum of \$ 655,000.00 under the agreement. A deposit in an amount of \$ 65,500.00 was paid by the plaintiff on the date of the agreement and the balance purchase price of \$ 589,500.00 was to be paid on or before 03 March 2006, being the date of settlement. The defendant undertook, in terms of the agreement, to hand over the registrable title of the property to the plaintiff on the date of settlement.
3. Parties agreed that the time was of the essence.
4. The plaintiff pleaded that the defendant defaulted the settlement obligation due on 03 March 2006. The plaintiff, however, agreed orally with the defendant to extend the date of performance. Consequently, time ceased to be of the essence as admitted under paragraph 5 of the statement of claim.

5. The plaintiff further pleaded that he was willing and able to perform his obligation under the agreement; but, the defendant failed to perform his obligations even after a second extension from 11 April 2006. The plaintiff, thereupon, rescinded the agreement after giving notice of such rescission on 21 April 2006 as provided for under clause 14 (a) of the agreement.
6. The plaintiff pleaded that, as a result of the defendant's failure to perform the settlement obligations, the plaintiff had suffered loss and damage, which he assessed to be the difference of prices between the market price as at 20 April 2006 and the purchase price agreed on 03 February 2006. The plaintiff, accordingly, claimed that price difference as the quantum he had suffered as damages together with the interest and the costs of the action.
7. The defendant, in his statement of defence dated 01 June 2012, admitted the agreement; and, that the date of settlement was extended from 03 March 2006. The defendant stated that he was not able to conform to the performance obligation even within seven days from 11 April 2006 as his application for the assessment of the Land Sales Tax had continued to be before the Commissioner of Inland Revenue.
8. The defendant specifically pleaded that he was not in a position to settle by 11 April 2006 as he had disputed the Land Sales Tax with the Commissioner of Inland Revenue. The defendant admitted that the agreement was rescinded by the plaintiff on 21 April 2006 after giving due notice to him.
9. Upon rescission of the agreement, the deposit in the sum of \$ 65,500.00 was duly returned to the plaintiff. The property was, thereafter, available in the market for sale until July 2008. The plaintiff, however, did not show an interest in buying the property thereafter. Instead, he had brought this action after the sale of the property to a third party.
10. The trial proceeded on the basis of the pleadings as set-out above.
11. At the trial, the plaintiff-Mr Brett William Whittaker gave evidence on his own behalf and relied on the statement of claim. Mr Whittaker claimed that he had held a Degree of Bachelor in Marketing and Accounting. He said that he had arrived in Fiji in 1994, and set up businesses along with his wife mainly dealing with property development; purchase and sale of real estate; and, construction work. He moved to Denarau in Nadi in 2005 and lived there since then.
12. Mr Whittaker asserted that there was substantial increase in the value of the property in Denarau around 2005. The value of the property in Marina Point in Denarau, where the largest residence blocks located, almost tripled.

13. It was Mr Whittaker's evidence that he was approached by one Ms Heally for the sale of Lot No 19 at a cheaper price as the owner of the property, the defendant-Mr John Joseph Byrnes, was returning to Australia.
14. The plaintiff said that an agreement for sale and purchase was entered into with a clause that the 'time was of the essence'. Lot 19, which had the added values of deep water fronts, did not have any encumbrances, too. After negotiation, the sale price was agreed upon to be \$ 655,000.00 and the settlement was to be reached in thirty days. Mr Whittaker said that the defendant, however, did not settle the matter and came up with excuses in relation to the Land Sale Tax. The plaintiff said that he eventually rescinded the agreement on or about 20 April 2006 and the defendant had returned the deposit and the stamp duty. He further stated that he would have sold the property around \$ 1.1-1.2 million had the transaction been finalized under the agreement.
15. The plaintiff, accordingly, assessed a sum of \$ 500,000.00, being the difference between the price agreed under the agreement and the projected sale price, as the loss that he claimed to have suffered. The plaintiff sought to recover that amount as damages from the defendant.
16. Mr Whittaker said that he was an expert on market analysis of the real property in Fiji after being in the trade for a considerable time from 1994.
17. Under cross-examination, the plaintiff admitted that the property was sold in July 2008 after two years from the date of rescission. He further said that Denarau had a unique market and that the price of an empty block went up substantially around the relevant time. He did not, however, have any material to support his claim of expertise in the property trade other than his own self-interested assertions in court.
18. The defendant-Mr Byrnes did not give evidence. Evidence of Mr Dinesh Goundar, a Conveyancing Officer attached to the defendant's solicitors, was presented in support of the defendant's case.
19. Mr Goundar, having gone through the file of the solicitors pertaining to the agreement, said that the purchaser had to pay the stamp duty and the seller had to pay the Land Sale Tax to the Fiji Inland Revenue and Customs Authority (FIRCA). The witness referred to the documents in the Agreed Bundle of Documents (ABOD) 3,2, 4,5, 6, 8, 9, 11 and 12, which were marked as DE 1-9, and said that the assessment of Land Sale Tax had not been finalized before 21 April 2006.

20. Upon consideration of the pleadings and the evidence, I am of the view that the case for the plaintiff depends on the construction of Clause 14 of the agreement, which was to the following effect:

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 seven (7) days from the due date then and in any such case the Purchaser without prejudice to any other remedies available to him may at his option exercise all or any of the following remedies namely:

- (a) *May rescind the contract and recover the deposit paid hereunder;*
- (b) *May sue for specific performance of this Agreement;*
- (c) *May claim damages in addition to seeking specific performance of this Agreement.*

21. Principles of rescission in the Law of Contract are very clear. **Cheshire and Fifoot's Law of Contract**: N C Seddon and M P Ellinghaus; Eighth Australian Edition, at page 493 states:

... ,[R]escission brings about a 'winding back' of the contract as if it had never been. It is a prerequisite of rescission that this must be substantially possible. Termination, on the other hand, stops the contract at a particular time so that any future obligations under the contract are terminated (apart from the obligation to pay damages in the event of breach and some 'procedural' aspects of the contract such as arbitration clauses or exemption clauses), while past accrued rights arising under the contract are enforceable. It would be logically impossible to sue for damages for breach of a contract that has been rescinded; while it is a commonplace to sue for damages for breach of a contract that has been terminated.

(Footnotes omitted; Underlined for emphasis)

22. Similarly, **Chitty on Contracts: General Principles; Sweet & Maxwell 1994** dealing with the effect of rescission at pages 1080-81, states that:

A contract which is rescinded by agreement is completely discharged and cannot be revived. The parties will usually make express provision for the restoration of money paid or for payment for services performed under the contract prior to rescission. But in the absence of

such provision (express or implied) money paid in pursuance of the abortive contract can be recovered by an action for money had and received, although it is more doubtful whether a claim could be made for payment not yet due in respect of services rendered.

(Underlined for emphasis)

23. In view of the above principles, I am of the view that it is not open for the plaintiff to seek damages on the basis of any default in the performance of any contractual obligation by the defendant after rescission of the agreement.
24. While parties are free to agree to terms without offending public policy considerations in a contract, ultimate construction of a contract entirely lies in court.
25. I am of the view that remedies in (b) and (c) under clause 14 of the agreement cannot possibly be sought after exhausting the remedy in (a) for the reason that the parties are brought back to a position as if there was never a contract at all after rescission. Clauses 14 (b) and (c), which permit the plaintiff to seek specific performance and/or damages, are not, therefore, enforceable in the context of the law of contract after the rescission of the contract notwithstanding the agreement of the parties. To put it differently, the remedies of specific performance and/or damages are not conceivable in law after rescission of a contract.
26. The plaintiff's action, in the circumstances, is misconceived. It is bound to be dismissed with costs.
27. As the plaintiff's action fails on the fundamental issue of contractual liability against the defendant, it must be placed on record - even at the risk of its redundancy – that there is indeed no need to consider the evidence relating to the issue of proof of plaintiff's case.
28. Plaintiff's action dismissed with costs. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
08 May 2013