

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 126 of 2014

BETWEEN : **REDDY ENTERPRISES LIMITED** a company incorporated in the Fiji Islands and having its registered office at 35 Ravouvou Street, Lautoka.

PLAINTIFF

AND : **SONAISALI ISLAND RESORT LIMITED** a company incorporated in the Fiji Islands and having its registered office at c/- KPMG, 157 Vitogo Parade, Lautoka.

FIRST DEFENDANT

AND : **SONAISALI PREMIUM (FIJI) RESIDENCES LIMITED** a company incorporated in the Fiji Islands and having its registered office at c/- KPMG, 157 Vitogo Parade, Lautoka.

SECOND DEFENDANT

AND : **TADRAI ISLAND RESORT LIMITED** a company incorporated in the Fiji Islands and having its registered office at c/- KPMG, 157 Vitogo Parade, Lautoka.

THIRD DEFENDANT

AND : **AARON MCGRATH** of Nadi, Fiji Islands, Businessman.

FOURTH DEFENDANT

Counsel : Mr. Turner and Mr. S.Singh for the Plaintiff
Mr. J. Connor and Mr. D Sharma for the Defendants
Date of Hearing : Thursday 19 June 2014
Date of Ruling : Friday 27 June 2014

RULING

INTRODUCTION

[1]. I am to consider whether or not to dissolve the injunction granted *ex-parte* by the High Court in Suva on 07 May 2014. The Orders granted, in effect, restrained the defendants, who are the owners and operators of Sonaisali Island Resort and Tadrai Island Resort from dealing with the various parcels of land on which the two resorts are built. Orders were also made to transfer the file to Lautoka.

BACKGROUND

[2]. The background to this case might be stated shortly. Reddys Enterprises Limited (“**REL**”) is a non-resident company. That is so by virtue of the fact that 408,112 shares out of its 408,160 shares are controlled or owned by non-residents and that three out of its five directors are also non-residents. REL is interested in purchasing the Sonaisali Island Resort as well as the Tadrai Island Resort. The two resorts are listed with the New Zealand real estate firm of Colliers International (“**Colliers**”), the agents of the resorts-owners. Mr. Rohit Reddy (“**Rohit**”), a director of REL, would learn through Colliers around mid-April this year, about the listing of the two resorts on the market. Rohit was keen. And so, on behalf of REL, Rohit made a bid of FJD\$17 million. After that initial bid, Rohit negotiated further a Mr. Humphries of Colliers. On 22 April 2014, Rohit raised REL’s offer to FJD\$18,500,000.00.

DID THE PARTIES REACH AGREEMENT?

[3]. The sequence of events that unfolded after Rohit raised his offer to FJD\$18.5 million is not in dispute. In fact, there is very little, if any, that is in dispute in terms of facts. Where the parties differ however is whether or not at any point in the course of ensuing negotiations, the parties had crossed the line to reach a binding and enforceable agreement.

REL’s CASE

[4]. As far as Rohit is concerned, REL’s FJD\$18.5 million bid was duly accepted on 22 April 2014 by the defendants. That was the date both parties executed and exchanged an **Exclusive Term Sheet**, prepared by the defendants’ agent, Colliers. The said document outlines the key terms of what, according to Mr. Turner, are the essential terms of the agreement:

- (a) price was agreed at \$18,500,000.00 + VAT if applicable;
- (b) deposit was \$1,850,000.00;
- (c) the Plaintiff had 7 days’ time in which to carry out its due diligence;

- (d) the Plaintiff had to give notice that the contract was unconditional on or before 2 pm on 2 May 2014;
- (e) the parties were to exchange contracts within 15 working days from the date of signing of the Term Sheet;
- (f) Settlement was within 15 working days of contract being exchanged or all regulatory consents being given;
- (g) there was exclusivity of dealings in that the Vendor was not to engage in any discussions with any other potential buyers in this time.
- (h) the parties were also bound during this period by confidentiality provisions

[5]. An email was sent by McGrath on 22 April 2014. According to Rohit, this email confirms the defendants' acceptance of REL's offer. Below is the trail of email relevant to this (marked "E" in Reddy's affidavit):

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
22.04.14 1:52 p.m.	McGrath	Humphries, Dean, Jan McGrathWe are now comfortable with this offer and are pleased to accept it. We note the Due Diligence period...and its expiry..... Until this arrangement goes unconditional, it is imperative that a high degree of confidentiality is maintained.... We await your heads of agreement in the meantime.
22.04.14 2.03 p.m.	Dean Humphries (of Colliers)	Rohit	Please see below response from Aaron and Jan McGrath who have now accepted your conditional offer of FJ 18.5 million for Sonaisali and Tadrai Island Resorts..... ...please acknowledge that you are happy with the timing of the seven (7) day working due diligence and also ...your general acceptance of this offer? We will now prepare a revised heads of terms that Aaron and Jan have requested is signed by all parties this afternoon.....
22.04.14 2.55 p.m.	Rohit	Humphries, Dean	..please email me and I will have it printed.
22.04.14	Maria Verner (of Colliers)	Rohit	...please see attached for amended terms sheetplease confirm the timing of points 10 and 11 are correct - both being 7 days
22.04.14 3.49 p.m.	Rohit	Anil Rana	Please review and call me back
05.05.14 9.57 a.m.	Anil Rana	Rohit	FYI Please see the first email in this trail from Aaron to Dean re the offer I think that it is pretty clear.

[6]. Following the execution of the Exclusive Term Sheet, REL instructed its solicitor, Mr. Anil Rana of the Auckland, New Zealand law firm of Ellis Gould Lawyers to liaise with Mr. Richard Naidu of Munro Leys, the defendants' solicitor. The relevant trail of e-mails exchanged follows:

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
28.04.14 10.45 a.m.	Naidu	RanaThere is a draft sale and purchase agreement in motion now. I just wanted to touch base with you on it for a few minutes before we populate it with the relevant data in schedules.
28.04.14 11.55 a.m.	Rana	Naiduwill call you shortly.

28.04.14 2.59 p.m.	Naidu	RanaI understand you will be discussing the form of the agreement with Rohit in the next 24 hours. As indicated to you, we are compiling the detail for the Schedules but we wanted to be comfortable that the basic form of the Agreement was signed off. We understand that you will wish to raise issues in respect of some of its provisions. One matter to note -which is detail- is that the Vendor wishes to retain: -two personal motor vehicles..... Four laptops and a printerand two professional support staff.....
28.04.14 5.03 p.m.	Rana	Naidu	I had some issues accessing Sonaisali's DD list of docs. Can you please get someone to look into this. Alternativelycan we get copies of all leases for the properties and details of insurance cover for the properties
28.04.14 18.58	Naidu	Rana	Sorry we have also had trouble internally....If we can't get this working by tomorrow we will scan you the materials you request.
28.04.14	Rana	NaiduHopefully the extranet is up and running tomorrow
29.04.14	Janice Fong (of Munro Leys)	Rana/Naidu	The credentials and link for external access to our DD room are.....
05.05.14	Rohit	Shelvin Singh	(forwarding message)

[7]. On 28 April 2014, Colliers forwarded to Reddy a first draft sale and purchase agreement. A copy of this is annexed to his affidavit and marked "I".

[8]. McGrath, for the defendants opines (in his affidavit sworn on 22 May 2014) that the FJD\$18.5 offered by REL was a conditional offer:

....a conditional offer for \$18,500,000.00, which was a Reserve Price and we accepted this as a non binding conditional bid and entered into a Term Sheet to allow REL to conduct their due diligence and if after due diligence both parties were still keen to pursue negotiations further to draft and exchange a Sale and Purchase Agreement, come to agreement of the terms and conditions of the contract and finally have the same signed in order to create a binding contract.

[9]. McGrath's view of things seems to be borne out by the fact that the Sheet itself requires REL to **"give notice that the contract was unconditional on or before 2 pm on 2 May 2014"**. Obviously, that notice will only happen (i) after REL had carried out its due diligence and (ii) REL being satisfied and, remaining committed, after due diligence.

DID REL EVER GIVE AN UNCONDITIONAL NOTICE

[10]. According to Rohit, on 01 May 2014 at 2.28pm, he gave notice to Colliers that REL had done its due diligence and that the agreement was now

unconditional subject to the completion and exchange of contracts. The email stated as follows (see Annexure “J”).

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
01.05.14 2.30 p.m.	Rohit	Humphries DeanFurther to clause 10 of the mutually signed term sheet attached, I confirm that Reddy Group are satisfied with their due diligence and are now unconditional on the two properties, <u>subject only to completion and exchange of the sale and purchase contracts.</u> Both our solicitors are fully engaged with this process and we hope to be able to exchange contracts as soon as possible, but no later than the 14 th of May 2014 as per the term sheet. Can you please advise the vendor of this and get his confirmation of the same and that the property is now officially off the market.

[11]. On 01 May 2014 at 6.28pm, Reddy sent an email to McGrath confirming that REL was now unconditional on the agreement and that **“we are getting the lawyers to ensure that the sale agreement closes within the time contemplated in the Term Sheet”**.

[12]. The time contemplated on the Term Sheet is:

....parties were to exchange contracts within 15 working days from the date of signing of the Term Sheet (i.e. from 22 April 2014).

[13]. But on 02 May 2014 at 5.26 p.m., McGrath sent an email to Reddy advising that the defendants had another buyer and was entering into negotiations with that buyer. The said email which is marked “K” in Reddy’s affidavit states as follows:

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
02.05.14 5.26 p.m.	McGrath	RohitDean has forwarded to me your email of yesterday. It is great to hear that you are through the due diligence stage and still keen to purchase. The property is not yet off the market. Another party has been waiting to perform due diligence but has been prevented from doing so <u>because we wished to keep faith with the seven-day exclusive period in our terms sheet with REL.</u> (my emphasis). Accordingly we told them we could neither offer due diligence nor discuss the options until expiry of the seven-day exclusive period. As that date has expired this afternoon, we have now allowed it to begin due diligence from that time and we have had some preliminary discussions with it on its offer. I have to say that the entry of and the commercial stance of the alternative buyer has put some upward pressure on the price we are discussing with you. It is not our intention to conduct an “auction”, but like any exiting owner we do want to maximize our price and minimize our inconvenience. The other bidder is local. It may be in a quicker position to obtain necessary regulatory approvals (if required). We see this as a plus if this means they can close a deal faster. As you will appreciate, once the sale

			<p>decision has been made (and very little appears to stay confidential in Fiji) it is in evryone's best interest that the sellers make a quick and clean exit.</p> <p>I make this disclosure only so that we can keep the playing field level for both bidders and be clear to you that it is now a multi-horse race. We value REL's interest. We can certainly see how both resorts would be sound additions to REL's portfolio and even though we are exiting vendors, we have a (non-commercial) interest in having the properties go to a party who could develop and advance it.</p> <p>Please don't hesistate to call me if there ios anything you want to discuss.</p>
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[14]. McGrath would explain his actions as follows in his affidavit:

I admit I sent Mr. Reddy an email on 02 May 2014. However, I do not accept Mr. Reddy's interpretation of the email.

I informed Mr. Reddy as per the Term Sheet that now the due diligence period was over we would also consider discussions with other potential purchasers.

I informed Mr. Reddy that there was another interested party and now that their exclusive due diligence period was over we would allow the other interested party to conduct due diligence as well and I confirmed that we had some preliminary discussions with the other party about its offer.

I informed Mr. Reddy that the entry of another interested party had put upward pressure of the price that we were discussing with REL.

The intention of my email was to alert Mr Reddy and REL about the fact that another party was interested and conducting due diligence and I wanted to ensure that there was a level playing field for all parties.

[15]. After receiving the above email, Rohit telephoned Humphries of Colliers. As to the nature of their conversation, Rohit deposes as follows in a supplementary affidavit he swore on 13 May 2014:

11. After receiving the fourth defendant's email at 5.26 p.m. on Friday 2 May 2014.....I telephoned the Colliers agent, Mr. Den Humphries...I told Mr. Humphries that I was very annoyed at this turn of events and that as far as I was concerned the parties had a binding contract which had already gone unconstitutional. I reminded Mr. Humphries that in his email dated 28 April 2014 at 10.12 a.m.....Mr. Humphries had stated.....: "Based on the mutually signed Term Sheet (attached) the Reddy Group firstly acknowledged in writing that the sale is unconditional by no later than 2 pm Friday 2nd May 2014. Both parties have fifteen working days to finalise and exchange the sale contract. Based on my reckoning, this date is by **no later than 2 pm Wednesday 14th May 2014.** (my emphasis)

12. Mr. Humphries said that he had not been aware of these events and that he was also shocked that the vendor would act in this way. He advised me that he would immediately contact Mr. McGrath of the vendor and tell the vendor that he had signed the Term Sheet and that he was obliged to continue with the sale. Mr. Humphries appeared to be quite annoyed with the vendor and expressed the view

that the vendor was breaching an established process for sales of this nature and the provisions of the Term Sheet which had been signed by both parties.

- [16]. The supplementary affidavit sworn by Rohit details various telephone conversations that Rohit had with Humphries and Naidu on 02 and 3 May 2014 in which he (Rohit) purportedly made known his disappointment with the vendors' conduct when there was clearly a binding unconditional contract.
- [17]. Both the Reddy and the McGrath interpretations are arguable. But I do not think it appropriate to determine the issue summarily at this interlocutory stage.

SUBSEQUENT DEALINGS

- [18]. Rohit says that out of the telephone conversations he had with Humphries¹, he would learn that the new bidder in the picture was Vision Group Limited ("**Vision**") which was bidding at \$19,000,000 (nineteen million dollars). Then, in an attempt to outbid and better Vision's offer, Rohit would then increase REL's offer to \$19.5 million.
- [19]. Rohit further deposes that:
-Navin's accounting firm DFK Oswin Griffiths has been the accountant for our New Zealand companies for over 15 years and he has been a trusted advisor for the Reddy Group of Companies for 20 years.
- [20]. Rohit, now faced with the competing bid of Vision, would launch into further negotiations about the price, prompting him to make a move to better Vision's offer. The following is what Rohit has to say about this:

19. On Saturday 03 May 2014, I came to know that the vendor was in discussions with other parties and under pressure/coercion of losing the property (given the Defendants' disregard of the contract between ourselves) I had no option but to negotiate the price. I spoke to Colliers International and I confirmed that the Plaintiff was offering the sum of \$19,500,000.00; a price over what I understood Vision was offering.

¹ Rohit says that it was Humphreys (of Colliers International) who advised him that Vision was negotiating with the Defendants and :

- (i) the bids closed on or about 22 April 2014;
- (ii) the new bidder did not place a bid on or before the closing date;
- (iii) the new bidder placed a bid of \$19,000,000.00 on 28 April 2014.

[21]. By email dated 03 May 2013 at 3.14 p.m., the defendants, through their lawyers, responded thus:

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
03.05.14 3.14 p.m.	Naidu	Rohit	<p>.....Attached is a revised copy of a sale agreement reflecting a purchase price of F\$19.5 million.</p> <p><u>Note that at this point the transaction contemplates sale of the State Lease along with the iTaukei Leases in this agreement. Given that REL is possibly foreign controlled, Land Sales Act issues may arise with respect to the State Lease. This is what Aaron may have been alluding to in his earlier email to you.</u> We want to avoid Land Sales Act issues if possible because time-wise, this is a real drag on the completion process because of delays in obtaining it. It may be that, if Land Sales Act is an issue, we would sell the resorts businesses first and the State Lease second (say at a nominal value of F\$100,000) because it is the thing that would cause the sale agreement to drag otherwise.</p>

[22]. Rohit says that, on the same day at 4.04 p.m, he sent an email to Richard Naidu seeking an undertaking that the Defendants refrain from negotiating with Vision over the deal. There is nothing before me to indicate that the defendants were willing to give that undertaking. Instead of giving an undertaking, at 4.24 p.m. Naidu emailed Rohit as follows:

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
03.05.14 4.24 p.m.	Naidu	Rohit	Instructions from Aaron (communicated to Dean) are: F\$21m is the number to get it off the market this afternoon.

[23]. At 5.01 p.m. Rohit replied to Naidu's email expressing his disappointment with, what he says, is the lack of good faith on the part of the defendants.

<i>Date & Time</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Message</i>
03.05.14 5.01 p.m.	Rohit	Naidu	<p>.....Aaron, you have once again undermined the integrity of this sale process and transaction after assuring Dean Humphries that the Reddy Group would have a deal at F\$19.5M. This shows again a clear lack of good faith by you when we had signed a mutually acceptable term sheet.</p> <p>I will be personally calling up Vision group to say that we are not proceeding with this transaction and that we were only ever willing to pay a certain amount.</p> <p>Furthermore we hereby reserve all our legal and equitable rights arising in this transaction against you personally and the vendor companies.</p>

COMMENTS

- [24]. In an interlocutory injunction application, the issues are, according to the **American Cyanamid [1975] AC 396** case, whether or not there is a serious issue to be tried, the balance of convenience, and whether damages would be an adequate remedy. I need not assess where the preponderance of evidence might lie from the affidavits before me, if there is a clash of evidence. All I need do is look at the whole case and have regard to the relative strength of the claim as well as the defence before deciding what is best done (as per Lord Denning in **Hubbard & Anor v Vesper & Anor [1972] EWCA Vic 9**).
- [25]. But this case before me is different. There is not much of a clash of evidence in the affidavits filed. This case involves a difference of interpretation as to the legal position of the parties. On 19 June 2014, counsel for the defendants urged the court to consider dissolving the injunction immediately on the following grounds:
- (i) material non-disclosure
 - (ii) there is no contract between the plaintiff and the defendant such as to give rise to an equitable interest
 - (iii) there is no consent of the Director of Lands
 - (iv) there is no consent of the Minister under section 6 of the State Lands Act.
- [26]. On the allegation of material non-disclosure, Mr. Connor argued that the fact that REL is a non-resident company was not disclosed to Kamal J and that the failure to do so amounted to a material non-disclosure. This is a strong argument when one considers the legal effect of the absence of the relevant statutory/regulatory consents on an agreement.
- [27]. I observe, as pointed out by Mr. Turner, that there is material attached to the affidavit filed (as per Naidu's email – see para [21] above) containing references to the possible applicability of the Land Sales Act.
- [28]. That, in my view, is not sufficient to discharge counsel from the duty to disclose to the learned judge who dealt with the application *ex-parte*. At an *ex-parte* hearing, when there is every likelihood that the judge sitting

might have overlooked the fact, it is incumbent on counsel to point out the fact. Counsel is duty bound to alert the learned judge once it became clear that the fact has not caught his attention.

[29]. I have considered the argument advanced by Mr. Turner that, in any event, the option was always open to REL to appoint a resident nominee company to complete the transaction on REL's behalf, if the Minister's consent became an issue. But the purported agreement we are dealing with at this stage is one that was negotiated between REL and the defendants. I am not prepared to give Mr. Turner the benefit of the doubt on that point.

[30]. While the Supreme Court of Fiji in **Gonzalez v Akhtar [2004] FJSC 2; CBV00011.2002S (21 May 2004)** has laid down that the prior consent of the Minister is a mandatory requirement under section 6 of the Land Sales Act, the parties may enter into contract subject to Minister's consent. The Fiji Court of Appeal in **Port Denarau Marina Ltd v Tokomaru Ltd [2006] FJCA 27** did observe that the Supreme Court in **Gonzalez** had made supportive dicta of this position:

The Supreme Court rejected each of these arguments. Most of the reasoning concerned the issue whether the agreement was enforceable notwithstanding breach of s6(1). The proposition that Hunter v Agpar should be overruled was dismissed in one sentence. But obiter the Court said [91]:

[Counsel] next submitted that it was always open to the parties to enter into a contract for the sale of land subject to a condition that the contract would not become effective unless, and until, the Minister's consent had been obtained. He referred to Butts v O'Dwyer [1952] HCA 74; (1952) 87 CLR 267 at 279-280 for that proposition. That submission was not challenged. It is obviously correct and nothing more need be said about it.

[31]. On the above score, I agree with Mr. Turner. It remains to be seen at trial whether in fact the parties had indeed reached such a contract subject to the Minister's consent. But having said that, it would appear then that the only issue to be tried in this case is whether or not the parties have reached an agreement which is subject to the Minister's consent? Many other questions follow from this.

Q: Is a plaintiff who alleges that he has an agreement which is subject to the Minister's consent entitled to the equitable remedy of specific performance?

Q: Does an equitable estate pass to a purchaser who has entered into an agreement for the sale and purchase of a piece of land, which agreement is yet to be consented to by the relevant government authorities as required by statute?

*Q: If the answer to the above is "No", does the purchaser then merely derive a **mere equity** (giving rise to sue only in contract) from an agreement reached but which does not yet have the requisite statutory consent?*

[32]. The above were not addressed by counsel but for which my answer would be as follows. Firstly, REL must convince me that it did reach an agreement with the defendants. This is something I reserve for trial, as stated. Secondly, if, supposing, at trial, REL is able to convince me that it did, in fact, reach such an agreement with the defendant, then, at best, the agreement can only be construed as an agreement for the sale of Sonaisali and Tadrai Resorts, subject to the condition that the contract would not become effective unless, and until, the Minister's consent had been obtained (my emphasis). Thirdly, once I have made that finding, I would then have to ask: does such an agreement (which does not become effective until the Minister's consent is obtained) entitle REL to the equitable remedy of specific performance?

[33]. I am inclined to the view that it does not.

[34]. Having said that, my view is also, that, such an agreement, which does not become effective until the requisite Minister's consent is obtained, cannot support the equitable remedy of an interim injunction either. I say that, because there are numerous authorities that an equitable estate over the land in question has passed to the intended purchaser.

[35]. In **Re CM Group Pty Ltd's Caveat [1986] 1 Qd R 381**, it was held that property did not pass in equity until the required municipal council approval was obtained.

[36]. In **Brown v Heffer (1967) 110 CLR 344**, an interest in equity did not pass because the required consent of the Minister had not been obtained.

[37]. In **Chand v Prakash** [2011] FJHC 640; HBC 169.2010 (7 October 2011), which, although dealt with a different issue, is founded on the same general principle, Mr. Justice Callanchini, after rejecting a claim on promissory and/or proprietary estoppels (which are equitable remedies) by a party who was asserting those rights in the alternative based on an agreement to occupy a protected Crown Lease for which the director of lands' consent had not been first had and obtained:

However, there is a principle that the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has enacted is to be invalid. (**Halsburys Laws of England** supra at paragraph 1515). As Gates J (as then was) noted in **Indar Prasad** (supra) at page 171:

"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."

And later

However, in my judgment the classification of the leases as protected leases and hence bringing into play section 13 of the State Lands Act is decisive. The mandatory requirement of section 13 and the legal consequences that flow from non-compliance overcome and sufficiently dispose of any interest claimed by the Defendant under section 172 of the Land Transfer Act.

[38]. In my view, given the absence of any regulatory consent on the dealings between the parties, at best, the proper course for REL to pursue is a claim for damages.

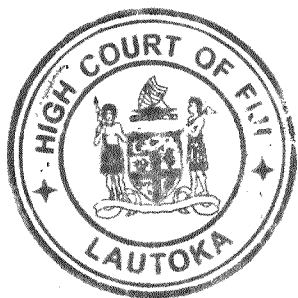
[39]. Accordingly, I am of the view that on the balance of convenience, it is imperative to dissolve the injunction now.

[40]. I must state here for the record that the undertaking as to damages offered on behalf of REL is inadequate. All its titles to the various real-properties exhibited as evidence of its assets in Fiji, are encumbered by mortgage.

[41]. As such, it is difficult to assess whether or not they are of any security value, in terms of an undertaking as to damages.

CONCLUSION

[42]. Injunction dissolved. Matter to take normal course.



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Anare Tuilevuka
JUDGE
27 June 2014