

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC No 257 of 2012

BETWEEN : **BAL SUNDARAM** of Lomolomo, Vuda, Businessman **PLAINTIFF**

AND : **ANN MASCARDO-HOLMES** (as Personal Representative) of
Australia, Employed Person **DEFENDANT**

AND : **ALEXANDER GORDON SPEAKMAN** and **CLIVE WILLIAM**
SPEAKMAN both of Australia, Retired Insurance Manager and
Retired Solicitor respectively. **INTERESTED PARTIES**

R U L I N G

INTRODUCTION

1. In this case, I have already granted an Order for Specific Performance against Gordon Wilson Speakman. The Order was made pursuant to a sale and purchase agreement between Speakman and Bal Sundram.
2. The subject matter of that agreement was a parcel of freehold real property which is legally described in Certificate of Title No. X1/05 Folio 218 comprising 137 acres. Speakman was the registered proprietor, and vendor, and Sundram was the intended purchaser. Their agreed price was FJD\$1.5 million dollars.
3. Speakman had delayed in settling the sale and purchase because of a caveat on the property. I believe that the fact that he was quite advanced in years and was virtually bedridden in a hospice in Queensland, Australia, also contributed to the delay. I say that because there is nothing before me to suggest that Speakman had any inclination to renege.

4. It was because of the delay in settlement that Sundram applied to Court for an Order for specific performance. On 07 June 2013, I granted Order in Terms of that application. Pursuant to that Order, Sundram, then duly paid the sum of \$1.4 million dollars into Court being the balance of the purchase price. He had earlier paid the sum of \$100,000 as deposit which was being held in the trust account of Cromptons.
5. Out of the \$1.4 million dollars paid into Court, a deduction of \$150,000 was then made by Order of this court dated 11 September 2003 being CGT assessed by the Fiji Islands Revenue & Customs Authority on Speakman. That sum was paid to FIRCA by the Deputy Registrar of the High Court (Lautoka).
6. The completion of the sale suffered a technical glitch when the duplicate title could not be located. On 27 September 2013, I granted Order in Terms of another application by Sundram for the Deputy Registrar to sign a request for Provisional Title from the Registrar of Titles. The title has since been conveyed to, and registered in favour of Sundram.
7. What is now before me is Sundram's Notice of Assessment of Damages filed on 07 February 2014 and which has been duly served on Speakman in Queensland. I must say here at this point that Speakman has since passed on after service of the Notice of Assessment on him. The personal representative of his estate is aware of these proceedings and has instructed a solicitor accordingly to defend the estate.

DAMAGES CLAIMED

8. As a general rule, specific performance is an order which requires a party to perform a contract. It is an equitable remedy (not a common law remedy) which is granted when damages would not be enough compensation.

Accordingly, specific performance is an alternative to common law damages for breach of contract.

9. Sundram's case appears to be grounded on the thinking that Speakman had breached the sale and purchase agreement by his delay and, although Sundram has since obtained the benefit of the bargain by the Order for specific performance, he has suffered some losses consequential upon Speakman's delay and accordingly, Speakman's estate should be held accountable for these losses.
10. Sundram said in court that he wants 7% interest on \$1.5 million dollars plus legal costs and stamp duty. It appears that the 7% represents the interest on the bank loan that he took out to finance the purchase.
11. He also talked about having to apply to the Director of Town & Country Planning for rezoning of the land and appears to blame Speakman of having failed to honour an obligation to do so beforehand.
12. Sundram also spoke about having to suffer an increase in stamp duty as a result of the delay. In 2011, stamp duty was levied at 2%. This was increased to 3% in 2013. The loss he suffered as a result amounted to \$15,000.
13. He also speaks of the loss he suffered when a certain Chinese developer who was interested in buying the land from Sundram and with whom he had been negotiating, had withdrawn due to the delay.
14. He also seeks damages for mental distress and the consequential loss to his business.

COMMENTS

15. All the indications in the affidavits filed before me are that Speakman was elderly and was suffering a serious medical condition which, as I understand

it, eventually claimed his life. At the time the action was filed, Speakman had been residing in a hospice in Queensland, Australia. He has since passed on as I have said.

16. The Agreement in question was dated 02 November 2011. The agreement, as most agreements of the sort do, provided that in the event that Speakman (the vendor) shall default of any of his obligations in the agreement, then Sundram (the purchaser) may either rescind the agreement, in which case he would be fully refunded all monies paid, or, sue for specific performance with or without damages (see clause 14).
17. As a general rule, Sundram cannot get an award of damages for breach of contract because he has already got the benefit of his bargain through the Order of Specific Performance. The land has now been transferred to him and he is now the registered proprietor of the freehold property in question.
18. He may be entitled to recovery of some unnecessary extra expenses that he has had to bear in having to file the writ action for specific performance.

Interest

19. I refuse to award any interest. Interest is something he would have to bear with his financiers and the slight delay in settlement is irrelevant.

Legal Costs & Stamp Duty

20. Sundram cannot claim from Speakman's estate the costs of his having to apply to the Director of Town & Country Planning for re-zoning. Under clause 11.5, Sundram:

...is satisfied as to the zoning or provisional or proposed zoning of the said property and no responsibility of any kind is taken by the Vendor in that respect.

21. Under clause 23.5:

The parties acknowledge that the said property is currently zoned "agricultural" and that the Vendor has not been and is not registered for Value Added Tax ("VAT") and they believe that VAT is not applicable to this transaction and accordingly has not been so applied. If however, after settlement, it is determined that VAT is applicable to this transaction, then in that event, the Purchaser shall pay for same upon demand by the Vendor in addition to the purchase price therein.

22. Besides, there is nothing in the agreement that remotely suggests that Speakman had undertaken to apply for and obtain a rezoning of the property.

23. As for the claim to be compensated for the increase in stamp duty, under clause 23.2 of the sale and purchase agreement, the following is stipulated:

The Purchaser shall pay all stamp duties, registration fees and statutory disbursements applicable to this Agreement and Transfer the allied documents.

24. Sundram of course did not have to bear this extra stamp duty. He could have rescinded the agreement and fully recover the deposit of \$100,000 he had paid. He chose not that option but for specific performance. He must bear that extra cost himself.

25. As for Sundram's claim for costs, under clause 23.1, the following is stipulated:

Each party shall pay their respective solicitors costs.

26. I accept the above only applies to the parties' respective costs in relation to the conveyance of the said property and does not apply to the costs of having to file the action in order to obtain an Order for specific performance.

27. I am prepared to grant Sundram the costs of having to file the action for specific performance and in that regard, I summarily assess his costs at \$6,500 (six thousand five hundred dollars only).

28. As for the loss allegedly suffered by Sundram when the Chinese developer who was interested in buying the land from Sundram had pulled out because of the delay, I am of the view that it would amount to an undue windfall to have to award Sundram any damages in this regard when he would still have the land for which he now has the whole world as his market. The indications are that

he did strike himself a good bargain and he may yet even get a much higher offer, or he may subdivide and develop the land himself for a much higher return than the Chinese investor was ever prepared to give him. There is not enough evidence and not enough strong legal submission to persuade me to award damages in this regard.

29. As for the mental distress that he allegedly suffered, generally, damages in contract law are awarded for economic loss and not emotional distress.

30. It is conceivable that one who has to deal with a breach by the other party will suffer some emotional distress. However, it has traditionally been hard to reconcile emotional distress suffered as a result of breach under the principles in **Hadley v Baxendale** (1854), 9 Ex. 341, 156 E.R. 145.

31. In **Chandra v Fiji Care Insurance Ltd** [2004] FJHC 311; HBCo220.1999 (23 September 2004), Mr. Justice Jiten Singh said:

Mental Stress

Mr. Mishra in his final submissions laboured at length for general damages for pain and suffering for two weeks and also for mental stress. He relied on **Eggers** case. As such I shall address this matter at a greater detail than I thought I need to.

Generally speaking a person in breach of contract is not liable for pain and suffering and distress for such breach caused to the innocent party. In **Watts v Morrow** (1991) 4 All ER 937 at 959 Bingham LJ noted:

“A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.”

In **Farley v Skinner** 2001 4 All ER 801 the House of Lords also considered damages for non-financial loss arising out of breach of contract. At page 812 speaking of the “exceptional category” cases Lord Steyn observed

“There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its contractual parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind”.

Considering the above cases and Eggers I am of the view that damages for mental stress in breach of contract can be awarded in a proper case or this exceptional category cases. However because this is exceptional category pleadings would need to be quite explicit. Further Lord Steyn gave a salutary warning that “awards in this area should be restrained and modest” and should not “contribute to the creation of a society bent on litigation”.

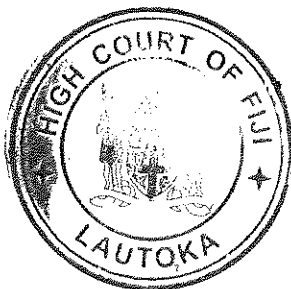
The plaintiff’s claim makes no reference to any pain and suffering or mental stress being suffered by the plaintiff. In her prayer she is asking for damages which in the context of the statement of claim would refer to damages for breach of contract. Further I looked at minutes of pre-trial conference which again made no reference to damages for pain and suffering and mental stress as an issue for the trial. Besides the plaintiff herself gave no evidence of mental stress. In Eggers damages for pain and suffering and for mental stress were allowed because they were referred to in the pleadings. Eggers was further a case where the insurance company delayed his evacuation resulting as prolonging his pain and stress. I would expect a more thorough allegations in the statement of claim than a bare word ‘damages’ in prayer. A defendant is entitled to know what is the nature of damages sought so he/she is prepared to counter them. I cannot allow damages for pain and suffering and mental stress.

However there is little doubt that the defendant was in breach of contract. I allow damages for breach of contract in the sum of \$1,000.00.

32. Relying on the principles expressed above by Singh J, I am not convinced that Sundram’s case falls within such an exceptional category of cases. Accordingly, I make no award for mental distress.

CONCLUSION

33. I award costs in the sum of \$6,500 (six thousand five hundred dollars only) in favour of Sundram against the estate of Speakman.



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Anare Tuilevuka
JUDGE
23 November 2016