

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

CIVIL ACTION NO. HBC 233 OF 2016

BETWEEN : **HUA JIA** of Westfield, Nadi, Businessman.

PLAINTIFF

AND : **NIGEL JAMES MORTEN DOUGLAS** and **CAROL DOUGLAS**
both of Sau Bay, Qamea, Fiji.

DEFENDANTS

Appearances : Mr R. Singh for the plaintiff
Mr E. Sailo for the defendants

Date of Hearing : 17 May 2018

Date of Judgment : 10 July 2018

J U D G M E N T

Introduction

[01] Before me is an application for summary judgment for specific performance against the defendants.

[02] By summons dated and filed on 30 May 2016 (*the application*), the plaintiff seeks specific performance of the sale and purchase agreement (*SPA*) entered into between the parties on the 20 March 2015 for the purchase of the land comprised in Crown Lease Number 16028, LD Ref. 4/10/4340, Lot 5 on SO 5250 known as Wailoaloa Beach in the Viti Levu, containing an area of 0.1521 ha (*the land*). The orders the plaintiff seeks by way of specific performance includes:

"1. AN order for specific performance against the Defendants requiring the Defendants to convey the land comprised in Crown Lease No. 16028, LD Ref. 4/10/4340, Lot 5 on SO 5250 known as Wailoaloa Beach in the Viti Levu, containing an area of 0.1521 ha by;

- a. Executing the application for consent to transfer pursuant to Section 13 of the State Lands Act seeking consent to transfer the Crown lease 16028 to the Plaintiff and together with the instrument of transfer transferring Crown Lease 16028 to the Plaintiff.
 - b. Accepting the sum of \$330,750.00 as the consideration sum for the transfer of Crown Lease 16028 to the Plaintiff.
 - c. Preparing and lodging an application for Capital Gains Tax over the instrument of transfer with the Fiji Revenue and Customs Authority.
 - d. Taking all steps necessary to transfer Crown lease 16028 to the Plaintiff.
2. AN order that the Plaintiff be permitted to pay the sum of \$42,750.00 to the Director of Lands and be allowed to deduct the said sum of from the sale price of \$415,000.00
 3. IN the event the Defendants fail or refuse to execute any or all papers for the transfer Crown lease 16028 unto the Plaintiff, the Deputy Registrar of the High Court be permitted to execute such papers in place of the Defendants.
 4. THAT there be costs of this Application on an indemnity basis.
 5. ANY further or other orders this Honourable Court deems fit."

[03] The plaintiff has made this application pursuant to Order 86 Rule (1) and (2) of the High Court Rules 1988 ("HCR").

[04] The application is supported by an affidavit of Hua Jia, the plaintiff sworn on 5 October 2016 and filed on 28 October 2016 (*the Affidavit in Support*).

[05] The defendants in opposing the application have filed an affidavit sworn on 10 July 2017 (*the Affidavit in opposition*).

[06] The plaintiff has also filed an affidavit in response sworn on 26 July 2017.

[07] At the hearing, the parties made oral submissions. In addition, they have also filed skeleton submissions which include the plaintiff's submissions in reply.

Background

[08] Mr & Mrs Nigel James Morten Douglas and Carol Douglas, the defendants are the registered lessee of the land. They agreed to sell the land to Hua Jia, the

plaintiff, and entered into a sale and purchase agreement on 20 March 2015 (“SPA”), for the sale of the land in the consideration sum of \$415,000.00. Pursuant to the SPA, the plaintiff paid a deposit of \$41,500.00 to Bayleys Real Estate of Fiji Limited (*‘the agents’*). The agents drafted the SPA.

[09] On 7 August 2015, the Director of Lands granted consent on the condition that the defendants pay a penal rent of \$42,750.00. After the conditional consent was granted by the Director of Lands, the defendants refused to perform the SPA.

[10] The plaintiff issued a demand letter through his solicitors for the completion and performance of the agreement. The notice reads:

- A. *The Purchaser is ready, able and willing to purchase the Property from you in accordance with Sale and Purchase Agreement dated 20th March 2015 (“the Agreement”) provided you comply with your obligations under the Agreement.*
- B. *You are now required to immediately complete all your obligations under the Agreement and attend to completion pursuant to the Agreement by Tuesday 22nd March 2016 at 12:00 noon, and in this respect time is of the essence.*
- C. *Unless you complete the Agreement within the time specified in this notice, the Purchaser will be entitled to exercise all its rights stated in Clause 11 of the Agreement and take all other action he deems fit.”*

[11] The defendants did not respond to the demand notice. The plaintiff issued another notice dated 25 August 2016 demanding the completion of the SPA. In response, the defendants wrote as follows:

- (a) The defendants agree that the parties executed a sale and purchase agreement for the sale of the said land on 20 March 2015.
- (b) The defendants agree that a deposit of \$41,500.00 has been paid by the plaintiff to the agents.
- (c) The defendants state that the agreement was prepared by the agents and they did not or were not able to get legal advice on the agreement.

- (d) They contend that there is no consent to the dealing and the plaintiff is in breach of clause 18 of the agreement.
- (e) Consent to the dealing was lodged with the Director of Lands by the defendant's solicitors on the plaintiff's solicitor's request. The application was lodged in April 2015.
- (f) The defendants disagree that consent of the Director of Lands, has been granted as conditions were set out by the Director of Lands to grant of consent.
- (g) The defendants allege that the plaintiff failed to execute an addendum to the agreement.
- (h) The agreement is null and void and unenforceable.

[12] On 28 October 2016, the plaintiff filed a writ of summons and claimed against the defendants that:

1. *An order for specific performance against the defendants requiring the defendants to convey the land comprised in Crown Lease No. 16028, LD Ref. 4/10/4340, Lot 5 on So 5250 known as Wailoaloa Beach in the Viti Levu, containing an area of 0.1521 ha by;*
 - a) *Executing the application for consent to transfer pursuant to Section 13 of the State Lands Act seeking consent to transfer the Crown Lease 16028 to the plaintiff and together with the instrument of transfer transferring Crown Lease 16028 to the plaintiff.*
 - b) *Accepting the sum of \$330,750.00 as the consideration sum for the transfer of Crown Lease 16028 to the plaintiff.*
 - c) *Preparing and lodging an application for Capital Gains Tax over the instrument of transfer with the Fiji Revenue and Customs Authority.*
 - d) *Taking all steps necessary to transfer Crown Lease 16028 to the plaintiff.*
2. *An order that the plaintiff be permitted to pay the sum of \$42,750.00 to the Director of Lands and be allowed to deduct the said sum of the from the sale price of \$415,000.00.*
3. *In the event the defendants fail or refuse or execute any or all papers for the transfer Crown Lease 16028 unto the plaintiff, the Deputy Registrar of the High Court be permitted to execute such papers in place of the defendants.*

4. *That there be costs of this Application on an indemnity basis.*
5. *Any further of other orders this Honourable Court deems fit."*

[13] The defendants filed acknowledgement of service together with statement of defence and counterclaim on 27 January 2017. The plaintiff filed reply to defence and defence to counterclaim on 15 February 2017.

[14] At the time when the plaintiff filed the writ of summons, he also filed an application for summary judgment of the specific performance.

The Law

[15] The law applicable to the application is the HCR, O 86, RR 1, 2 & 3, which provides:

"Application by plaintiff for summary judgment (O 86, R 1)

1.-(1) In any action begun by writ indorsed with a claim –

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages,

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this Rule whether or not he has acknowledged service of the writ. (Emphasis provided)

Manner in which application under Rule 1 must be made (O 86, R 2)

2.-(1) An application under Rule 1 shall be made by summons supported by an affidavit verifying the facts on which the cause of action is based and stating that in the deponent's belief there is no defence to the action.

Unless the Court otherwise directs, an affidavit for the purposes of this paragraph may contain statements of information or belief with the sources and grounds thereof.

(2) *The summons must set out or have attached thereto minutes of the judgment sought by the plaintiff.*

(3) *The summons, a copy of the affidavit in support and of any exhibit referred to therein must be served on the defendant not less than 4 clear days before the return day.*

Judgment for plaintiff (O 86, R3)

3. Unless on the hearing of an application under Rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action."

Discussion

- [16] A speedy process for obtaining summary judgment is available by virtue of O 86. In claims for specific performance and similar claims out of the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages (*see O 86, R 1 (1) (a)*).
- [17] Specific performance requires an exceptional case (*see Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1*).
- [18] In this case, the claim for specific performance arises out of a sale and purchase agreement entered into between the parties in respect of the Crown Lease No. 16028, LD Ref. 4/10/4330, Lot 5 on SO 5250 (*'the agreement'*).
- [19] In this discussion, I will concentrate on whether or not the defence demonstrates an arguable case.
- [20] The judge is not entitled to enter into a mini-trial on an application for summary judgment, and it was wrong to attempt to resolve disputes of facts on such application on the balance of probabilities (*see North East Lincolnshire Borough Council v Millenium Park (Grimsby) Ltd [2002] EWCA Civ 1719, The Times, 31 October 2002*).

The objection

- [21] The defendant opposes the application on the following three grounds:
- (i) The consent of the Director of Lands was not issued and/or granted as the conditions set out in the said letter dated 7th August, 2015 of the Lands Department were not met in order for the Director of Lands to endorse his consent on the transaction.
 - (ii) The said Agreement became unenforceable, prior to the conditional letter from the Lands Department dated 7th August, 2015 due to the condition precedent stipulated in clause 18 of the said Agreement was not satisfied by the plaintiff.
 - (iii) That they were not legally bound to comply with the conditional letter of the Lands Department as the said Agreement became unenforceable prior to the Lands Department's letter dated 7th August, 2015.

[22] It is worth noting that the defendants appear not to be disputing of facts on which the agreement was made and the contents of the agreement.

Consent issue

[23] Mr Sailo of counsel contends that the consent of the Director of Lands was not granted, and therefore the condition precedent as in clause 18 of the agreement is not met.

[24] Counsel appearing for the plaintiff, Mr Singh submits that the agreement which is the subject to these proceedings was made conditional to consent of the Director of Lands and when the Director of Lands granted the consent to the agreement on 7 August 2015, the agreement was legal and proper. He cites the case authority of *Ram Chandar Reddy v Subadra Devi, Director of Lands* (FCA) Civil Appeal No. ABU 0026 of 2013.

[25] Clause 18 of the agreement states:

"18. Condition Precedent

18.1 This Agreement is subject to and conditional upon the Purchaser obtaining the consent of the Director of Lands on or before the 30th April, 2015. The Purchaser (with the Vendor's assistance) shall as soon as practicable make application for such consent and using its best endeavours take all reasonable and practicable steps (and continue to do so) to obtain such consents."

[26] By letter dated 7 August 2015 ('Ex-A'), the Director of Lands has granted consent to the dealing. The letter reads:

"I refer to your application for consent to Transfer dated 9/4/2015 and I am pleased to advise that consent is hereby granted, subject to;

- 1) Payment of penal code rental of \$42,750.00 as a penalty charged for an acknowledgement land.*
- 2) Transferees providing an undertaking that they will comply with clause 3 of the lease (building condition) within 1 year being registered.*
- 3) Certified true copy of Purchasers passport to be submitted to verify citizenship.*

The necessary consent will be endorsed on the documentations upon complying with the above." (Emphasis supplied)

[27] The defendant argues that the agreement became unenforceable due to the condition precedent stipulated in cl.18 of the agreement was not satisfied by the plaintiff.

[28] It is not in dispute that the Director of Lands had granted consent to the dealing by his letter of 7 August 2015, however subject to conditions enumerated therein.

[29] Section 13 of the State Lands Act 1945 ('SLA') prohibits to alienate or deal with the land comprised in the protected lease by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same. That section provides:

“Protected leases

13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-

“This lease is a protected lease under the provisions of the State Lands Act”

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.”
(Emphasis supplied)

[30] In *Reddy v Devi* [2016] FJCA 17; ABU0026.2013 (26 February 2016), Fiji Court of Appeal dealt with an issue of whether the agreement between the appellant and the 1st respondent, was rendered void *ab initio*, when the 2nd respondent, Director of Lands withdrew the consent initially given by him under Section 13 of the State Lands Act. The High Court held that there was no valid agreement as consent was withdrawn. The Court of Appeal turned down the High Court decision. The Court of Appeal observed:

“Missing the Wood for the Trees

[15] When the Director subsequently withdrew his consent, the agreement at that point of time may have been rendered unenforceable but respectfully, it would amount to missing the wood for the trees to say that the initial agreement was rendered void ab initio.

[16] Consequently, when the Director regranted his consent, the agreement became enforceable and the Appellant was entitled to seek specific performance of the agreement. The purported termination of the agreement by the 1st[st] Respondent was rendered of no consequence and effect. It is to be noted that the only basis on which the 1st Respondent could have

terminated the agreement was for a breach of clause 12 of the agreement by the Appellant. That is not the 1st Respondent's case.

[17] On the contrary, it is the 1st Respondent who is now found to be in default in the performance of the agreement, which entitled the Appellant to seek specific performance of the agreement as provided in clause 13 (b) of the agreement.

[18] Withdrawal of the consent initially given and the subsequent validation of it were acts done by the Director as a matter of exercise of his discretion. Neither the Appellant nor the 1st Respondent have sought any reliefs from the 2nd Respondent. I agree with the Appellant's counsel's submission that, Section 13 of the Crown Lands Act being silent as to both withdrawal of an initially given consent and its subsequent re-instatement, if withdrawal is to be regarded as being permitted, then the subsequent re-instatement of it also must be regarded as being permitted."

[31] In *Goundar v Fiesty Ltd & Ors* (Civil Appeal No. ABU 0001 of 2013 (5 March 2004)), the Fiji Court of Appeal (Hon. Mr Justice G. Amaratunga JA) observed that:

"... The requirement to obtain consent is not regarding any 'dealing', but it is specifically limited to:

- (a) 'alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any manner whatsoever, nor to mortgage, charge or pledge the same'.*
- (b) 'Dealing' effected to a lease."*

[32] In the present matter, the Director of Lands had given the consent required by section 13. When giving the consent, the Director had imposed a condition that the defendant must pay a penal rental of \$42,750.00 as a penalty charged for no development on the land. The condition has been imposed because the defendant might have violated a condition of the lease in that he had failed to develop the land. The plaintiff has nothing to do with the penalty imposed by the Director. The defendant does not challenge the imposition of the penalty.

[33] In the legal sense, the Director of Lands had given the section 13 consent though conditional. The plaintiff has agreed to pay the penal rent of \$42,750.00 from the sale proceeds. The prayer 2 in the plaintiff's application seeks: an order that the

plaintiff be permitted to pay the sum of \$42,750.00 to the Director of Lands and be allowed to deduct the said sum of \$42,750.00 from the sale price of \$415,000.00.

- [34] The defence that the agreement has become unenforceable, prior to the conditional letter from the Lands Department dated 7 August 2015, due to the condition precedent stipulated in clause 18 of the agreement was not satisfied by the plaintiff is unacceptable since the Director of Lands had given the consent. The question of breach of clause 18 of the agreement does not arise. The defendant's argument that the agreement is null and void *ab initio* is equally untenable. In my view, the defendant cannot succeed in this defence even if the matter goes to trial.

Variation

- [35] Another defence the defendant has raised is that the agreement shall not be changed or modified in any way subsequent to its execution except in writing signed by all the parties.

- [36] The condition precedent clause 14.1 of the agreement states:

"(T)his Agreement is subject to and conditional upon the Purchaser obtaining the consent of the Director of Lands on or before the 30th April, 2015."

- [37] It is true the plaintiff obtained the consent on 7 August 2015 and not before 30 April 2015 as stipulated by cl.14.1 of the agreement. The question is whether the defendant elected to repudiate the agreement for breach of the condition in cl. 14.1. The simple answer to this question is in the negative.

- [38] *Cheshire, Fitfoot & Furmston's Law of Contract* (At page 684) states:

"If the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once he has done this, his election is final and cannot be retracted. The effect is to terminate the contract for the future as from the moment when the acceptance is communicated to the party in default."

- [39] If the plaintiff had defaulted in obtaining the consent before 30 April 2015, the defendant would have elected to treat the contract as discharged and

communicated his decision to the plaintiff. The defendant did not exercise the option that was available for him to repudiate the agreement on the ground of breach of clause 14.1. Instead, the defendant is in default of the agreement. The defence that the agreement cannot be changed or modified in any way after its execution in writing signed by both parties would necessarily fail.

Independent legal advice

- [40] The third defence of the defendants is that they were not given any opportunity to obtain legal advice on the agreement. They say the Real Estate Agent is not a capable person to explain the parties on the issues of law and procedure adopted by Lands Department in respect to the agreement.
- [41] The defence of not given an opportunity to seek legal advice is an afterthought one. The defendants have taken this defence only after the claim was filed. The defendants themselves applied for consent. They did not raise this issue any time before the plaintiff filed his claim. This is not an arguable defence.

Conclusion

- [42] In the case of specific performance the burden is on the defendant to satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought to be some other reasons to be a trial of the action (see O 86, R 3). I am of the opinion that the defendants have failed to discharge their burden envisaged in Rule 3. There is no dispute of facts in this case. The defence raised against the claim does not demonstrate an arguable case. This is an exceptional case for summary judgment. I would, therefore, enter summary judgment and grant the relief the plaintiff seeks with the costs of \$1,000.00 which is summarily assessed.

The results

1. The defendants shall execute the application for consent to transfer pursuant to Section 13 of the State Lands Act seeking consent to transfer the Crown Lease 16028 to the plaintiff and together with the instrument of transfer transferring Crown Lease 16028 to the plaintiff.

2. The defendants shall accept the sum of \$330,750.00 as the consideration sum for the transfer of Crown Lease 16028 to the plaintiff.
3. The defendants shall prepare and lodge an application for Capital Gains Tax over the instrument of transfer with the Fiji Revenue and Customs Authority.
4. The defendants shall do all things necessary to transfer Crown Lease 16028 to the plaintiff.
5. The plaintiff shall pay the sum of \$42,750.00 to the Director of Lands and be allowed to deduct the said sum from the sale price of \$415,000.00.
6. In the event the defendants fail or refuse to execute any or all purpose for the transfer of Crown Lease 16028 unto the plaintiff, the Deputy Registrar of the High Court shall execute such papers in place of the defendants.
7. The defendants shall pay the summarily assessed costs of \$2,500.00 to the plaintiff.

M.H. Mohamed Ajmeer
10/7/18

M.H. Mohamed Ajmeer

JUDGE



**At Lautoka
10 July 2018**

Solicitors:

For the plaintiff; M/s Patel & Sharma, Barristers & Solicitors

For the defendants; M/s KLaw Chambers & Partners, Barristers & Solicitors