

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 63 of 2019

BETWEEN : **ABINESH SINGH** and **JYOTI LATA SINGH** both of Nacovi, Nadi.
PLAINTIFFS

AND : **RAJESH SINGH** of Nacovi, Nadi, Farmer.
FIRST DEFENDANT

AND : **THE DIRECTOR OF LANDS** of Government Buildings, Suva.
FIRST NOMINAL DEFENDANT

AND : **THE REGISTRAR OF TITLES** of Suvavou House, Suva.
SECOND NOMINAL DEFENDANT

AND : **THE ATTORNEY GENERAL'S OFFICE**, Suva.
THIRD NOMINAL DEFENDANT

Appearances : **Mr. Kishan Siwan for the plaintiffs**
(Ms) Vateitei Adi Litia for the first defendant

Hearing : **Tuesday, 06th August 2019**

Ruling : **Friday, 30th August 2019**

RULING

(A) INTRODUCTION

- (1) The plaintiffs filed a writ of summons dated 21.03.2019 together with Ex-Parte Notice of Motion, (subsequently made inter-partes by court) supported by an affidavit sworn on 20.03.2019.
- (2) The reliefs prayed for in the Ex-Parte Notice of Motion dated 21.03.2019 are as follows

1. *An INJUNCTION restraining the Defendants whether by themselves or by their servants and or agents or by whoever from selling, partitioning, disposing, assigning, mortgaging, charging or in any way dealing with*

all that piece and parcel of land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1075m² situated at Nacovi, Nadi until final determination of proceedings herein.

2. *An INJUNCTION restraining the Defendants whether by themselves, their agents, servants or otherwise howsoever from interfering with the Plaintiff, it's agent's and caretaker's right of use and enjoyment of the Plaintiff's portion of all that part and parcel of land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1075m² situated at Nacovi, Nadi until final determination of proceedings herein.*
 3. *An ORDER that the Defendants pay for the costs of this application.*
- (3) The application is made pursuant to Order 29, rule 2 of the High Court Rules 1988 and inherent jurisdiction of the court.

(B) THE FACTUAL BACKGROUND

- (1) In the supporting affidavit sworn on 20.03.2019, the plaintiffs deposed;
1. *I am the First Named Plaintiff in the within matter and I am duly authorised by the Second Named Plaintiff to swear this affidavit on its behalf as well. (Annexed hereto is a copy of the Authority dated, 2019 marked as "AS-1")*
 2. *That in so far of the contents of this affidavit is within my personal knowledge it is true, in so far it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*

Background

3. *That I and the Second Named Plaintiff had been residing in all that piece and parcel of land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (Part of) Formerly Lot 71 ND 3904 L/D 4/10/5779 having an area of 1075m² (Hereinafter referred to as "the subject property") (Annexed hereto is a Copy of the Lease No. 844744 registered on the 31st May, 2017 marked as "AS-02")*
4. *That the first Sale and Purchase Agreement was made on the 10th January 2003 (hereinafter referred to as the "Initial Agreement") where the deposit of \$500.00 was paid to the First Defendant which was acknowledged on that day upon execution. (Annexed hereto is a copy of the Sale and Purchase Agreement dated 10th January, 2003 marked as "AS - 03")*

5. *That by virtue of a Power of Attorney No. 57337 registered on the 14th January, 2016, one Rodney Eichenberger of United States of America had granted me and my wife powers to deal with the Subject Property for the issuance of lease in his name. (Annexed hereto is a copy of the Power of Attorney registered on the 14th January, 2016 marked as "AS - 04")*
6. *That one Rodney Eichenberger of United States of America was the initial Purchaser however, the Plaintiffs, First Defendant and Rodney entered into a Nomination Agreement wherein, we are nominated as the Incoming Purchaser and Rodney was nominated as the Outgoing Purchaser. (Hereinafter referred to as "the Nomination Agreement") The same was executed by all the parties including the First Defendant. (Annexed hereto is a copy of the Nomination Agreement dated 13th March, 2019 marked as "AS - 05").*
7. *That by virtue of the Initial Agreement and the nomination agreement referred to herein above, the first defendant as vendor was supposed to comply with the following:*
 - a) *As per clause 9 of the Initial Agreement in conjunction with the Nomination Agreement, the First Defendant was to subdivide the Subject Property and execute all necessary documents to vest the subject property in our name.*
 - b) *As per clause 14 of the Initial Agreement in conjunction with the Nomination Agreement, the First Defendant had made default in failing to attend to settlement despite notice being issued to him.*
8. *That a payment in regards to the sale price of the Subject property in a sum of \$5,000 was made on the 8th May, 2003. (Annexed hereto is a copy of a Promissory Note dated 08th May, 2003 marked as "AS - 06")*
9. *That a payment in regards to the sale price of the subject property in a sum of \$6,000 was made on the 20th June, 2003. (Annexed hereto is a copy of a Promissory Note dated 20th June, 2003 marked as "AS - 07")*
10. *That a payment in regards to the sale price of the subject property in a sum of \$6,500.0 was made on the 1st July, 2003. (Annexed hereto is a copy of a Promissory Note dated 01st July, 2003 marked as "AS - 08")*
11. *That I and the second named Plaintiff have made a payment of \$2,000 in respect of our interest in the subdivision of the subject property. (Annexed hereto is a Copy of Receipt dated 19th March 2018 marked as "AS - 09")*

12. *That I have also paid for the stamp duty for 2018 to the Fiji Revenue and Customs in the sum of \$180.00. (Annexed hereto is a Copy of Official Receipt dated 27th September 2018 marked as "AS – 10")*
13. *That the Director of Lands has already granted its consent on the transfer documents on the 5th September, 2018 and have been stamped therefore we are ready for settlement. (Annexed hereto is a copy of the stamped transfer dated 5th September, 2018 marked as "AS – 11")*
14. *That on the 12th day of October, 2018, the First Defendant through its Solicitor Messrs Asta's Law had issued a Demand Notice for us to pay a sum of \$12,000.00. (Annexed hereto is a copy of the Demand Notice dated 12th October, 2018 marked as "AS – 12").*
15. *That on the 9th day of November, 2018 our Solicitors Messrs Rams Law on our instructions had advised the First Defendants Solicitors that consideration amount has..... (annexed hereto is a copy of the Notice to Settle dated 27th November, 2018 marked as "AS – 15")*
18. *That we have been residing on the subject property since 16 years.*
19. *That we have spent approximately a sum of \$150,000.00 in building the structure at the subject property.*
20. *That due to the First Defendants act/omission to comply with the Agreement, thus there has been a breach of the Agreement on the part of the First Defendant which are as follows:*
 - a) *The Frist Defendant failed to attend to settlement despite requests being made verbally and in written to the First Defendant.*
 - b) *That despite the Transfer duly executed by all the parties, the First Defendant had failed to obtain the Capital Gains Certificate and attend to settlement.*
 - c) *That despite the Consent being granted by the Fiji Nominal Defendant, the First Defendant had failed to attend to complete the Agreement.*
21. *That due to the above, we have suffered loss and damages and as per the Agreement, we are being advised by our Solicitors and verily believe that we are entitled to obtain Orders from the Honourable Court for Specific Performance for the First Defendant to executed all relevant and necessary documents in our favour.*

22. *That we are being advised by our Solicitors and we verily believe that we have a serious issues to be tried before the Honourable Court in terms of seeking for Orders for Specific Performance against the First Defendant so that the Subject Property in properly transferred under our names.*
23. *That we are further being advised by our Solicitors and we verily believe that we have the ability to meet the adequacy of damages as we are the Directors of Abis Rental having a total of 25 vehicles on Rentals. (Annexed hereto is a copy of the Registration of Business Details marked as "AS – 16").*
24. *That we are also being advised by our Solicitors that balance of convenience also lies in favour of granting of the Injunctive Orders as per this application since the First Defendant had failed to comply with the Agreement thus, we have already faced difficulties and at a loss since the property to date has not been transferred in our name.*
25. *For the aforesaid reason explained hereinabove, I pray for Interim Orders as per the Ex- Parte Notice of Motion filed herein.*

(2) The application for interim injunction is vigorously opposed by the first defendant. The first defendant filed an affidavit in opposition. The first defendant deposed;

1. *THAT I am the above named First Defendant in this action.*
2. *THAT I depose as follows from my knowledge, from the contents of documentary materials, files and from information to the best of my knowledge and belief. Such facts and matters in so far as they are within my knowledge, are true. In so far as they are not within my knowledge, they are true to the best of information and belief.*
3. *THAT as per paragraph 3, I partly admit the same as per the initial agreement dated 10th day of January, 2003, the Plaintiffs were to be the care takers of the subject property. Further that Mr Rodney Eichenberger had given the Plaintiffs his Power of Attorney as the initial buyer to deal in the land for him.*
4. *THAT as per the paragraphs 4 and 5 of the said Affidavit the contents herein are admitted.*
5. *THAT I deny the allegation for paragraph 6 and further say that I had executed a Nomination Agreement on or about sometimes in August 2018 and further state that all dates were blank on the Agreement. Annexed hereto and marked with the letter "RS-1" is a copy of Nomination Agreement where the dates were blank.*

6. *THAT as per the paragraph 7 of the said Affidavit the contents herein are denied and disputed and further the Plaintiffs is put on strict proof of their allegations as the dispute started sometimes in or about the 23rd day of August, 2018 with the current Plaintiff and myself. Annexed hereto and marked with the letter "RS-2" are the copies of email back and forth between myself and Messrs. Babu Singh & Associates to freeze all dealings in this matter.*
7. *THAT as per the paragraph 8, 9 and 10 of the said Affidavit the contents herein are denied and disputed and further the Plaintiffs is put on strict proof of the same. In addition I had only received an amount of \$6,000.00 (Six Thousand Dollars) from the Plaintiff Mr. Abhinesh Singh at my place.*
8. *THAT as per paragraph 11, the contents are partly admitted by me and I further state that I had issued an invoice on the 16th day of March, 2018 amounting to \$3913.80 to the Plaintiff for the subdivision cost incurred however the Plaintiff made the payment of \$2,000.00 (Two Thousand Dollars) only on the 19th day of March, 2018 and the balance sum of \$1913.80 was outstanding. Annexed hereto and marked with the letter "RS-3" are the copies of email back and forth between me and Messrs. Babu Singh & Associates regarding the total cost incurred for subdivision which was agreed by the Plaintiff.*
9. *THAT I neither admit nor deny to paragraphs 12 and 13 as the contents are beyond my knowledge. As I further state that as letter dated 12 day of October, 2018 was hand delivered to the Lands Department to hold any dealings with subject property. Annexed hereto and marked with the letter "RS-4" is a copy of letter delivered to Lands Department.*
10. *THAT paragraph 14 is admitted and I further state that only \$6,000.00 (Six Thousand Dollars) was paid to me and nothing else was given.*
11. *THAT as per the paragraph 15 of the said Affidavit the contents herein are denied and disputed as the only amount paid to me was \$6,000.00 (Six Thousand Dollars).*
12. *THAT as per paragraph 18 the contents are partly admitted as the Plaintiff were care takers for Mr Rodney Eichenberger only.*
13. *THAT as per the paragraph 19 of the said Affidavit is strongly denied and disputed and further state that Plaintiffs is put on strict proof of the same.*
14. *THAT I deny and dispute the contents of paragraph 20 and further put the Plaintiffs on strict proof of their allegations as*

sometimes in August, 2018 I had instructed our common solicitor Messers Babu Singh & Associates at that point in time to stop all the transactions pertaining to the subject property.

15. *THAT as per the paragraphs 21 and 22 of the said Affidavit the contents herein are strongly denied and disputed as the sales and purchase was never consented to by the Director of Lands and hence does not hold any legal essence.*
16. *THAT as per the paragraphs 23 and 24 of the said Affidavit the contents herein I would seek from the Plaintiffs an undertaking amounting to \$100,000.00 (One Hundred Thousand Dollars) as I want to sell of my property and because of the litigation being brought in I will be prejudiced, or alternatively, and amount of at least \$50,000.00 (Fifty Thousand Dollars) to be deposited into this Honourable Court.*
17. *THEREFORE I pray to this Honourable Court to dismiss the Plaintiffs application filed herein with costs awarded to the Defendants.*

(3) The plaintiffs filed an affidavit in reply. They deposed;

1. *We are the Plaintiffs in the within matter and we are duly authorised swear this affidavit on its behalf as well.*
2. *That in so far of the contents of this affidavit is within my personal knowledge it is true, in so far it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*
3. *That we crave leave of the Honourable Court and refer to the Affidavit in Opposition of the First Defendant (Hereinafter referred as "the Affidavit in Opposition") sworn on the 25th day of April 2019, filed on the 26th day of April, 2019, and served on the 21st day of May, 2019 after numerous follow ups were done by our Solicitors. Our reply to the Affidavit in Opposition is in the foregoing paragraphs.*
4. *That we are being advised by our solicitors and we verily believe that the Affidavit in Opposition is not in compliance with the High Court Rules, 1988 hence, the said affidavit must be expunged out of Court. Our Solicitors will argue this issue at the hearing of the Injunction Application.*
5. *That we are agreeing to the contents of paragraphs 3 and 4 of the Affidavit in Opposition.*
6. *That save to admit that the First Defendant had executed a Nomination Agreement sometimes in August 2018 and that the*

dates were blank on the Agreement, we deny the rest of the allegations contained in paragraph 5 of the Affidavit in Opposition and further states as follows:

- a) *The Nomination Agreement was prepared on the Instructions of Rodney Eichenberger and was agreed to by the First Defendant based on which, Messrs Babu Singh & Associates had prepared that said nomination Agreement and it was executed by us and the First Defendant and awaiting Rodney to execute the same.*
 - b) *That Rodney only came to Fiji early this year and that is when he managed to execute the Nomination Agreement.*
7. *That we deny the allegations contained in paragraph 6 of the Affidavit in Opposition and further put the Defendant to strict proof of the same and further states as follows:*
- a) *That there was no dispute apart from the fact that the First Defendant did not inform us that the Lots have been subdivided.*
 - b) *That the First Defendant being our family and that we always had been in good terms with each other until we came to know that the First Defendant was selling the Subject Property to a Third Party whilst we are occupying the property and awaiting the Lot to be issued and transferred under our name.*
 - c) *As per the First Defendants affidavit and Annexure "RS – 2", it shows that the First Defendant was demanding \$12,000.0 from us which he alleges that we took loan from him without any evidence.*
 - d) *In any event, even if there was a loan, it is a separate issue. The Subject Property and its dealings must not be affected due to other dealings between the parties if it does not concern the Agreements and the Subject Property.*
 - e) *Further, the email to Messrs Babu Singh & Associates even does not show the reason as to why the First Defendant has said for the Transfer to be stopped immediately which is again unlawful and not in compliance of the respective agreements which the parties had signed off.*
8. *As to paragraph 7 of the Affidavit in Opposition, we deny the allegations contained in said paragraph and further reiterate paragraphs 8, 9 and 10 of the Affidavit in Support.*
9. *Save to admit that the invoice in the sum of \$3,913.80 was to be paid, and that only \$2,000.00 was only paid to the First Defendant, we deny the rest of the allegations contained in*

paragraph 8 of the Affidavit in Opposition and further state as follows:

- a) *The sum of \$1,913.80 is yet to be paid and the only reason it has not been paid is that First Defendant he requires a sum of \$12,000.00 from us, which is not in accordance to the agreement and the further claim of the First Defendant that he gave a sum of \$12,000.00 to build the house is hereby denied and a misleading statement.*
- b) *That we are undertaking to pay the sum of \$1,913.80 on the date of settlement or on the date that the transfer is issued in our name.*
10. *That we are unaware of the allegations raised in paragraph 9 of the Affidavit in Opposition hence, we neither deny nor admit to the allegations raised in the said paragraph as letter was not issued to us and further, it does not disclose any material reasons as to why the dealings on the subject property must be on hold until further notice.*
11. *That as to paragraph 10 of the Affidavit in Opposition, we deny the allegations that we only paid \$6,000.00 and nothing else and further reiterate paragraphs 8, 9 and 10 of the Affidavit in Support.*
12. *As to paragraph 11 of the Affidavit in Opposition, we deny the allegations in the said paragraph and further reiterate paragraph 11 hereinabove.*
13. *As to paragraph 12 of the Affidavit in Opposition, we admit to the fact that we were the care takers only however, by virtue of the Nomination Agreement, we are the incoming purchasers.*
14. *As to paragraph 13 of the Affidavit in Opposition, we deny the allegations of the said paragraph and further reiterate paragraph 19 of the Affidavit in Support.*
15. *That we deny the allegation raised in paragraph 14 of the Affidavit in Opposition and further out the First Defendant to Strict proof of the same and further state that the grounds are not explained as to why the First Defendant wants to stop this transaction.*
16. *As to paragraph 15 of the Affidavit in Opposition, we deny the allegations contained in the said paragraph and further reiterate paragraph 13 of the Affidavit in Support wherein, by virtue of Annexure AS – 11, it is clear that the First Nominal Defendant had granted its consent on the 05th of September, 2018.*

17. *As to paragraphs 16 of the Affidavit in Opposition, we deny the allegations contained in the said paragraphs and further puts the First Defendant to Strict proof of the same and further state that there is no need to deposit any sum in to the Honourable Court since we have the means to pay any damages as we are running the Business of Abis Rental and have 25 Rentals which is sufficient enough for the Honourable Court to Grant Injunctive Orders until the matter is dealt by trial proper. (Annexed hereto are the Copies of the Business Registration Details, Financials of Abis Rental and the Rental Permits for each vehicles marked as "AS – 01", "AS – 02" and "AS – 03" respectively).*
18. *That we pray to this Honourable Court to grant our Application for Injunction until the matter is sorted out at the Trial with costs in our favour.*
19. *For the aforesaid reason explained hereinabove, we pray for Interim Orders as per the Inter-Parte Notice of Motion filed herein.*

(C) LEGAL PRINCIPLES

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "Interlocutory Injunction".
- (2) The Plaintiffs' application is made pursuant to Order 29, rule 1 of the High Court Rules, 1988 which provides;

Application for injunction (O.29, r.1)

1.- "(1) *An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counter claim or third party notice, as the case may be.*

(2) *Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.*

(3) *The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

- 3 The governing principles applicable when considering an application for interim injunction were laid down in the leading case of “American Cyanamid Co v Ethicon Ltd”¹ as follows;

- (A) Whether there is a serious question to be tried?
- (B) Whether damages would be adequate remedy?
- (C) Whether balance of convenience favour granting or refusing Interlocutory injunction?

In that case Lord Diplock stated the object of the interlocutory injunction as follows at p. 509;

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial: but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies.”

In Hubbard & Another v. Vosper & Another² Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”

(D) DISCUSSION

- (1) The dispute before this court is concerned with a leasehold property measuring 1075 square meters in extent, known as Nacobi (part of) formerly Lot 71 ND 3904, being Crown Land (Protected Lease) under the Crown (State) Lands Act. (Annexure marked AS – 02 referred to in the affidavit of Abhinesh Singh sworn on 20.03.2019).

¹ (1975) (1) ALL.E.R 504

² [1972] EWCA Civ 9; (1972) 2 WLR389

- (2) The first defendant is the last registered proprietor of the subject land.
- (3) On 10.01.2003, the first defendant entered into an agreement for the sale and purchase of the land with Rodney Eichenberger. (Annexure marked as AS – 03 referred to in the affidavit of Abhinesh Singh sworn on 20.03.2019).
- (4) Clause (5) of the agreement provides;

5. TERM OF PAYMENT

(i) DEPOSIT

The vendor undertakes to pay to the Purchaser a sum of \$500.00 (FIVE HUNDRED DOLLARS) as part payment of the said land on grant of consent to this dealing by the Director of Lands as Lessor

- (ii) *The Purchaser undertakes to pay the balance of the purchase price of the property in the sum of \$17,500.00 (SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS) to the Vendor in exchange of stamped transfer in registrable form duly consented by the Director of Lands as Lessor for the demised area hereby sold and on approval by the appropriate authorities for separation of the lease but will remit the initial sum of \$11,500.00 (Eleven Thousand Five Hundred Dollars) to the Trust Account of the solicitors Messrs Pillai, Naidu & Associates on or before the 7th day of February 2003.*

- (5) Clause (7) of the agreement provides;

7. POSSESSION

The Vendor shall give and the Purchaser shall take possession of the property upon settlement of the purchase price in full satisfaction.

- (6) That by virtue of a Power of Attorney No. 57337 registered on the 14th January, 2016, Rodney Eichenberger of United States of America had granted powers to the plaintiffs to deal with the Subject Property for the issuance of lease in his name. (The Power of Attorney registered on the 14th January, 2016 is marked as “AS – 04”)
- (7) Rodney Eichenberger of United States of America was the initial Purchaser however, the Plaintiffs, First Defendant and Rodney entered into a Nomination Agreement wherein, the plaintiffs were nominated as the Incoming Purchaser and Rodney was nominated as the Outgoing Purchaser. The same was executed by all the parties including the First Defendant. (A copy of the Nomination Agreement dated 13th March, 2019 is marked as “AS – 05”).

- (8) Clause (19) of the agreement provides;

19. SPECIAL CONDITION

The within dealing is subject to approval of consent by the Director of Lands and all other appropriate authorities to this dealing.

We hereby mutually agree to all necessary consents (if any) to enter into the within transaction and to complete all documents necessary for carrying the same into effect such documents to contain the within written terms and conditions and such other provisions as are usually inserted in documents of a similar nature pursuant to proper and usual conveyancing practice of solicitors in Fiji. That the agreements obligations and warranties of the parties hereto herein set forth insofar the same have not merge with the giving and taking of title to the property or with delivery of the chattels if any.

- (9) Both parties admitted having executed the agreement. It is to be observed that in Clause 5(1) of the agreement the parties provided that; *“The Vendor undertakes to pay to the purchaser a sum of \$500.00 (Five hundred dollars) as part of the said land on grant of consent to this dealing by the director of lands as lessor”*. Clause (19) of the agreement provides; *“The within dealing is subject to approval of consent by the Director of Lands and all other appropriate authorities to this dealing”*
- (10) The plaintiffs have spent, it is alleged, approximately \$150,000.00 on erecting a dwelling-house on the land. They entered into possession and they have been in occupation of the land since 2003. The plaintiffs allege that due to the first defendant’s act/omission to comply with the agreement, there has been a breach of the agreement on the part of the first defendant which are as follows:
- (a) The first defendant failed to attend to settlement despite requests being made verbally and in written to the first defendant;
 - (b) That despite the transfer duly executed by all the parties, the first defendant had failed to obtain the Capital Gains Certificate and attend to settlement;
 - (c) That despite the consent being granted by the first nominal defendant to the transfer documents, the first defendant had failed to attend to complete the agreement.

In reply the first defendant says;

- (a) The sale and purchase agreement was not duly consented by the Director of Lands and hence does not hold any legal essence.
- (b) The sale and purchase agreement between the first defendant and Rodney Eichenberger dated 10-01-2003 is void for illegality and its enforcement would be contrary to public policy as there is no prior consent of the Director of Lands.

- (c) The sale and purchase agreement between the first defendant and Rodney Eichenberger dated 10-01-2003 has been terminated as the said Rodney Eichenberger intended not to attend to settle the dealing between the first defendant.
- (11) The plaintiffs took possession of the subject property in 2003 pursuant to the sale and purchase agreement. The plaintiffs have erected a dwelling-house on the land before the Director of Lands written consent has been obtained. No prior written consent of the Director of Lands as head lessor was obtained for the entry into possession and erection of the dwelling-house on the land. This clearly shows that the plaintiffs had assumed 'proprietary privileges' and had exercised the 'powers of a purchaser' without obtaining the prior written consent of the Director of Lands. Under the State Lands act, the required consent is a condition precedent to formation and performance of a contract to purchase. What that means is that the Director of Lands consent must be obtained before either party has incurred any obligations or acquired rights of any description in respect of a sale and purchase of land. **As far as I can gather**, the plaintiffs occupation on the land since 2003 is illegal and it continued to be illegal although the Director of Lands has granted its consent on the **transfer documents** on the 05.09.2018, about 15 years after the date of execution of the agreement. Another factor that must be considered is that the Director of Lands has not consented to the instrument between the parties to date. **It appears to me that** that as regards the agreement of 10-01-2003, the plaintiff's occupation was illegal, and that state of affairs was not terminated. To be more precise, once the plaintiff's occupation was illegal it continued to be illegal although the transfer documents were consented to by the Director of Lands about 15 years after the date of execution of the agreement. **But I do not desire to express a conclusive opinion on the question, which may be the subject of judicial decision hereafter.**

Generally, a purchaser of land who purchases land under a binding and unconditional contract of sale, has an equitable interest in the land. The extent of that equitable interest is commensurate with the purchaser's ability to obtain specific performance. Of course, a legal estate will later vest in the purchaser upon payment in full of the purchase money and execution of a formal transfer document. The view is that a purchaser's equitable interest is commensurate only with his ability to obtain specific performance.

In **Legione v Hateley**³ for example, Mason and Dean JJ in their joint judgment sated at page 446 ;

"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).

In **Stern v McArthur**⁴, Deane and Dawson JJ in their joint judgment stated at para 2:

"As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with

³ [1983] HCA 11; (1993) 152 CLR 406

⁴ [1998] HCA 51; (1988) 165 CLR 489

accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense."

Similarly, the New Zealand position is explained in Sale of Land (2000) 2nd ed by DW McMorland at page 299:

"In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without consideration of any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest."

Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a binding contract. Usually, one of the many factors to be considered is whether damages are inadequate in lieu of specific performance. If not, then the court may order specific performance. Part-performance is usually also relevant. **The right time to determine the question whether the agreement can be enforced or not is the time when the action is tried.**

In Re CM Group Pty Ltd's Caveat⁵, it was held that property did not pass in equity until the required municipal council approval was obtained. In Brown v Heffer⁶, an interest in equity did not pass because the required consent of the Minister had not been obtained.

- (12) The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an 'interlocutory injunction' is granted the plaintiff should satisfy the court that there is a "probability", a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous nor

⁵ [1986] 1 Qd R 381

⁶ (1967) 110 CLR 344

vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried.

The plaintiffs in the instant case must first satisfy the court that on the evidence presented to this court their claim to an equitable interest in the property does raise a serious question to be tried; and, having done so, they must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action.

As far as I can gather, the plaintiffs' entry upon the land in 2003 and the erection of the dwelling house on the land is illegal because they had not obtained the necessary prior written consent of the Director of Lands which was necessary by virtue of Section 13 of the State Lands Act. **It seems to me that** the giving of the consent to the transfer document about 15 years after the date of execution of the agreement does not have a kind of **retroactive effect** making the instrument effective as from its date. It is not enforceable in equity by injunction. The equity is necessary to support an injunction. The contract did not create an equitable interest in the land. Therefore, the court has no general jurisdiction to restrain the defendant by injunction.

(13) **The result therefore is that the plaintiffs are not entitled in equity to the land and cannot claim an equitable charge or lien on the land and as such there is no serious question to be tried. Equity would not assist illegality. The plaintiffs have not met the First requirement of satisfying the court that their claim does raise a serious question to be tried. I cannot grant the interlocutory injunctive orders sought.**

(14) What is more, the writ in the action was filed on 21-03-2019, about 16 years and 2 months after the date of execution of the agreement. **That is a very long time.** In the agreement time was made an essence of the contract. Time is of the essence clause in real estate contracts refers to a clause that requires one party in a real estate contract to fulfill his or her obligations within a certain time frame. If the party fails to complete the required task on time, it is regarded as a breach of contract. Why did the plaintiffs wait for 16 years to file an application for specific performance of the agreement? Why is there a delay on the part of the plaintiffs in bringing these proceedings? Have they abandoned their rights under the contract? The modern approach to **defenses of laches and acquiescence** was considered by Mummery LJ in **Patel v Shah (2005) Times 2nd March.**

What is more damaging is that the sale and purchase agreement is not stamped.

Section 41 of the Stamp Duties Act 1920 provides:

“Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situated or to any matter or thing done or to be done in any part of Fiji, shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.”

- (15) The plaintiffs have clearly based their claim on the Sale and Purchase Agreement. There is no way the Court can order specific performance of the agreement when the instrument upon which the plaintiffs base their claim “shall” not be given in evidence. Therefore, it is not enforceable in equity by injunction. The equity is necessary to support an injunction. It all boils down to this; that there is no serious question to be tried.

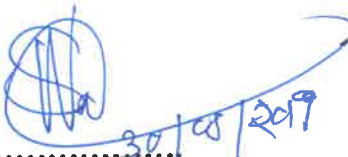
In any consideration of the issue before the Court the principles governing an application of this nature are stated in the well-known and leading case of *American Cyanamide Co. v. Ethicon Ltd*⁷, where it is stated:

....the Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried...

ORDERS

- (01) The plaintiff's application for interlocutory injunctive orders is dismissed with costs.
- (02) I summarily assess costs at \$1,000.00 to be paid within seven (07) days from the date of this ruling.




.....
Jude Nanayakkara
Judge

At Lautoka
Friday, 30th August, 2019

⁷ [1975] AC 396