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

CIVIL ACTION NO. HBC 44 OF 2017

BETWEEN : **VIJAY NANUBHAI MAISURIA** of Varadoli, Ba, Fiji
PLAINTIFF

AND : **NAGAMMAL GOUNDER** of 6/158 Main Street, Beenleigh, 4207 Queensland, Australia, formally of Lovu, Lautoka, School Teacher as the sole Executrix and Trustee of the **ESTATE OF MUNSAMI GOUNDER** as known as **MUNSAMI GOUNDAR** also known as **MUNISAMI** of Lovu, Lautoka, Deceased, Testate.
DEFENDANT

Appearance : Ms Ravai & Ms M Tavakuru for the Plaintiff
Ms S Pillay & Ms Chand for the Defendant

Date of Hearing : 14 October 2019

Date of Judgment : 30 January 2020

DECISION

1. This is a claim by the plaintiff as purchaser seeking specific performance of a sale and purchase agreement entered into in July 2013, which the defendant as vendor says she has validly cancelled.

BACKGROUND

2. The defendant is the executrix in the estate of her husband, Munsami Gounder, who died in 1998. Probate In his estate was granted to her in August 1998.

3. At the time of his death Munsami Gounder owned a fee simple estate in a property (hereinafter referred to as *the property*) described as house 9 (lot 23)Park Street, Varadoli, Ba (Lot 23 DP 4312 on CT 18072). In his will the deceased left a life interest in all his estate to his widow, and thereafter to his son and daughter in equal shares.

4. Although probate in his estate was granted in 1998 as above, the title to the property in Park Street remained in the deceased's name until around the

time the plaintiff sought to sell the property, i.e. in 2011/12. In the meantime it appears that the property was rented. Certainly at the time the sale and purchase agreement was entered into, and at all times subsequently, the plaintiff and her family were living overseas.

5. Once she became interested in selling the property, which appears to have been in early 2011, it seems that the defendant approached her neighbour (I assume that she meant by this a neighbour of the Ba property, although it is not completely clear) Raj Gopal Achari, telling him that she was interested in selling the property, and asking him if he knew anyone who might be interested in buying it. Mr Achari was acquainted with the plaintiff (again the connection is not completely clear, but they may have worked at the same place) and it was though him that the plaintiff became aware that the property was for sale.

6. On 5 May 2011 obviously after some discussion between them, the plaintiff sent an email to Mr Achari saying:

> *Hello Raj saab,*
> *this is with the brief talks we had last sunday. I hope we can hasten the provision of letter or MOU from seller stating her Name, fathers Name, address, status that she has agreed to sell Property _____ located at _____ lot number_____ to Vijay Maisuria Father's name Nanubhai Maisuria, residing at Flat 2 House 11, Lot 40 Shivana Crescent, Varadoli, Ba.*

7. In response to this email Mr Achari replied the following day as follows:

> *Hi Vijay*
> *Please see below the Landlords letter. I hope this will do.*
>
> *To Whom It May Concern*
>
> *I Nagamma Gounder F/N Permal Pillay of 6/158 Main Street, Beenleigh, 4207 Queensland, Australia, confirm that I have agreed to sell my Varandoli Property being Lot No. 23 and CT. No. 18072 to one Mr Vijay N. Maisuria of Varandoli, Ba. The selling price is One Hundred and Seventy Five Thousand dollars, (F$175,000).*
>
> *If you have any query, please do not hesitate to call me on my home phone (07) 31333911.*
> *Thank you.*
> *Regards,*
> *Mrs. N Gounder.*

8. Although this exchange occurred in May 2011 it was not until July 2013 that a formal agreement was signed between the parties for the sale of the property. It appears that the delay was at least partly due to the need to have the title to

the property transferred/transmitted into the name of Mrs Gounder so that she could in turn sell the property to the plaintiff as intended. In October 2011 an email was sent by the plaintiff to the solicitors he had engaged to act for him on the purchase, Samuel K Ram, Solicitors of Ba saying:

> *Sam,*
> *I am informed by Raj that the owner of the property would like to engage you to also work on her behalf to sort out the matters of the transfer of title and ownership and all such matters that will require legal intervention.*

and thereafter there was ongoing email communication between the solicitor's firm and the plaintiff, Mr Achari and the defendant. This exchange includes an email in March/April 2013 from the solicitors Samuel K Ram directly to Mrs Gounder, which encloses a sale and purchase agreement and transfer for signing, and also emails between Mrs Gounder and the solicitors about whether she wished to instruct other solicitors to act who were not also acting for the plaintiff. I mention this because it was suggested in the course of the evidence that Mrs Gounder did not realise until much later that Samuel K Ram was also acting for the purchaser. It is clear from these exchanges that Mrs Gounder and her son Sarvesh, who became involved in the matter around this time, were well aware that Samuel K Ram was acting for the purchaser as well as for her.

9. On 10 April 2013 Samuel Ram sent the following email to Sarvesh Gounder, in response to an email the same day indicating that the vendor was having second thoughts about whether to proceed with the sale to the plaintiff:

> *Sarvesh*
> *I did not realise that you are contemplating a possibility that the sale will not go ahead. I would suggest that you do not take that course of action. I have sufficient materials in writing including confirmation from your mother that the sale is to go ahead for the agreed price. In the event she decides to back off from the deal, I anticipate that this may end up in a court action. It may not be enough to simply say that the sale and purchase agreement is not signed. A court will look at all the documents and determine whether substantial agreement had been reached.*
> *Mr Vijay Maisuria has incurred expenses to allow this transaction to go through. The title was not properly in the name of the Estate of your late father and we have regularised that. The only reason this was done was to affect the transfer to Vijay Maisuria.*
> *Therefore the appropriate question is are you going to back off from the deal. If so, I will have to advice Vijay Maisuria to seek legal advice from another lawyer because I will have to stop acting for him.*
> *If you cancel the deal, it could amount to a breach of contract and there are several other legal/equitable actions available to Vijay. In any event, I will have to stay away from this transaction and cannot act for either one of you. This is because I would be a witness should any court proceedings be taken.*

Please give this careful thought before taking any drastic action.

In response to this is an email from Sarvesh Gounder on 25 April saying:

Our lawyers will be in touch with you soon.

10. As the sale and purchase agreement is dated 20 July 2013 it can be assumed that the defendant/vendor decided to proceed with the sale. Nor is there any evidence at this stage that the vendor instructed anyone else to act for her.

11. The essential terms of the sale and purchase agreement are as follows:

Property: *Certificate of Title No 18072, being Lot 23 in the District of Ba, in the Islands of Viti Levu, Land known as Varadoli (Part of), containing an area of Thirty Two Perches on deposited plan No. 4312 together with any improvements on it, including any buildings or temporary structures built on it.*

Purchase Price: *The sum of FJD $175,000 (One Hundred Seventy Five Thousand Dollars)*

Deposit: *FJD $34,000.00 (Thirty Four Thousand Dollars)*

Conditions: *2. The agreement is subject to Purchaser arranging finance from a financial institution provided that if such finance is not arranged within a period of 20 (Twenty) days this agreement shall come to an end and deposit sum shall be forfeited to the Vendor.*

Other terms: *4(a) The purchaser shall pay the deposit by a Bank Cheque payable to Samuel K Ram Trust Account on the date of execution of this agreement.*

4(b) Within a period of 10 (ten) days from the signing of this agreement the purchaser shall show to the Vendor an acknowledgement from the bank that he has the full purchase sum ready for settlement.

5. Settlement shall take place within 30 (Thirty) days of execution of this agreement.

25 If the Purchasers shall make default in the performance or observance of any stipulation or agreement on the Purchasers part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then, the Vendor may without prejudice to other remedies available to him, exercise all or any of the following remedies namely:

(a) He may enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and at once payable, or

(b) He may rescind this contract of sale and thereupon all monies paid under the terms of this agreement and applied in reduction of the purchase price shall be forfeited to the Vendor as liquidated damages; or

(c) He may sue for specific performance; or

(d) He may re-enter upon and take possession of the land without the necessity of giving any notice or making any formal demand.

27. The Purchaser shall pay any Capital Gains Tax, which may be assessed by the Commissioner of Inland Revenue pursuant to the Capital Gains Tax Decree.

12. I note in passing that the deposit amount provided for in the agreement ($34,000) is approximately 20% of the purchase price. There are a number of cases, including a decision of the Privy Council in **Workers Trust Bank v Dejap Investments** [1993] 2 All ER 370, that establish that a deposit in excess of 10% of the purchase price will normally be regarded as a penalty and therefore irrecoverable/unforfeitable in the event of default.

13. After the agreement was signed there were further delays in completing the agreement, although it is apparent from the correspondence that at all times the plaintiff remained keen to complete the purchase. The particular issue that arose after July 2013 (when the agreement was signed) was an issue about the amount assessed by Fiji Revenue & Customs for the Capital Gains Tax payable. It will be recalled that the plaintiff had agreed to pay any Capital Gains Tax and after an unexpectedly high assessment was made in January 2014 unsuccessful but time-consuming attempts were made to have this reviewed. Strictly speaking this was not the vendor's problem given the terms of the agreement (see clause 27 of the agreement cited above) but it seem that she attempted to co-operate in this by providing such information as she could that might have assisted in having the assessment revised downwards.

14. It seems clear that at least by this point the defendant Mrs Gounder was being disadvantaged by the fact that one solicitor was acting for both parties. Had she been separately represented it seems likely that her solicitor would have advised her to push for settlement, rather than wait while the process of discussion continued between the solicitors and FRCS in an attempt to obtain a lower assessment of Capital Gains Tax. It is nevertheless clear from the correspondence that Mrs Gounder was well aware that Samuel K Ram was acting both for her and for the purchaser, and did nothing – at this stage – to obtain separate representation.

15. In the course of this lengthy delay a question was raised by Mr Achari on behalf of Mrs Gounder about payment of the deposit, which in terms of the sale agreement was to have been paid at the time of signing the agreement. On 14 June 2014 Mr Achari emailed the following request to the solicitors (copied to the plaintiff):

Dear Sir
I understand from Kalpana that your office has received two sets of revised transfer documents from Mrs Gounder last week. Can you please fast track the lodgement of the documents to FIRCA for their assessing of Capital Gains Tax payment by Vijay Maisuria and settlement to take place thereafter.
Meantime kindly advise whether Vijay Maisuria has paid deposit of $34,000 to your Trust Account as per the Sale & Purchase Agreement.'
Please treat this as urgent.

(Kalpana was an employee in the office of Samuel K Ram). In response to this email Mr Ram said (by email the following day to Mr Achari):

I will fast track this. The deposit has been approved by FNPF. It will be released upon settlement. In cases where the purchase is being financed, the deposit does not usually come into our trust account. Vijay has been approved a loan.
I can get my staff to provide a copy or in the alternative Vijay who is copied in this email can forward you a copy.

16. Although I think that the advice here is questionable, the solicitor's email makes it clear that the purchaser had not yet paid the deposit, and that the intention was to pay it on settlement. There is no evidence that Mr Achari or Mrs Gounder objected to this arrangement.

17. Eventually the vendor did run out of patience, and sought independent legal advice. She came to Fiji in December 2016 and spoke to the plaintiff. She says that she discovered that the deposit had not been paid as required by the agreement, and so on 21 December 2016 her new solicitors wrote to the plaintiff/purchaser, purporting to immediately rescind the agreement (exercising her right to do so under clause 25(a) and (b) of the agreement) for failure by the purchaser to pay the deposit, and to provide evidence of his ability to pay the purchase price in full. The letter is addressed to the plaintiff/purchaser personally (i.e. not via the solicitors). There is no evidence of how the letter was delivered to him, but there is no suggestion either that it was delivered earlier than the date of the letter, i.e. 21 December 2016.

18. However before he received this letter Mr Maisuria had obviously got wind of her intention. There is no evidence of how this happened, or that Mrs Gounder had previously given Mr Maisuria verbal notice of cancellation of the agreement. She says she sent/delivered to him a letter dated 16 December 2016 referring to 'your tenancy' of the Park Street property, and demanding payment of rent of $13,850 into her bank account 'by noon today', but this letter does not refer to the sale and purchase agreement. It seems that, realising or at least concerned about the way the matter was heading, Mr Maisuria paid the deposit amount into the Samuel K Ram trust account (as stipulated in clause 4(a) of the agreement) on 20 December 2016, the day

before the letter of cancellation was sent by Mrs Gounder's new solicitors (Nazeem Lawyers). Hence at the time of the purported cancellation of the agreement for sale and purchase, the plaintiff had already remedied the default complained of in relation to the payment of the deposit.

19. Following the letter of 21 December from Nazeem Lawyers the plaintiff also sought independent legal advice. His new solicitors, Vijay Naidu & Associates, responded to the letter of 21 December on 6 January, pointing out that the deposit had been paid, and refuting the alleged failure to provide evidence of the finance arrangements. It seems clear that acting as they were for both parties, Samuel K Ram Solicitors already had all the documentation for the proposed bank loan that Mr Maisuria required to complete the purchase, and the defendant cannot argue that this information had not been provided in terms of the agreement.

20. On 21 December solicitors for the plaintiff also registered a caveat over the property 'as purchaser as per the Sale and Purchase Agreement dated 20th July 2013' in the property.

21. It therefore seems clear that although he certainly had not complied with the requirement in clause 4(a) to pay the deposit on the date of execution of the agreement, Mr Maisuria had made the payment before the purported cancellation by the vendor on 21 December.

22. The plaintiff has been living at the property since 2012, when he moved in by arrangement with Mr Achari. It seems that he was initially paying rent of $200.00 per month, but this was increased to $250.00 per month from January 2013. In response to questions from me Mr Maisuria says that he continued to pay rent at $250.00 per month after December 2016 until Mrs Gounder closed her bank account in May 2017. The defendant disputes this evidence, and says she did not close her bank account. She does however appear to accept that she has received payment of the amount referred to in the letter dated 16 December 2016 (see paragraph 17 above). The plaintiff also says that the $34,000 deposit he paid in December 2016 remains in the trust account of Samuel K Ram Lawyers.

THE PLAINTIFF'S CLAIM

23. In a Writ of Summons dated 29 March 2017 the plaintiff sought an order for specific performance of the agreement for sale and purchase dated 20 July 2013, directing the defendant to complete the transaction.

24. The defendant responded with a statement of defence and counterclaim filed in July 2017 in which Mrs Gounder alleged (among other things) that she was

unaware that Samuel K Ram solicitors were acting for the plaintiff as well as for her, or that the deposit had not been paid. She says that she has validly cancelled the sale and purchase agreement for non-payment of the deposit, and failure to arrange and provide information about his bank finance. She seeks judgement against the plaintiff for the amount of the deposit, and damages for 'breach of the agreement'. Curiously she does not seek an order for possession of the house, which is still being occupied by the plaintiff.

THE LAW

25. Specific performance is an equitable remedy that enables the court to enforce a contract (i.e. require a party to do what it has contracted to carry out) as opposed to simply awarding damages for non-performance. It is typically used when damages would not be an adequate remedy, and therefore is most often used for enforcement of transactions involving the sale and purchase of land, particularly when sought by the purchaser. This is because land is unique, and a purchaser compensated only by damages for a failed transaction cannot simply replicate his/her purchase elsewhere.

26. As with all equitable remedies, the court has an element of discretion as whether specific performance will be ordered in a given situation. In its decision in **Reddy v Devi** [2017] FJCA 25 the Court of Appeal listed some of the factors that might militate against applying this remedy:

i. Hardship, i.e. where the granting of an order for specific performance could cause severe hardship to the party against whom the order is sought (Vide **Denne v Light** [1857] S.D.M & G 774, and **Sullivan v Henderson** [1973] 1 WLR 33.3)
ii. The contract was unconscionable, e.g. where a contract has been obtained by unfair means springing an element of surprise by the purchaser on the vendor (**Walters v Morgan** (1861) 3 DF&J 7/8 cf. **Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd** [1993] BCLC 442 and **Mountford v Scott** [1975] Ch 258.
iii. Lack or inadequacy of consideration. i.e. where there has been a lack of consideration in that only a gratuitous promise has been involved (see **Jeffreys v Jeffreys** [1841] Cr & Ph 138) or where there has been an inadequacy of consideration that shocks the conscience amounting to conclusive and decisive evidence of fraud.
iv. Unmeritorious conduct. i.e. the claimant/plaintiff has misbehaved in such a way that making an order for specific performance would reward him for his misconduct. E.g. **Gregory v Wilson** [1851] 9 Hare 683
v. Specific performance is impossible: Performance will not be ordered against a person who has agreed to sell land that he does not own, because 'the court does not compel a person to do what is impossible'.
vi. Vagueness: an agreement may be couched in such vague terms that it cannot be enforced specifically.

vii. Unilateral mistake, misrepresentation and delay (see **Chitty on Contracts** 29th ed. (2004) volume 1 para 1504).

Other factors counting against applying specific performance include that the obligations for which performance is sought are so personal (i.e. contracts for personal service) or complex (e.g. building contracts) that any court order for their performance could not effectively be enforced.

27. When making an order for specific performance the court can impose such conditions as it sees fit to ensure that the outcome is fair. In its decision in **Harvela Investments Ltd v Royal Trust Company of Canada (C.I.) Ltd** [1986] AC 207 the English House of Lords (per Diplock LJ at p227D commented on this principle as follows:

> *Just as damages at common law for breach of contractual obligations are intended to put the party not in breach in the same position, so far as money can do so, as if the contractual obligations had been performed by the other party, so too the equitable remedy of specific performance is intended to put both parties in the same position as if their respective contractual obligations had been timeously performed by both of them. This finds expression in the maxim 'equity treats as done that which ought to have been done'.*

and per Lord Templeman (at p236G):

> *There is a well recognised principle [in equity] that, subject to any contractual provision to the contrary, the vendor ought to be entitled from the completion date to interest on the purchase money, which in equity belongs to the vendor, and the purchaser ought to be entitled from the completion date to the fruits of the property, which in equity belongs to the purchaser. A corresponding principle is that if the vendor is not to blame for the delay in completion, then again subject to any contractual provision to the contrary the purchaser should not be allowed to claim the fruits of the property and to retain the benefit of interest which was or could have been earned by the purchaser on the purchase price which in equity belongs to the vendor. Every case must be judged on its own merits.*

28. Also relevant to this proceeding is the law relating to time for performance of a contract. Unquestionably the purchaser did not pay the deposit or complete settlement within the times contemplated by the agreement (see clauses 4(a) and 5 of the agreement quoted in paragraph 11 above), but what is the consequence of those failures? At law, time is not of the essence of a contract unless the parties explicitly agree, or can be taken to have agreed. Counsel for the defendants acknowledges that the agreement between these parties does not explicitly make time of the essence in relation to either of the payments referred to, which would normally mean that in neither case can the failure to

pay on time be used as a basis for cancellation of the contract without first giving notice of default.

29. Although, at the conclusion of the trial I invited them to do so, nether party's submissions included material relating to the essentiality of time for payment of the deposit. My own research suggests that there is a line of cases, including a decision of the English Court of Appeal in **Samarenko v Dawn Hill House Ltd** [2012] 2 All ER 476, to the effect that payment of the deposit in property transactions is so important that, in the absence of circumstances pointing to the contrary, stipulations of time for payment are to be taken to be essential. However this decision does not suggest that once triggered by the failure to pay on the due date or within the time prescribed, the right to cancel a contract remains open to be exercised even after the default in payment has been remedied. While I have no doubt that such a right could be contracted for, it would create a great deal of uncertainty in a contract (i.e. whether a party was expected or entitled to still perform its contractual obligations, and what rights remained to be performed), and would require an express provision to that effect. There is no such provision here.

ANALYSIS & CONCLUSION

30. The plaintiff's claim relies on the fact that there was admittedly a sale and purchase agreement between the parties, and that the plaintiff has complied – albeit not within the times agreed – with his obligations such that the defendant should be ordered to perform the contract.

31. While the defendant may (see my comments in paragraph 28 above) have had the right to cancel the agreement without prior notice for non-payment of the deposit the fact remains that she did not attempt to do so until after the plaintiff had remedied his default and paid the deposit. There is therefore no need for me to consider whether her conduct (i.e. her failure to exercise the right knowing that the deposit had not been paid) over the intervening three years amounted to a waiver of that right.

32. In so far as any right to cancel required first a notice making time of the essence, no such notice was given. Instead the letter of 21 December 2016 from the defendant's new solicitor sought to immediately cancel the agreement, and – in the case of failure to settle, for which prior notice stipulating a time for settlement was certainly necessary – was therefore defective.

33. It is not clear whether, and if so in what manner, the defendant relies on any of the principles referred to in paragraph 25 above in her defence to the plaintiff's claim. In closing submissions counsel for the defendant appears to suggest that the fact that her solicitor was also acting for the purchaser is

something that might justify the court refusing an order for specific performance. This issue is also raised in the statement of defence, but in neither the submissions or the pleadings is it clear how the fact that Samuel K Ram Lawyers was acting for both parties might be a factor that disqualifies the plaintiff from a remedy that he might otherwise be entitled to. Certainly one can speculate (this is not intended to be an indication of my views) that Mr Ram's office may have failed to fulfil its contractual obligations to the defendant, to her disadvantage. But there is no evidence presented or argument raised to suggest that any such failure is attributable to the plaintiff, or that it might lead the court to exercise in favour of the defendant its discretion to grant or decline an order for specific performance.

34. Also referred to in closing submissions for the defendant is an argument that a presumption of undue influence applies to any contract between the defendant and her solicitor. Reference was made to the case of **Maguire & Anr. v Makaronis & Anr.** (1998) 188 CLR 449, which is a case where clients had given a mortgage in favour of their solicitors without being advised to get independent legal advise. With due respect to counsel for the defendant, I don't agree that any issue that might arise when enforcing a contract/arrangement between a solicitor and its client can apply to the sale contract here between the plaintiff and the defendant. The plaintiff is not responsible, any more than is the defendant, for the fact that they both chose (knowingly) to use the same solicitor. I do not accept that the plaintiff has an onus to negate an assertion of undue influence, but even if there was such an onus, I am satisfied that there is simply no evidence that the defendant has been unduly influenced by the plaintiff, the solicitor or anyone else in a way that prejudiced her. The defendant was apparently happy with the sale price and transaction when she signed the agreement in 2013, and the evidence does not indicate in what way the defendant's acceptance of the delays in settlement thereafter was attributable to any conduct of the plaintiff.

35. A similar analysis applies to the defendant's submission that the lack of independent legal advice for the defendant somehow disqualifies the plaintiff (who also had no independent legal advice) from any remedies he might otherwise be entitled to. The decision of the Privy Council in **Permanent Trustee of NSW v Bridgewater** [1936] 3 All ER 507 (relied on by counsel for the defendant in her submissions) has no parallels to the present case. In that case the court declined to enforce a contract for sale of an expectancy to a moneylender at a substantial undervalue. The fact that the beneficiary had received (deficient) independent legal advice was insufficient to satisfy the court that the contract was just and equitable, and so should be enforced. There is no suggestion in the present case that the sale and purchase agreement is inherently unfair or unjust. Nor was there any reason – certainly not one to which the plaintiff contributed - why the defendant could not have

chosen before she did to get independent legal advice, and take steps to enforce or terminate the contract as she eventually did in 2016.

36. Accordingly I make an order for specific performance directing the defendant to complete the sale of the property to the plaintiff on receipt of payment of the purchase price, and otherwise on the terms set out in paragraph 36 below.

37. However, while I am not persuaded that there is any hardship to the defendant from enforcing the contract (there is no evidence for example of how much the property might sell for if it were to come onto the market now), or that any of the other discretionary factors listed in paragraph 26 above apply to justify the court declining specific performance, I completely accept that the defendant should not suffer loss, or the plaintiff receive any benefit, from the delays of the plaintiff in completing the purchase.

38. The bargain that the parties signed up for in July 2013 (noting that the price had first been discussed in 2011) was for a purchase price of $175,000, and the defendant was entitled to received that amount within a reasonable time there-after. While she may have acquiesced in the delays that occurred while the plaintiff was trying to obtain a reduced assessment of capital gains tax, that delay was not the defendant's fault, or for her benefit.

39. On the other hand, the plaintiff has been living in the house since 2012, and it seems has been paying rent only for part of that period. If he had completed the purchase of the property in 2011 it seems (from the Westpac loan offer produced by the plaintiff in evidence) that he would have been paying interest of 7.75% per annum on the amount borrowed. Since he has had the benefit of living in the property for over six years, and will receive the benefit of any increase in value of the property since then, I see no reason – applying the principles discussed by the House of Lords in **Harvela** (referred to above) - why the plaintiff should not pay to the defendant an amount by way of interest for late settlement that is calculated at the same rate at which he would have had to pay his bank on any loan amount he required, i. e. 7.75% per annum. This should apply from 31 August 2012, (which I appreciate is before the date of the agreement, but which I have arrived at as a fair mid-point taking into account the date the price was fixed (2011) and the approximate time when the plaintiff moved into the property), up to the date of final settlement of the purchase as set out in the next paragraph. It is to be calculated on the whole of the purchase price of $175,000, that being the amount for which the defendant has been out of pocket over this period. From this should be deducted any rent that the plaintiff is able to prove that he has paid to the defendant over the period since he has been in occupation of the property. To the extent that the plaintiff is worse off if he settles on

these terms than he would have been had he settled the purchase earlier, that it is a consequence of his own decisions, and he will have to live with them.

40. It is also a condition of the order for specific performance, that:

i. The plaintiff is to pay a deposit of $17,500 (i.e. 10% of the purchase price) to the defendant's solicitor's trust account within 2 weeks from the date of this judgement, time being of the essence.

ii. the plaintiff is to complete settlement of the purchase by paying the balance of the purchase price (and paying any capital gains tax that is assessed in respect of the transaction), and interest for late settlement as set out in paragraph 39, not later than 8 weeks from the date of this judgment, time being of the essence.

In the event that the plaintiff does not pay the deposit, or pays the deposit but fails to tender payment in full of the amounts due under the agreement, and as per this judgment, on or before the date/period specified, the defendant will be entitled to cancel the agreement. In that event, the defendant will also be entitled to forfeit the deposit (or apply for judgement for the amount of the deposit due) and apply for possession of the property, arrears of rent and for the plaintiff's caveat to be removed.

41. Although the plaintiff has succeeded in his claim, albeit subject to conditions, I am not inclined, in all the circumstances of this case, to award costs against the defendant.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 30th day of January 2020

SOLICITORS:
Vijay Naidu & Associates – Plaintiff
Siddiq Koya Lawyers - Defendant