

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0026 of 2013
(High Court Civil Action No. 341 of 2006L)

BETWEEN : **RAM CHANDAR REDDY**
Appellant

AND : **SUBADRA DEVI**
1st Respondent

AND : **THE DIRECTOR OF LANDS**
2nd Respondent

Coram : **Calanchini P**
Almeida Guneratne JA
Mutunayagam JA

Counsel : **Mr D.S. Naidu for the Appellant**
Mr R.P Singh for the 1st Respondent
Ms T. Sharma with Mr. A. Prakash for the 2nd Respondent

Date of Hearing : **02 February, 2017**

Date of Judgment : **23 February, 2017**

JUDGMENT

Calanchini P

[1] I agree that the appeal should be allowed and I also agree with the orders proposed by Guneratne JA.

Almeida Guneratne, JA

Central issue for Determination in this Appeal

- [2] The central matter for determination in this appeal is whether the agreement between the Appellant and the 1st Respondent, was rendered void *ab initio*, when the 2nd Respondent (hereinafter referred to as the Director) withdrew the consent initially given by him under Section 13 of the Crown (State) Lands Act (Cap. 132).

The Edifice on which the Judgment of the High Court challenged in this Appeal is founded

- [3] The Learned High Court Judge held that, when the Director withdrew his consent to the transfer of the land in question, the Sale and Purchase Agreement between the 1st Respondent and the Appellant was rendered void *ab initio*, rendering any reliefs claimed by the purchaser of no consequence. The Judgment of the High Court is at pages 5 to 12 of the Record of the High Court (RHC).

Undisputed and established facts as revealed from the pleadings, the evidence and the submissions made by Counsel

- [4] (i) The 1st Respondent, the registered lawful lessee of an allotment of land made an application to sell the same to the Appellant, which resulted in a Sale and Purchase Agreement on 23rd November, 2004 (Vide: the Memorandum of Agreement).
- (ii) The land in question being Crown (State) land, the Director gave his consent to the sale on 24th November, 2004, (Vide: the endorsement by the Director at the top of page 248 of the RHC)
- (iii) On 25th November, 2004, the Appellant entered into possession of the allotment of land, paid a deposit, part of the purchase price and commenced and continued harvesting sugar cane, being the purpose for which the agreement had been entered into.

- (iv) While the *status quo* had remained thus, the Director withdrew his consent on 9th November, 2005 (Vide: Page 254 of the RHC).
- (v). Thereafter on 2nd December, 2005, the 1st Respondent purported to terminate the agreement in question on the basis of the withdrawal of consent by the Director as aforesaid (Vide: Page 236 of the RHC).
- (vi) The withdrawal by the Director led to the termination of the agreement by the 1st Respondent on the basis that the Appellant had another holding of State Land, which he had not disclosed to the Director.
- (vii) Thereafter the Director by a letter dated 4th July, 2006, informed the Appellant that the consent to the agreement in question had been withdrawn by an oversight and validated the initially given consent. (Vide: page 261 of the RHC).

Consideration of the Legal Issues that arise from the aforestated facts and the relevant legal provisions impacting thereon in ascertaining whether the Judgment of the learned High Court Judge bears scrutiny

[5] In that regard, it is necessary to look at Section 13 of the Crown (State) Lands Act (Cap. 132 as amended) (The Act).

Section 13

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

“The lease is a protected lease under the provisions of the Crown 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.

- (2) *On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.*
- (3) *Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this Section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.*
- (4) *Any consent required by this Section may be given in writing by any officer or officers, either solely or jointly, authorized in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent. (Inserted by 21 of 1959, s.2)*
- (5) *For the purposes of this section "lease" includes a sublease and "lessee" includes a sub lessee.*

[6] On a simple analysis of that provision, the only legislatively imposed condition required was the consent of the Director for the agreement in question to become lawful and operative. That condition being satisfied, a lawful agreement came into existence.

[7] If so, how could that agreement have been regarded as void *ab initio*?

When may an agreement be regarded as being void *ab initio*?

[8] It is when an agreement is entered into between parties expressly prohibited by law. This clearly is a case that does not fall within any prohibition imposed by the Act in question.

When may a contract (agreement) be regarded as illegal?

[9] It is when an agreement is entered into between parties and the same is contrary to:

- (a) Any statute Law.
- (b) The common Law as being contrary to public policy or morality.

- [10] The ground referred to in paragraph (8) above strikes common ground with ground (9) (a) above, but I could see nothing in the agreement in question that was liable to be regarded as one liable to be rendered void *ab initio*.
- [11] In so far as ground 9 (b) referred to above, I could not see anything in the agreement that could be regarded as being contrary to the common Law either.
- [12] The instant case does not attract any of the aforesaid grounds, the only ground being, according to the learned High Court Judge: "*the agreement became null and void ab initio when the Director withdrew his consent*" (at page 11 of the RHC).
- [13] At this point I wish to say that the principles I have referred to above are well established in all modern jurisdictions, but in order to be doubly sure and be convinced in my own mind in enunciating the said principles, I derived guidance from the celebrated works of Anson as well as Cheshire and Fifoot on Contract Law.
- [14] Applying those principles to the instant case, for the agreement to have been regarded void, there needed to be some element in the agreement that was forbidden or prohibited by the statute in question. The only prohibition is an agreement entered into without the consent of the Director. In the instant case however, the agreement in question is one which was entered into with the consent of the Director. The cases cited by Counsel for the Respondents are distinguishable and inapplicable to the instant case.

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 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.

Applicable Legal Principles entitling a Party for Specific Performance

- [19] The following applicable principles or criteria may be discerned from the authorities.
- (i) A purchaser (such as the Appellant in the instant case) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. (Vide: Fry, **Specific Performance**, paragraph 62). The 1st Respondent as the vendor could have repudiated the agreement only on the basis of Clause 12 of the Agreement. Consequently, the 1st Respondent was in breach of the Agreement when he refused to perform the bargain or dealing when the Appellant had been in the process of cultivating the farm for sugar cane, being his side of the bargain.
 - (ii) In those circumstances, damages could not have been a satisfactory substitute for specific performance.
 - (iii) A ground on which specific performance might be refused is where the granting of an order for specific performance could cause severe hardship to the party against whom the same is sought. (Vide: **Denne v. Light** [1857] S.D.M & G.774) and CG. **Sullivan V. Henderson** [1973] I.W.L.R. 333). It is to be noted that, the 1st Respondent did not even address this Court on that aspect.

(iv) Other grounds, on which Specific Performance might be refused are:-

Unfair Means

(a) 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 D. f. & j. 7/8 **cf: Quadrant Visual Communications Ltd. V. Hutchison Telephone (UK) Ltd** [1993] B.C.L.C.442 and **Contra: Mount Fond V. Scott** [1975] Ch 258.

Lack of or inadequacy of Consideration

(b) Where there has been a lack of consideration in that where only a gratuitous promise had been involved (Vide: **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 (Vide: **Coles v. Trecothick** [1804] 9 Ves 234.

Unmeritorious Conduct

(c) Unmeritorious conduct on the part of a claimant for specific performance is another ground on which specific performance might be refused. (vide: **Gregory v Wilson** [1851] 9 Hare 683).

Impossibility

(d) Specific performance will not be ordered against a person who has agreed to sell land which he does not own because “the court does not compel a person to do what is impossible” (Vide: **Forrer. Nash** [1856] 35 Beau 165,171.

Vagueness

(e) An agreement may be couched in vague terms that it cannot be enforced specifically. (Vide: **Waring & Gillow v. Thompson [1912]** 29 T.L.R. 154 and **Tito v. Waddell** (No.2) [1977] Ch. 106 at 322-328.

Unilateral Mistake, Misrepresentation and Delay

(f) These are the other grounds on which an order for specific performance may be refused. (See: **Chilty on Contracts**, Vol 1 29th ED. (2004) P 1504.

Application of the aforesaid principles to the instant case

[20] Applying those principles or criteria enunciated above to the instant case, I have no hesitation in holding that, none of those principles or criteria, save for the criteria referred to in paragraphs (19)(i) and (d) above constitute any reason why the Appellant should be regarded as being disentitled to an order for specific performance.

[21] I wish to add one further criterion and that is, *Consideration of the Conduct of a party refusing to comply with the terms of a contract (agreement)*.

[22] The first Respondent, as conceded by his counsel was well aware that at the time the Appellant entered into the Agreement in question, he owned another agricultural holding. That fact the 1st Respondent chose not to disclose to the 2nd Respondent (Director of Lands) and thought it fit to enter into the said agreement. Then the 1st Respondent complains resulting in the Director withdrawing the initially granted consent to the agreement which the 1st Respondent himself had in fact applied for. Subsequently, when the Director withdraws the said withdrawal, the 1st Respondent seeks refuge on the misconceived premise that, when the said initial withdrawal was made, the agreement was rendered void *ab initio* ignoring the fact that when the said withdrawal was withdrawn subsequently, the initial agreement between the (vendor-the 1st Respondent) and the purchaser (the Appellant) was revived for all intents and purposes.

[23] Such conduct on the part of the 1st Respondent cannot be condoned by this court.

[24] For the above stated reasons, I hold that the Appellant is entitled to an order for specific performance and accordingly set aside the Judgment of the High Court.

Apparent reason why the Director had withdrawn his initial consent

[25] The reason for such withdrawal was the fact that the Appellant owned other Agricultural Holdings and had not disclosed that fact.

Law and Policy

- [26] The Act does not lay down as a condition precedent, the non-ownership of any other holding as a qualification to be a purchaser in terms of section 13 of the Act and a duty to disclose such fact. Counsel did not draw the attention of Court to any other statute that imposes such a condition.
- [27] Thus, while there was no statutorily mandated disqualification of the Appellant to be a party to the Sale and Purchase Agreement in question, the decision of the Director to withdraw the consent initially given was a condition based on administrative policy. Whether policy considerations could have been super-added to what the statute states has not been questioned by the Appellant.
- [28] But, perhaps, it is after considering the above mentioned matters and on receiving legal advice that the Director by letter dated 4 July, 2006, wrote to the 1st Respondent stating that:
- (i) Withdrawal of the consent was due to an oversight;
 - (ii) The consent granted is validated; and
 - (iii) The withdrawal is void for all intents and purposes. (Vide: at p. 261 of the RHC).
- [29] On the Appellant's part, it must be said to his credit that, out of deference to the said administrative policy, he was prepared to comply with the said condition subsequent as revealed in the Communications dated 9 December, 2005 (at pages 258 and 257 of the RHC) read with the communication dated 14 August, 2006 (at page 107 of the RHC) which he eventually complied with as borne out from the material contained in the Appellant's "*Supplementary Bundle of Documents*" tendered to the High Court in April 2010.
- [30] It is also a matter for regret that, in the face of the decision dated 4th July, 2006, the 2nd Respondent nevertheless thought fit to contend that "*the agreement (in question) was null and void ab initio and the subsequent consent neither constituted a reinstatement of the agreement nor rendered it lawful.*" (Vide: 2nd Respondent's written

submissions dated 16 November, 2016). The authorities Counsel relied on for that contention do not apply to the present case.

Re: The Argument of the 1st Respondent based on the alleged lack of good faith on the part of the Appellant.

[31] There is one crucial factor that goes against that argument. It is the 1st Respondent who had made the initial application that set in motion the agreement in question. As conceded by Mr. Singh who appeared on behalf of the 1st Respondent, the 1st respondent was aware that the appellant was the beneficiary of other agricultural lands (1st Respondent's evidence at the trial-(vide: page 292 of the RHC).

[32] The Appellant's position as revealed by the evidence was that he was not aware of a policy that prevented a purchaser who owned other agricultural holdings from entering into a sale and purchase agreement (Vide: page 289 of the RHC).

[33] Apparently, the 1st Respondent also had not been aware of such a policy. It is to be noted that during the relevant time, it is the same firm of solicitors that had been acting for both the Appellant and the 1st Respondent.

[34] In those circumstances the argument that the Appellant did not act with clean hands cannot be accepted. As once remarked by Lord Mansfield, C.J:

"[t] he governing principle to all contracts and dealings: Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from the ignorance and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their Judgment upon" (Vide: Carter v. Boehm (1766) 3 Butt 1905, 1910.

[35] The Appellant did not conceal anything he privately knew in drawing the 1st Respondent into the agreement in question. In fact the 1st Respondent was aware that the Appellant owned other agricultural holdings.

[36] Thus, the 1st Appellant's, complaint that the Appellant when he instituted action in the High Court did so with unclean hands cannot hold water.

Another point that warrants consideration by this Court

[37] The 1st Respondent not having challenged the decision of 4th July, 2006 of the Director in appropriate proceedings to have the same quashed, the 1st Respondent cannot collaterally attack the same in these proceedings.

What reliefs can this Court order in this Appeal?

[38] This is the final question this Court is obliged to answer. Can it or is it obliged to order specific performance of the Agreement? If not what reliefs is the Appellant entitled to?

[39] That query stems from what I have stated at paragraph [19] of this judgment in regard to two principles or criteria that apply in the context of the granting of specific performance. Those principles or criteria are:-

The Rule

(i) A purchaser cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him.

The Exception

(ii) However, specific performance will not be ordered against a person who has agreed to sell land which he does not own because "*the Court does not compel a person to do what is impossible.*"

Application of the aforesaid principles to the facts of the instant case

[40] When the Director withdrew his initially given consent to "*the Agreement*", the 1st Respondent may well have thought that he was free of any obligations under the same which had led to him to transfer the land in question to a third party. Thus, there was no "*fraud*" or any other impediment to him effecting a transfer of the land to a third

party. No question of “*collusion*” between the vendor and the third party also arises between him and said third party who stepped into the shoes of a bona fide purchaser.

- [41] While I firmly stand on the ground that, the learned High Court Judge was in error when he held that, the Agreement was rendered void *ab initio*, the issue that has to be dealt with is as to how specific performance could be ordered in view of the supervening or intervening circumstances as recounted above in paragraph 40 above.

A Court will not act in vain

- [42] I do not think this Court could or should order specific performance of the Agreement for the reason that, a court will not act in vain and make an order which would be empty relief in the hands of a party.

- [43] Viewing the matter in the light of the above supervening facts and intervening circumstances, this Court would be acting in vain to order specific performance of the Agreement in question.

What then is the resulting effect on the rights of the Appellant who might have been otherwise entitled to specific performance?

- [44] Is the Appellant to be left with no remedy or relief on account of those supervening or intervening facts and circumstances?

- [45] I do not think so and I venture to formulate the principle that ought to be applied in the instant case and that is:

Though ordinarily specific performance would have been available to a purchaser (such as the Appellant in the instant case) given the fact that, at the point of time when the Director withdrew his Consent to the Agreement, it is not reasonable to regard the vendor’s act of selling the land to a third party as being unreasonable there being no allegation based on “fraud,” either but nevertheless, when the Director re-instated his consent, the Agreement having been revived, the initial purchaser (the Appellant) became entitled to relief in Equity for damages and compensation, though not for an order for specific performance.

[46] For the above formulated principle I derived guidance in a decision of this Court in Yogesh Chandra aka Navin Morarji v. Stephen Patrick Ward, (ABU 0042 of 2008, 18 November 2010)

Essential features in that decision that have relevance to the instant case

[47] Khan JA in that case had observed thus:

“ _ _ _ at the beginning of this appeal, it was announced in Court by the respondent’s Counsel, _ _ _ that the property had been sold to another buyer and specific performance was no longer possible” (vide: paragraph 41 of the said judgment).”

[48] Thereafter His Lordship raised the question “*whether any other remedy such as damages is available to the purchaser*” (paragraph 42, supra).

[49] This is the very same issue this Court is confronted with.

[50] I agree with His Lordship Khan JA’s view that, the purchaser cannot claim common law damages because he did not rescind the contract. He could have done so on the basis that the vendor had repudiated the contract by his wrongful rescission. However, when the Director withdrew the Consent for the Agreement, it was as I said earlier, it is not unreasonable to infer that the vendor thought he had no obligations under the Agreement so far as specific performance was concerned but given the fact that there had been part performance, the vendor was not released from all obligations under the Agreement.

[51] Thus, while it cannot be said that the purported termination on the 1st Respondent’s part was by wrongful rescission, nevertheless the 1st Respondent was in breach of the Agreement when he purported to terminate the Agreement for he could have done so only in pursuance of Clause 12 of the Agreement. There had not been any breach of the Agreement by the purchaser.

Damages and Termination

[52] As Cheshire and Fifoot observe:

“Damages are in principle available whether or not the contract has been terminated. Termination is not required for the right to damages to arise. Nor is termination a bar to damages.” (p.796, **Contract Law**, 6th Aus.Ed.)

[53] Consequently, when the Director withdrew his consent the Agreement may have become unenforceable at that point of time but the Agreement (having received the Director’s consent initially) which was a valid and lawful Agreement between the 1st Respondent and the Appellant stood revived when the Director withdrew the withdrawal of consent and validated it by the letter of 4 July 2006. ;

[54] Why the Agreement has now become unenforceable by specific performance is on account of the 1st Respondent transferring the property to a third party.

[55] But it would result in a travesty of justice should the purchaser (the Appellant) be left with no relief.

The Role of Equity

[56] It is precisely in this kind of situation that the role of equity comes into play which developed alongside the Common Law to mitigate the rigours of the law and now operate in modern jurisdictions hand in hand. As once observed by Justice Michael Kirby *“the process of working out the relationship of law and equity continues to this day.”* (quoted in **Remedies – Commentary and Materials**, Tilbury, Noone and Kercher, 3rd ed.2000 at p13).

Is then the present appeal an appropriate case for this Court to award the Appellant damages in equity?

[57] This is precisely the question the Court of Appeal answered in the affirmative in **Yogesh Chandra aka Navin Morarji v. Stephen Patrick Ward** (supra)

When Can Equitable Damages be given?

[58] Applicable principles in that regard can be gathered from **Yogesh Chandra's** case (supra). They may be stated as follows:

- (i) Equitable damages can be given if the Court would have normally granted specific performance. (**Harvey v. Powell** [1888] 39 Ch.D.508 cited at paragraph 44 in **Yogesh Chandra's** case.
- (ii) Where the remedy of specific performance was no longer possible to be given to a party who is without any fault of his own, equitable damages can be given.

[59] I adapt the aforesaid principles applying them to the instant case. I hold that this is an appropriate case for this Court to award the Appellant equitable damages.

Re: The Basis for the Assessments of Equitable Damages

[60] In **Yogesh Chandra's** case (supra), this Court made reference to the House of Lords decision in **Johnson v Agnew** [1980] AC 367, 400 in the matter of how damages were to be assessed viz:

“The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach . . . But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would appear to me more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost . . .

In the present case if it is accepted, as I would accept, that the vendors' acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendor's fault) should logically be fixed as the date on which damages should be assessed.”

[61] Though useful, the whole of that passage is not applicable to the instant case. As I have said earlier, when the Director withdrew his consent, the Agreement became unenforceable. Although the 1st Respondent thereafter purported to terminate the Agreement, he could not have done so, in as much as, there was no breach of clause 12 of the Agreement by the Appellant and by the time the Director subsequently validated the Agreement the 1st Respondent had transferred the property to a third party making specific performance no longer possible.

[62] In those circumstances the most appropriate date from which damages should be assessed is 15th December, 2011, that is, the date of the High Court judgment when the trial judge refused to grant an order for specific performance. The same view has been taken by the High Court of Australia in Johnson v Perez [1988] 166 CLR 351.

Conclusion

[63] For the aforesaid reasons, I would allow the appeal and set aside the Orders of the High Court. I would order that the Appellant be awarded equitable damages to be assessed by the High Court, as at 15th December, 2011, the date of the High Court Judgment. Such equitable damages shall be in addition to what the Appellant sought in paragraph 25(a) of his statement of claim dated 6th October, 2006, also to be assessed by the High Court. The Appellant shall also be entitled to a refund of the deposit of \$8,000.00 which he paid to the 1st Respondent.

Mutunayagam JA

[64] I agree with the reasons and conclusions arrived at by Guneratne JA.

Orders of Court

[65] The orders of this Court are:

- 1. The appeal is allowed and the orders of the High Court dated 15th December, 2011, are set aside.*

2. *The Appellant is awarded equitable damages in lieu of specific performance of the Sale and Purchase Agreement, to be assessed as at 15th December, 2011 by the High Court.*
3. *The Appellant shall also be entitled to the relief he sought in paragraph 25(a) of his statement of claim dated 6th October, 2006, to be assessed by the High Court.*
4. *The appellant shall be entitled to a refund of the deposit of \$8,000.00 paid by him to the 1st Respondent.*
5. *The 1st Respondent shall pay within 21 days of this Judgment a sum of \$5,000.00 as costs to the Appellant.*

W. Calanchini

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Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Justice Almeida Guneratne

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

M. D. B. Mutunayagam

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Hon. Mr Justice Mutunayagam
JUSTICE OF APPEAL