

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No: 273 of 2016

BETWEEN : SWEET RAINBOW INVESTMENTS (FIJI) LIMITED  
PLAINTIFF

AND : MOHAMMED AFZAL KHAN  
FIRST DEFENDANT

AND : SILVER FERN INVESTMENT LIMITED  
SECOND DEFENDANT

**Coram** : The Hon Mr Justice David Alfred

**Counsel** : Ms S. Devan, Mr K Gosai with her, for the Plaintiff  
Mr Devenesh Sharma for the First and Second Defendants

Dates of Hearing : 26 May 2017

Date of Judgment : 30 May 2017

DECISION

1. This is the Plaintiff's Inter-Partes Summons seeking an injunction to restrain the Second Defendant from selling, leasing, transferring assigning or dealing or

disposing of the property held under Certificate of Title No. 41486,(the property) until further Order of this Court.

2. It is supported by the Affidavit of Rajendra Sami (Sami) a director of the Plaintiff, who deposes as follows: The Second Defendant is the registered proprietor of the property. By an agreement in writing on 5 March 2013 between the Plaintiff and the First Defendant, the First Defendant agreed to sell and the Plaintiff agreed to purchase a portion of land (the land) being part of the land held under Certificate of Title No.16663. The First Defendant failed to inform the Plaintiff that a separate title had been issued for the land viz No. 41486, which was transferred to one, Ajit Durhiyant Rahut who, in turn, transferred the property to the Second Defendant.
3. The Second Defendant in its Affidavit in response sworn by its director, Ashwini Kanima Kuar, essentially states that the matters alleged by Sami relate to matters between the Plaintiff and the First Defendant and “do not relate to any dealing with the 2<sup>nd</sup> Defendant whatsoever”(see para 12).
4. The First Defendant in his Affidavit in response to Sami’s Affidavit deposes as follows:
  - (1) In para 22: The Plaintiff never acquired any right in the property as the contract of sale was conditional and if he had breached it then the Plaintiff’s remedy lies in clause 14 of the agreement and not in the property.
  - (2) In para 30: The First Defendant entered into a conditional sale and purchase agreement (s.p.a.) with respect to the property with the Estate of Ram Narayan (Estate) which came to an end on 30 June 2013.
  - (3) In para 32: The Estate transferred the property to Ajit Rahut who then transferred it to the Second Defendant.
  - (4) The First Defendant had no rights or interest in the property which he could transfer to the Plaintiff as his s.p.a. with the Estate had ended on 30 June 2013.
5. The Plaintiff’s Affidavit in reply deposed by Satya Sekran (Sekran) makes it clear that all its assertions are directly against the First Defendant. Indeed this affidavit makes this crystal clear for in para 8 Sekran states “the plaintiff is not



requesting to purchase the said property from the Second Defendant but rather requesting the First Defendant to honor his obligations under Sale and Purchase Agreement between the First Defendant and the Plaintiff”.

6. At the hearing of this Summons, Counsel for the Plaintiff submitted that the matter stems from a sale and purchase agreement (SPA) that the First Defendant would acquire the property and then sell it to the Plaintiff. The First Defendant had not completed the SPA to the Plaintiff. The land was transferred to the Second Defendant on 1 February 2014. Counsel confirmed “we are not alleging anything against the Second Defendant”. Nothing was disclosed by the First Defendant in the SPA with the Plaintiff, of the agreement between the First Defendant and the estate of Ram Narayan.
7. Counsel for the Second Defendant submitted the Plaintiff has no locus standi against the Second Defendant. Clause 14 of the SPA provides a full remedy and there is no provision for specific performance. The Plaintiff’s solicitors were guilty of laches and showed no urgency. The transferees were not parties in the action. Finally, the undertaking as to damages was insufficient and not by the Plaintiff.
8. The Plaintiff’s Counsel in her reply said the Plaintiff is blaming the First Defendant. The undertaking is given by Ram Sami as the Plaintiff has no assets and is not in a position to give an undertaking.
9. At the conclusion of the arguments I said I would take time for consideration. Having done so, I now proceed to deliver my Decision.
10. The facts of this Summons are contained within a small compass and belie the verbiage the court has to consider. This is apparent from a perusal of the Statement of Claim. From para 1 to para 18 thereof there is not even the slightest allegation against the Second Defendant nor even a single demand made of the Second Defendant. The first time there is any claim against the Second Defendant is in the prayers, but, if I may say so, they do not have a leg to stand on.

11. As this is an application for an interlocutory injunction, I shall now turn to the locus classicus which is the opinion of Lord Diplock in: *American Cyanamid Co. v Ethicon Ltd* [1975] A.C.396, which lays down the following principles:
  - (1) The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect.
  - (2) The Court must not attempt to decide this claim on the affidavits.
  - (3) An undertaking from the Plaintiff to be answerable in damages if the injunction proves to have been wrongly granted.
  - (4) If the Plaintiff satisfies the above, the grant or refusal of an injunction is a matter for the court's discretion on the balance of convenience i.e. if damages will be a sufficient remedy an injunction ought not to be granted.  
(See the White Book 1995).
12. The pivotal issue is whether the Plaintiff has an arguable claim against the Second Defendant. The SPA from which the Plaintiff's claim stems shows that it is made between the First Defendant and the Plaintiff. It has absolutely no connection with nor any relation to the Second Defendant.
13. Further and most significantly it provides, in clause 14, that if the Vendor (First Defendant) defaults, the SPA shall be deemed to be cancelled and of no effect. There is no provision for the Purchaser (Plaintiff) to apply to the Court for specific performance of the SPA.
14. This is in sharp contra-distinction to the vendor's right to sue for specific performance given to it (the First Defendant) by clause 13(c).
15. But even if the Plaintiff were entitled to apply for specific performance of the SPA it could only be to compel the First Defendant to transfer to the Plaintiff, some other piece of land (subject to contract, survey, title etc).
16. It could not be the property to which he never had any title as a perusal of Certificate of Title No 41486 shows so clearly. Nor could it be the land which Certificate Title No 16663 shows equally clearly he never had any title to either.



17. I do not need to go any further except to consider the undertaking as to damages. There is no such undertaking by the Plaintiff. Instead what is produced is an undertaking from Ram Sami and Sons (Fiji) Ltd, a third party, one who is a stranger to a transaction or proceeding, as defined by Osborne's Concise Law Dictionary.
18. In the final analysis the only relief based on the SPA that the Plaintiff is entitled to claim, and only from the First Defendant is what is provided for in clause 14. It is not inapt to observe that even this may no longer be available to the Plaintiff as this clause states that "this Sale and Purchase shall be deemed to be cancelled and of no effect". "Deemed" is defined by Osborne's Concise Law Dictionary as "to be treated as".
19. At the end of the day, the Plaintiff has left me to entertain no doubt that it has not complied with any of the principles laid down in *American Cyanamid*. In fact, its entire case collapsed to the ground at the outset when it became as clear as daylight that it did not have any claim whatsoever against the Second Defendant, let alone a good arguable one.
20. I hereby dismiss the Inter-Partes Summons with costs which I summarily assess at \$1,000 to be paid by the Plaintiff to the Second Defendant.

Delivered at Suva this 30<sup>th</sup> day of May 2017.



David Alfred  
**JUDGE**  
High Court of Fiji.