**IN THE HIGH COURT OF FIJI**
**WESTERN DIVISION**
**AT LAUTOKA**

Civil Action No. HBC 09 of 2017.

**BETWEEN** : **TAGRA SPARE PARTS & CARWASH (FIJI) LIMITED** a limited liability company having its registered office at Lautoka in the Republic of Fiji.

**Plaintiff**

**AND** : **IFTIKAR IQBAL AHMED KHAN** of Lautoka, Barrister & Solicitor, operating as **IQBAL KHAN & ASSOCIATES**, Barristers & Solicitors, Lautoka.

**1st Defendant**

**AND** : **SAROJINI NARAYAN & VICKY HARISH NARAYAN** both of 34 Ravouvou Street, Lautoka, Property Owners.

**2nd DEFENDANTS**

# RULING

## INTRODUCTION

1. Before me is an application seeking to set aside a Consent Order. The said Consent Order was made in Court by counsel of both parties. It was later perfected by the defendants' counsel. Tagra Spare Parts & Carwash (Fiji) Limited (**"TSPCL"**) has been a tenant of the defendants, Sarojini Narayan & Vicky Harish Chand at some premises legally described as Industrial Native Lease No. 9095, Section 31, allotment 7 Town of Lautoka since 01 October 2014. TSPCL's and the defendants' arrangement is formalised in a Tenancy Agreement dated 01 October 2014.

2. There is a clause in the said Agreement by which the defendants (as Landlords) had covenanted as follows:

> The Landlords hereby agree that they will not engage with selling the property for the period of 2 years from the date of execution of this agreement of the said property and also hereby agree that if the property is to be sold the Landlords shall give first priority to the Tenant to purchase the property subject to both parties terms and conditions.

3. Both counsel agree that the above clause confers upon TSPCL a right of first refusal.

4. Before TSPCL instituted these proceedings, the defendants had filed an application before the Master under section 169 of the Land Transfer Act seeking an Order to evict TSPCL from the premises. That application is premised on the allegation that TSPCL had fallen into arrears in their rental. Upon beings served with that section 169 application, TSPCL would file a writ action in HBC 221 of 2016 against the defendants seeking damages, presumably for breach of the Tenancy Agreement (although this is not succinctly set out) and also seeking injunctive orders to restrain the defendants from selling the land and also from pursuing the eviction proceedings.

5. There was also an urgent *ex-parte* application filed with the writ seeking the same orders.

6. An affidavit sworn by Amal Dip Singh is filed in support of the ex-parte injunction.

**EX-PARTE ORDERS**

7. I did grant the Orders *ex-parte*. Counsel for TSPCL had refuted the allegation that her client was in arrears on the rental. She also submitted that the defendants were trying to evict TSPCL in order to sell the property

in question to a prospective buyer who had already shown interest in purchasing the same. She submitted that her client was interested in purchasing the property and was entitled to that right of first refusal.

8. The case was then adjourned to a latter date for *inter-partes* hearing. On the date of hearing, directions were given to TSPCL's counsel to arrange for service of all the documents on the defendants.

**INTER-PARTES HEARING**

9. At the *inter-partes* hearing, both counsel settled the matter. The terms of their settlement was recited in Court by TSPCL's counsel and confirmed by the defendants' counsel. In a nutshell, the defendants had agreed that they would discontinue their section 169 application if TSPCL agrees to vacate the said premises by a certain date. Later, the defendants' counsel would perfect and seal the Orders.

**APPLICATION TO SET-ASIDE CONSENT JUDGEMENT**

10. The director of the plaintiff company, Mr. Amal Dip Singh, has now filed a fresh action in HBC 09 of 2017 through his new solicitors seeking to set aside the said Consent Order.

11. The gist of his argument is that the said Consent Order was entered into by his former solicitors without his instruction and knowledge.

12. The thrust of Mr. Mohammed's argument is that not only did his client not authorise his former counsel to consent to settlement of the matter on the terms set out above, but also, that his client would never ever have consented to those terms because his client was interested in purchasing the property and was relying on the right of first refusal therein the Tenancy Agreement.

## THE LAW

*Right Of First Refusal Or Option to Purchase?*

13. At the outset, let me just point out that a term of a contract (usually in a lease agreement) which gives a tenant an option to purchase creates a proprietary type interest in the said tenant. Because such a right is proprietary in nature, it is, for example, also a caveatable interest and may even support such an equitable remedy as specific performance or injunction.

14. In contrast, a right of first refusal only confers a mere personal right.

15. In **Re Rutherford 1 NZLR [1977] 504 at page 506 to 507**, the New Zealand Supreme Court clearly distinguished the two interests as such :

> "Both types of agreement are common and it was open to the parties to have entered into either provided that apt words were used. It was argued that there was a clear distinction between them in regard to the results which follow from the adoption of one or the other. Speaking generally, the giving of an option to purchase land prima facie implies that the giver of the option is to be taken as making a continuing offer to sell the land, which may at any moment be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period. There is ample authority for the proposition that, generally speaking, the grant of an option has more than a mere contractual operation and confers upon the optionee an equitable interest in the land which will support a caveat.
>
> A right of pre-emption on the other hand confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It certainly confers a contractual right but the argument before me was directed to the issue of whether it creates an interest in land capable of supporting a caveat.

16. The Court in **Re Rutherford** then went on to conclude that as a matter **of** principle, that the right of first refusal is a mere personal right and is not such as will support a caveat under section 137 of the New Zealand Land Transfer Act.

17. In **Walker Corporation Pty Ltd v W R Pateman Pty Ltd (1990) 20 NSWLR 624,**

> "It is common ground that the grant of an option creates an equitable interest in land, in that the grantor is bound to sell the land to the grantee, if and when the option is exercised: the grantee has the right to call for a conveyance of the legal estate.....The defendant also accepted that a right of first refusal or a right of pre-emption, does not create an interest in the land..."

18. The short-point to all this is that, because a right of first refusal only confers a right in personam, that right is not sufficient to sustain an injunction against the defendants from selling their property. Having said that, I also am of the view that the Consent Order entered between the parties superseded the Tenancy Agreement and, in a way, resembles a mutual termination of the said Agreement.

*Consent Orders*

19. The plaintiff has complied with the rule that an application to set aside a Consent Order must be made in a whole new separate action altogether (as per Mr. Justice Connors in **Ram v Martinez** [2004] FJHC 388).

20. The Kenyan High Court's decision in **E.T. v Attorney-General & Another** [2012] eKLR[1] is very useful in its description of the principles involved:

> *A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contracts, it becomes a valid agreement, which has the force of law between the parties.*
>
> *When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the Court, it is a determination of the controversy and has the force and effect of a judgement and is covered by the doctrine of res judicata.*(my emphasis)
>
> (my emphasis)

[1] http://kenyalaw.org/Downloads_Free Cases/84402.pdf.

21. In this case, the terms of what the parties had agreed to, was later perfected and has been sealed and thus will have the force or effect of a judgement and will invoke the principles of *estoppel.*

22. At common law, courts have full power to rehear or review a case until judgment is drawn up, passed and entered. But once entered, the judgment could not be set aside subject to any right of appeal (see Scutt J's Ruling in **Naigulevu v National Bank of Fiji (No. 2)** [2009] FJHC 65; Civil; Action 598.2007 (10 March 2009), see also **Pitatails & Ors v Sherefettin** [1986] QB 868 cited by Scutt J in **Naigulevu**).

23. There is a view, that when an oral judgment is given, the successful party ought to be able to assume that the judgment is a valid and effective one, and that great caution should be exercised before permitting a re-hearing (see **Venkata's Case** (1886) 11 App Cas, at pp. 663-664 as per Lord Watson delivering the opinion of the Privy Council).

24. The public policy that underlies the principle of finality was thus described by Lord Wilberforce in **Ampthill Peerage** (1976) 2 WLR 777:

> English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. [It]...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

(my emphasis)

25. The same applies in the case of Consent Orders. The Order may be set aside on the same grounds as the court would normally set aside any contract or agreement. As Lord Denning said in **Siebe Gorman Ltd v Pneupac Ltd** [1982] 1 WLR:

> ....by **consent** " may evidence a real contract between the parties. In such a case the court will only interfere with such order on the same grounds as it would with any other contract...."

26. **Halsbury's Laws of England** Volume 3(1), 4th edition, paragraph 521, states that:

> ...a **consent** order or compromise may be set **aside** on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation.

27. In **Scammell & Ors v Dicker**[2005] All ER (D) 153, Ward and Rix LJJ said:

> In theory it was possible that a **consent** order might be declared void for uncertainty, just as a **consent** order might be set **aside** for misrepresentation or fraud or for mistake....

28. Hammett PJ in **Mohammed Rasul v Hazra Singh** 8 FLR 140at p. 144 as follows:

> In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set **aside** in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.

29. Assuming that the plaintiff's former counsel did act without the plaintiff's authority to settle the matter on terms embodied in the Consent Order, can that settlement be set aside on account of the fact that it all happened without the plaintiff's instructions.

30. As a general rule, counsel have general apparent authority to settle claims even without express authority of clients.

31. In **Mathews v Munster** (1888) 20 QBD 141, the defendant's counsel had consented to judgement in favour of the plaintiff for a particular amount. The defendant was not in court when his counsel consented. He wanted to set aside the consent order on the ground that he had given no authority to his counsel to consent[2].

32. The House of Lords held that a counsel who settled a claim on behalf of his client, in the absence of, and without the instructions of, his client, had the apparent general authority to do so. Accordingly, any consent judgment entered upon that compromise was binding on the client[3] as against the other party.

33. The above statement is justified on the ground that a client who retains a counsel as his advocate represents to the other side that counsel is to act for him in the usual course, that counsel is acting in accordance with his (client's) will, and accordingly, the client is therefore bound by any representation of his counsel.

> No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for **he thereby represents to the other side that counsel is to**

[2] Lord Esher MR summarises the facts thus:
In the course of the case and while the defendant was not present in Court, his counsel, desirous to do what in his judgment was best for his client, submitted to a verdict for the plaintiffs for a particular amount, and that certain imputations on the plaintiff's conduct should be withdrawn, that is, he submitted to a verdict on terms. The defendant now seeks to set aside this verdict and to have a new trial on the ground that counsel in agreeing to it did that which they had no authority to do.

[3] The headnote to the case reads:
On the trial of an action for malicious prosecution the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350l. with costs upon the understanding that all imputations against the plaintiff were withdrawn:-
Held, that this settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant.

**act for him in the usual course, and he must be bound by that representation so long as it continues,**.....
(as per Lord Esher MR).

34. Hence, as Lord Esher MR said in **Matthews**, a client who secretly withdraws his authority to his (former) counsel without the knowledge of the other party, will still be bound by a the representations of the counsel. This is because, as far as the other party is concerned, the counsel still has apparent authority to act for the client, as Lord Esher MR has said.

> .....so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, **and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.**
>
> I apprehend that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate.
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> I have said that the relation of an advocate to his client can be put an end to at any moment, but that the withdrawing of the authority must be made known to the other side, and this shews that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.
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> Now let me consider what authority there is on this point. In **Swinfen v. Lord Chelmsford** (1), Pollock, C.B., in delivering the judgment of the Court said (2),
>
> > "We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial –we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."
>
> The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the **consent** of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it". If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the

course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdrew his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be set **aside** as between himself and his opponent. This the Court will not do, and this appeal must be dismissed. (my emphasis)

35. Bowen LJ said:

> The case was called on the second day, and the defendant, instead of coming into court where he might have exercised his influence on the course the case might take, was absent. During his absence he left his counsel with complete command and with authority to do whatever he thought best. Counsel agreed to a verdict for the plaintiffs, which the Court below refused to set aside.
> It seems to me that within certain limits the retainer shews that counsel has authority to bind his client. What those limits are seems to me to be laid down by Pollock, C.B., in the passage that has been read. Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. It has been frequently discussed, as far back as the time of Best, C.J., if not further, whether counsel can be called the agent of his client, but on this it is sufficient to say that even if he is called an agent he is not one in the ordinary sense, but has a particular authority, the origin of the limit of which it is not necessary to examine. What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say – yes, with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the alternative of returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as compromise of the action, but that is a point we have not go to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise. In this particular case it was clear what was done as within the reasonable scope of the advocate's authority within the rule laid down by Pollock, C.B.
>
> (my emphasis)

36. Fry LJ said:

> Prior to the compromise in this case counsel had received no instructions as to a compromise. In the compromise itself there was nothing collateral to the action, nothing unjust, and there was no mistake of fact on the part of counsel. In the absence of all these matters it was plainly the duty of counsel to do that which he considered best for his client. I think it would be disastrous-I do not say in the interest of the bar but-in the interest of litigants if we had to decide otherwise, for such a result would often necessitate the refusal, because the client happened to be absent, of an offer of compromise highly advantageous to him.
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> (my emphasis)

37. The High Court of Malaysia in **Yap Chee Meng v Ajinomoto (Malaysia) Berhad** [1978] 2 MLJ 249, succinctly summarises the approach to be taken and reiterated that a solicitor is authorized to effect the clients' settlement:

> It is quite clear, therefore, that there are two contradicting versions of what exactly were the instructions plaintiff gave to his solicitor AEH.
>
> Whatever may the truth be, how does it affect the defendants. This raises the question with regard to the relationship between solicitor and client.(my emphasis)
>
> It is settled law that a solicitor once retained has full authority to act on behalf of his client and this authority extends to negotiations to effect settlement out of court.....

38. In Singapore, a solicitor instructed to conduct legal proceedings has an implied authority of the client to compromise them, once legal proceedings have commenced, in the absence of instructions to the contrary. This was the position in **Bank of China v Maria Chia Sook Lan** [1976] 1 MLJ 41 at 48 and upheld on appeal by the Singaporean Court of Appeal in **Maria Chia Sook Lan v Bank of China** [1976] 1 MLJ 49.

39. In this case before me, there is no evidence of fraud, undue influence or misrepresentation directed against the defendant. But even if there was, such evidence will have to be that of the fraud, undue influence, or misrepresentation (or any other valid ground to set aside a contract) of the defendant to be sufficient to unsettle the settlement between Iqbal Khan & Associates and AK Lawyers. Flowing from this, I say that, even if Deo is able to establish any impropriety against his lawyers (Iqbal Khan & Associates), that will only be sufficient to found a separate cause of action against his solicitors, but will not be enough to set aside settlement in question.

40. I say that, bearing in mind that one also has to factor-in the position and interest of the defendant in this scenario who has entered into and concluded the settlement *bona fides*. The observations of the High Court of Malaysia in **Yap Chee Meng v Ajinomoto** (supra) is on all fours:

> As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the flood-gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of out of court settlements. That would be a great pity. But a settlement is a contract and like all

contracts it is voidable on specific grounds e.g. undue influence, misrepresentation, fraud or mistake. If this can be shown it is then the duty of the court to interfere so that justice is done. In this case, prima facie there is a valid settlement, conducted between advocates and solicitors
of this court.

**CONCLUSION**

41. The plaintiff only alleges that he did not instruct Messrs Iqbal Khan & Associates to settle the case. This point is irrelevant, in the context of setting aside a consent order, or even an out of court settlement, for the reasons stated above. It is a matter between Tagra Spare Parts & Carwash (Fiji) Limited and his former solicitor what exact authority the latter had.

42. From the defendant's perspective, the former solicitor retained full authority to act for and bind Tagra Spare Parts & Carwash (Fiji) Limited. The defendant need not inquire further as to whether or not the former solicitor had actual authority. It is of course still open to Tagra Spare Parts & Carwash (Fiji) Limited to pursue a separate claim against the former solicitor – but that is for it to choose.

43. Accordingly, I dismiss the application. Costs follow the event. I order nominal costs in favour of the defendants in the sum of eight hundred dollars ($800) only. The interim injunction granted earlier now lapses.

.....

Anare Tuilevuka

**JUDGE**

01 February 2017.