

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 77 of 2015

BETWEEN

R. PRASAD LIMITED a limited liability company having its registered
office at 411 Fletcher Road, Nabua, Suva in the Republic of Fiji.

PLINTIFF

AND

BIJAY PRASAD and **PUSHPA WATI** formerly of Yarawa Road,
Samabula Suva in the Republic of Fiji. Retirees, but now 8944,
Shasta Lily Drive, FT K Grove, CA 95624, USA.

DEFENDANTS

Counsel : Mr. B.C. Patel for the Plaintiff
Mr. K. Jamnadas for the Defendants

Date of Hearing : 11th October, 2018

Date of Judgment : 29th November, 2018

JUDGMENT

[1] The plaintiff instituted these proceedings seeking the following orders:

- A.** An order of specific performance against the defendants to transfer the property situated at 41 Yarawa, Samabula, Suva described in **CT No. 27290 being Lot 31 on Deposited Plan No. 1657** to the plaintiff in terms of the sale and purchase agreement dated 24 May 2014 signed by the defendants as vendors and the plaintiff as purchaser, and for that purpose the defendants be ordered:
- (i). to lodge within 7 days of the date of the order a completed and signed Capital Gains Tax Declaration and the signed Transfer with Revenue and Customs Authority for assessment of Capital Gains Tax and Stamp Duty;
 - (ii). to pay the assessed capital gains tax or undertake to pay the same from the sale proceeds and to pay the stamp duty provided by the plaintiff so as to obtain release of the CGT Certificate and the stamped transfer;
 - (iii). to effect settlement of the sale and purchase at the Registrar of Titles Office, Suva within 7 days after release of the CGT Certificate and the stamped transfer; and
 - (iv). to give vacant possession of the property to the plaintiff at settlement.
- B.** An order that if the defendants or any of them refuse or fail for any reason to sign any document required to complete the sale and purchase agreement in terms of order A above, and such refusal or failure has continued for 7 days after a written notice to sign has been given to them (or as the court may otherwise direct), then in that case the Chief Registrar of the High Court of Fiji at Suva be authorised to sign all such documents for and on behalf of the defaulting defendants and the Chief Registrar so signing shall not be held liable personally or otherwise;
- C.** Damages for breach of contract in addition to specific performance;
- D.** The plaintiff be awarded costs of this action on an indemnity basis.

[2] At the commencement of the trial the learned counsel for the plaintiff informed court that the plaintiff was not pursuing the claim for damages (Prayer 'C' of the amended statement of claim).

[3] The plaintiff's case briefly, is that the plaintiff entered into a sale and purchase agreement to purchase the property referred to above from the defendant and the plaintiff by 4th November, 2014 was ready to complete the transaction but on 19th November, 2014 the plaintiff's solicitors advised that the defendants wished to withdraw from the transaction.

[4] The defendants allege that the plaintiff was in breach of the contract, in that the plaintiff failed to comply with Clauses 3a and 4.1 of the agreement. The particulars of the plaintiff's breach as averred in the amended statement of defence are as follows:

The plaintiff failed to pay the deposit of \$28,000.00 on 24th May, 2014 in breach of clause 3(a) of the agreement. This breach continued for a period of more than 14 days after the initial breach.

The plaintiff failed to pay the purchase price of FJD280,000.00 to the defendants on 23rd July, 2014 which resulted in the failure to effect settlement on 23rd July, 2014 in breach of clause 4.1 of the agreement.

[5] By way of a counter claim the defendants claim the following amounts from the plaintiff:

- a) Airfares in having to come to Fiji from USA to 27th October, 2015 to engage counsel to act for the defendants in the pending civil action and return to USA on 27th December, 2015 in the sum of USD2270.
- b) Travel expenses, accommodation expenses, meal expenses and other expenses incurred in Fiji in the process of engaging counsel for the defendants in the civil action estimated at FJD1500.00.
- c) Airfares in having to come to Fiji from USA to give evidence in the trial proper when this matter is eventually set down for trial and return to USA which is yet to be ascertained but estimated at USD2270.00
- d) Legal fees for civil action from commencement of trial which is yet to be ascertained but estimated at FJD30,000.00.

[6] The defendants sought following reliefs:

- a) that the statement of claim be dismissed;
- b) that judgment be entered in favour of the counter claim;
- c) a declaration that the plaintiff has pursued it is statement of claim against the defendant in bad faith without clean hands;
- d) that the agreement be rescinded for the plaintiff's breach of clause 3(a) and/or clause 4.1 or alternatively a declaration that the agreement was validly rescinded for the plaintiff's breach of clause 3(a) and/or 4.1;
- e) that the deposit of FJD28,000.00 paid by the plaintiff to the defendants be retained by the defendants as liquidated damages for the plaintiff's breach of clause 4.1 of the agreement;
- f) that the plaintiff pay general damages to the defendants;
- g) that the plaintiff pay aggravated damages to the defendants;
- h) that the plaintiff pay exemplary damages to the defendants; and
- i) that the plaintiff pay the defendants' costs on an indemnity basis.

[7] On behalf of the plaintiff its Managing Director testified at the hearing. His evidence is that his wife is the other director of this company and that he is also the Managing Director of the Kalabo Investment Limited.

[8] The plaintiff company is involved in property development and when the witness received a message in February, 2014 that the land which is the subject matter of this action was for sale he had discussed it with the first named defendant and since the company has other properties adjacent to this land he went to USA to meet the first named defendant who commonly owned the land with his wife, the second named defendant. The witness offered FJD250,000.00 for the land but finally the defendants agreed to sell it for FJD280,000.00 and the defendants had agreed to prepare the sale and purchase agreement and to send it to Fiji for the plaintiff's signature.

[9] The defendants signed the agreement before a Notary Public in California and sent it to Fiji for the plaintiff to sign. It is the evidence of the plaintiff's witness that when the agreement reached Fiji he was out of the Island and when he came back he and the company secretary signed the agreement and paid the deposit of FJD28,000.00 to the defendants' solicitors. The receipt for the payment of the deposit was tendered in evidence marked as "P12". The defendants in their

evidence admitted the above facts and said that they came to Fiji and executed the transfer documents on 31st October, 2014. It is the position of the first named defendant, who was actively involved in this transaction, that after two weeks from coming to Fiji nothing was happening and therefore asked solicitors to cancel the agreement. The letter written by the defendant's lawyers to the plaintiff's lawyers on 19th November, 2014 was tendered in evidence marked as "P16".

[10] The defendants' position is that the plaintiff failed to comply with its part of the agreement within the period prescribed in the agreement. When the plaintiff moved to tender the agreement in evidence the learned counsel for the defendants objected to it being admitted in evidence on the ground that it has not been stamped. However, subsequently the parties agreed that the plaintiff can stamp the agreement and hand the stamped copy to Court within 14 days after the conclusion of the trial. Subject to that condition the document was allowed to be marked as "P26". On 19th October, 2017 the plaintiff's solicitors tendered the stamped copy of the agreement.

[11] Clause 4 of the agreement provides as follows:

4.1 The Date of Settlement shall be within sixty (60) days from the date of signing of this agreement or such other date as may be mutually agreed in writing, between the parties.

4.2 The Date of Settlement shall not be modified nor in any manner extended unless such other date which is mutually agreed to by the parties in writing.

[12] The defendants consider the date appears on the agreement that is 24th May, 2015 as the date of signing the agreement. For any agreement to have binding effect both parties must sign it. The agreement came to effect on the day the agents of the plaintiff company signed it that is according to the evidence of the plaintiff's first witness, on 26th or 27th July, 2014. The 60 day period therefore, ended on 26th or 27th September, 2014. The plaintiff deposited of FJD28,000.00 with the solicitors of the defendants on 28th July, 2014, in compliance with clause 3 of the sale and purchase agreement.

[13] On 31st October, 2014, after more than three months from making the deposit for advance payment and after more than a month from the expiration of the 60 days prescribed by the agreement, the defendants executed the transfer document.

- [14] It is a fact admitted by the parties that after the defendants' solicitors wrote to the plaintiff's solicitors informing them that the defendants had withdrawn from the deal. The reason given by the defendants, according to the draft agreement of cancellation is as follows:

The Vendors have now decided not to sell the property because they intend to utilize the property for their own use as they are retired and will have issues with the bank regarding sale proceeds if they sell the property.

- [15] The first named defendant in his evidence said that he did not instruct the solicitor to write it this way and he was only told to cancel the agreement. In cross-examination he admitted that he told his lawyer to sell part of the land and for him to keep front portion with the house. The evidence of the first named defendant shows that he wanted to terminate the agreement for the reasons given in the letter of cancellation and not for any delay on the part of the plaintiff.
- [16] In fact there is no delay on the part of the plaintiff. Before lodging the transfer documents for registration there were certain other requirement for the defendants to fulfil. Under clause 20 of the sale and purchase agreement it is the responsibility of the vendors to obtain an assessment of Capital Gains Tax and pay it to FRCA. Until this is done the transaction cannot be completed. Therefore, the delay is on the part of the defendants and they cannot say that the plaintiff caused the delay in completing the transaction.
- [17] In this matter the Managing Director of the plaintiff company testified that he was always prepared to pay the balance purchase price and at that time they had more than two million dollars in the company's accounts.
- [18] The next question for determination is whether the plaintiff is entitled in law for a judgment for specific performance.
- [19] The normal remedy for breach of contract is the recovery of damages at common law. In most cases this affords adequate reparation, as, for example, where the contract is for sale of goods easily procurable elsewhere, or for the delivery of stocks or shares for which there is a free market; but in many instances and especially where a vendor refuses to convey the land sold, a mere award of damages would defeat the just and reasonable expectations of the plaintiff. The fundamental rule, therefore is that specific performance will not be decreed if

there is adequate remedy at law. The purpose of such a decree is to ensure that justice is done. [*Cud v Rutter 1720*]1 P Wms 570 – *Law of Contract by Cheshire, Fifoot and Furmstone*, 16th Edition at page 796].

In the case of **Lysaght v Edwards** (1876) Vol II ChD 499 at page 506 Jessel MR said:

It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

In arriving at the above conclusion Jessel MR relied also on the following decisions which are relevant to the matter before this court:

In **Hadley v. London Bank of Scotland** 3 DJ & S 63, 70 Lord Justice Turner said:

I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

In **Shaw v. Foster** Law Rep 5 HL 321 Lord Chelmsford in his speech said:

According to the well-known rule in equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster." Lord Cairns says (at p338): "Under these

circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust (beneficiary of a trust) subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property"—that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money.

In **Rose v. Watson** 10 HLC 678, Lord Westbury said:

When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate in equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee," by which I understand him to mean "a mere trustee." He has already said that he is a trustee, and he is not now distinguishing the vendor's position from that of a trustee, but distinguishing it from that of some other kinds of trustees. His Lordship continues: "Thus, as it is stated by the Master of the Rolls in *Wall v. Bright* 1 Jac & W 508, "The vendor is not a mere trustee; he is in progress towards it"—that is, towards being mere trustee—and finally becomes such when the money is paid, and when he is bound to convey.


- [20] For the reasons I have given and the decisions cited above the plaintiff is entitled to a judgment for specific performance. Since the plaintiff informed court at the commencement of the hearing that it was not pursuing the alternative claim for damages the plaintiff's claim for damages is refused.

- [21] The defendant claimed travelling expenses by way of damages. It is settled law that the party who does not perform his part of the contract is not entitled to damages. Therefore, the defendants are not entitled to the reliefs prayed for in their statement of defence.

ORDERS

1. The defendants are ordered to transfer the property situated at 41 Yarawa, Samabula, Suva described in CT No. 27290 being Lot 31 on Deposited Plan No. 1657 to the plaintiff in terms of the sale and purchase agreement dated 24th May, 2014 and to hand over vacant possession of the said property to the plaintiff to the plaintiff within 30 days from the date of this judgment
2. If the defendants or any of them refuse or fail for any reason to sign any document required to complete the sale and purchase agreement within 30 days, the Chief Registrar of the High Court of Fiji at Suva is authorised to sign all such documents for and on behalf of the defaulting defendants and the Chief Registrar so signing shall not be held liable personally or otherwise;
3. The defendants are also ordered to pay \$7500.00 as costs of this action to the plaintiff.




Lyone Seneviratne

JUDGE

29th November, 2018