

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 174 of 2017

BETWEEN : **HIN MAN NGAI** of Flat B, 8/F, Wah Tat Building, Hoi Pa Street, Tsuen Wan, N.T Hong Kong, Businessman

PLAINTIFF

AND : **FANNENG SOUTH PACIFIC HOLDINGS LIMITED** a limited liability company having its registered office C/- Mamlakah Lawyers, Barristers & Solicitors, 46 Gordon Street, Suva.

DEFENDANT

Appearances : A.K. Lawyers for the Plaintiff
: Patel & Sharma for the Defendant

R U L I N G

INTRODUCTION

1. Before me is the plaintiff's application for specific performance under Order 86 Rule 1, 3 and 6 of the High Court Rules 1988 against the defendant. Order 86 provides as follows:

Application by plaintiff for summary judgment (O.86, r.1)

1.-(1) In any action begun by writ indorsed with a claim –

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or

(b) for rescission of such an agreement, or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ

.....

Judgment for plaintiff (O.86, r.3)

3. Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

.....

Costs (O.86, r.6)

6. If the plaintiff makes an application under rule 1 where the case is not within this Order, or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62, and, in particular, to rule 4(1) thereof, the Court may dismiss the

application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

2. An application under Order 86 is akin to an application for summary judgement under Order 14. The summary judgement procedure under Order 14 as well as Order 86 is available to any Plaintiff who desires a quick judgment on his claim where there is no arguable defence to a claim, or, if a defence is raised, it either fails to set up a *bona fide* defence or discloses no triable issues and will merely have the effect of delaying a judgement in favour of the plaintiff. The Court's task is to determine whether there ought to be a trial.

THE AGREEMENT

3. The plaintiff (as vendor) and the defendant (as purchaser) executed an agreement on 11 April 2017 for the sale and purchase of a piece of land in Denarau which is comprised in Certificate of Title No. 35903. The agreed price was \$2, 100, 00-00 (FJD\$2.1 million dollars). They had a common solicitor namely R. Patel Lawyers. It appears that towards the end of 2016, the parties had arranged that the consideration for the purchase be deposited into and held in escrow in the trust account of R. Patel Lawyers, pending the consent of the Minister for Lands.
4. On 07 December 2016, the plaintiff paid a 10% deposit of \$210,000. The balance was paid on 15 March 2017. Thereafter, as a pre-requisite to settlement, the defendant would apply to the Fiji Islands Revenue Service ("FIRS") for a Capital Gains Tax Clearance Certificate. At that point, by all accounts, the highly expectant parties were proceeding smoothly in the normal course towards settlement. However, the defendant would start to retract from the deal after it received from the FIRS a tax assessment which was considerably higher than it had hoped. The defendant of course now wants out of the deal. At this time, it is resisting the plaintiff's application for specific performance on the ground of illegality and loss of bargain.

ALLEGED ILLEGALITY

5. The application for Ministerial consent was made on 06 February 2017. Consent to the dealing was issued under the hand of Minister of Lands on 12

April 2017. The consent in fact was granted with some conditions attached to it. Curiously, the attachment containing the conditions was actually dated 06 April 2017.

6. The defendant argues that the consent was granted on 12 April 2017. This means that consent was actually granted a day after the Agreement was executed on 11 April 2017. This would render the dealing illegal under sections 6 and 7 of the old Sales Act which was in force at the time.
7. The plaintiff raises two arguments:
 - (i) first is the argument that the date of the consent is to be taken to be the date on the conditions i.e. 06 April 2017 – which predates the date of execution of the sale and purchase agreement and which therefore does not offend sections 6 or 7 of the Land Sales Act.
 - (ii) second is the argument that, in any event, the contract comes into force upon the granting of the Minister's consent in light of Clause 2 of the Agreement. Clause 2 makes Ministerial consent a pre-condition to contract formation.
8. Section 6 forbids a non-resident from purchasing any land in Fiji which is over and above 1 acre in acreage without the prior written consent of the Minister. Section 7 forbids a non-resident from disposing of any land in Fiji to another non-resident without the prior written consent of the Minister.

Purchase of land by non-resident

6.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

(2) The Minister responsible for land matters may require any application for his consent mentioned in subsection (1) to be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms whether by way of imposition of bond or otherwise upon which such consent is conditional.

(3) No appeal shall lie against a decision by the Minister responsible for land matters made under this section.

(4) The provisions of this section shall not apply to dealings in native land, as defined by the Native Land Trust Act, or to the original grant of any lease or licence by the Native Land Trust Board.

Disposition of land by non-resident

7.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract for the disposition of any land in favour of another non-resident.

(2) The Minister responsible for land matters shall where necessary require any application for his consent mentioned in subsection (1) to be accompanied by a bond for such sum as he shall direct and to, be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms upon which such consent is conditional.

(3) No appeal shall lie against a decision by the Minister responsible for land matters made under this section.

9. I note that clause 2 of the sale and purchase agreement is titled **CONDITION PRECEDENT**.

Without prejudice to any obligations herein undertaken by the parties hereto, this Agreement shall neither comprise nor become a contract to purchase any land or a contract for the disposition of any such land unless and until the Minister for Lands in Fiji consents....to the making of a contract between the parties hereto in the form and terms of this agreement. The parties shall forthwith apply for such consent and will cooperate with each other and use their best endeavours to obtain the same however if such consent is refused or cannot be obtained by 30th January 2017 or such later date as may be agreed between the parties than this agreement shall be deemed cancelled and of no effect and the deposit paid under clause 3.1(a) hereof shall forthwith be refunded to the Purchaser without any deduction.

DISCUSSION

10. There are no triable issues of fact in this case. The issues which the parties raise are all to do with law.
11. As regards the issue of illegality, I would take 12 April 2017 to be the point of time when the consent was granted. I say that for two reasons. First, because that presumably was the point in time when the consent would have been communicated to the parties' common solicitor. Secondly, in my view, the conditions cannot stand alone but must be referenced against the actual consent by hand of the Minister dated 12 April. However, in this case, I agree that by virtue of clause 2 which is a condition precedent, the contract actually came into force on the date of the Minister's consent i.e. on 12 April 2017 rather than on the date of execution.

12. In this regard, I rely on the judgement of Mr. Justice Calanchini (as he then was) in **Resort in Park and Garden Ltd v Naidu** [2012] FJHC 883; HBC164.2009 (24 February 2012) which contained a thorough review of the Fiji Court of Appeal and the Fiji Supreme Court decisions on the issue¹.

LOSS OF BARGAIN

13. The defendant submits that it will suffer tremendous economic and financial loss if the agreement is to be enforced. The Agreement provided that defendant (as vendor, and as the law requires) would pay 10% Capital Gains Tax on the agreed sale and purchase price of FJD\$2.1 million. It appears that the defendant had hoped that the transaction would attract Capital Gains Tax.
14. However, as it turned out, the FRCS would actually carry out a valuation of the property itself, and based on that valuation of \$3,520,000-00 (FJD\$3.52 million), it would then assess 20% income tax on the transaction (instead of 10% CGT).
15. The plaintiff submits that FRCS' position was based on the fact that the defendant was at all material times engaged in the business of real estate consultancy and property investment and that the proceeds from the proposed sale would constitute income for the defendant's business.

¹The relevant clauses in that case state as follows:

Clause 2 is headed "Conditions" and then there appears a sub heading "Condition precedent – Land Sales Act." There is only one clause in this part of the agreement and so far as is relevant states:

"2.1 This agreement shall neither be nor become a contract for either the acquisition or disposition of land under the Fiji Land Sales Act (Cap 137) unless and until it has the consent in writing of the Minister for Lands subject to the usual conditions applying to such consents, as are set out in Schedule 3 (Minister's Consent). The parties further agree that:

(a) an application for Minister's Consent shall be lodged immediately by the Purchaser upon execution of this Agreement and the parties shall cooperate with each other in all respects using their best endeavours to secure the Minister's Consent

(b) ---

(c) ---

(d) the securing of the Minister's consent shall be obtained by 30 June 2008. If, before the expiry of this date either party, by written notice to the other, gives written notice to the other, this period shall be extended initially by a month if however consent is not received within that extended time two further months extensions may be given however this date will not be extended beyond 30 September 2008."

Clause 3 of the agreement then makes provision in the event that the condition precedent is not satisfied in the following terms:

"3.1 If

(a) the Minister's consent is not obtained by 30 June 2008 (or if extended in terms of that clause 2.1 (c) to a date no later than 30 September 2008

Then unless otherwise agreed between the parties;

(b) this Agreement shall terminate, and

(c) the Vendor shall be entitled to retain the agreed sum of US\$500,000 as per clause 1.3 and 1.4

(d) the remaining balance amount paid to the Vendor as Deposit is to be refunded to the Purchaser forthwith,

(e) neither party shall have any further right or claim against the other under this Agreement."

16. Furthermore, as the plaintiff points out in his submissions:

The property was let out on rental of \$10,000 per month...

The Income Tax Act 2015 leaves FRCS with an option to assess CGT at 10% or to otherwise treat a transaction as a disposal for deriving a profit. Due to the fact that the purpose of acquisition was an "investment property" and was used to derive income, FRCS assessed taxes under section 18(1)(b) of the Act as opposed to the provisions under Capital Gains Tax (i.e. section 65)

.....

The Defendant ought to have complied with its obligations under the agreement to provide a Capital Gains Tax Certificate at settlement. Notwithstanding the fact that the Defendant was assessed under income tax and not CGT, when FRCS issued the assessment they made it clear that "[t]he CGT certificate will be released by the Authority upon compliance of one of the following conditions..." In other words, FRCS were ready to issue the CGT Certificate had the Defendant either paid the assessed taxes or provided an undertaking to pay it.

17. I gather that the defendant has taken no steps to lodge an objection to the assessment under section 16(1)(a) of the Tax Administration Decree 2009.

18. As a starting point, and as every lawyer knows, specific performance is an equitable remedy.

19. Like all equitable remedies, the granting of the relief of specific performance is a matter of discretion for the court and is granted where it is just and equitable to do so in the circumstances of the case. As Lord Hoffman said in **Co-op Insurance Society Ltd v Argyll Stores (Holdings) Ltd** [1997] 3 All ER 297.

A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to "do more perfect and complete justice" than would be the result of leaving the parties to their remedies at common law. (*Wilson v. Northampton and Banbury Junction Railway Co.* (1874) L.R. 9 Ch.App. 279, 284). Much therefore depends upon the facts of the particular case and I shall begin by describing these in more detail.

20. The defendant relies on the Fiji Court of Appeal case of **Ram Chandar Reddy v Subadra Devi** [2017] FJA 25; ABU0026.2013 (23 February 2017) where, in a general discussion of the grounds upon which an order for specific performance may or may not be granted, the Court said as follows at paragraph 19(iii):

(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.

21. In Denne v. Light (1857) 8 DM & G 774 the vendor of farmland sought specific performance as against the purchaser of the contract of sale. The court, however, refused this remedy when it was shown that to order specific performance would leave the purchaser with an entirely landlocked piece of land: i.e. surrounded by land belonging to others and with no right of way to it.
22. In Patel v. Ali (1984) Ch. 283, the seller and her husband were co-owners of a house which they contracted to sell in 1979. The husband's bankruptcy caused a long delay in completion of the sale transaction for which neither the seller nor the purchaser was to blame. After the contract had been entered into, the seller got bone cancer and had her leg amputated. She later brought forth her second and third children. The purchaser obtained an order of specific performance against which the seller appealed on the ground of hardship. She pleaded that she spoke little English and relied on help from nearby friends and relatives, hence it would be hard to leave the house and move away. The court allowed the appeal, stating that although a person of full capacity before the contract took the risk of hardship, the court in a proper case could refuse to grant specific performance on the ground of hardship occasioned subsequent to the contract even if it is not caused by the plaintiff and is not related to the subject matter of the suit. On the facts of this case, there would be hardship amounting to injustice and therefore the appropriate remedy was damages.
23. It is hard for me to find any equitable ground in favour of the defendant upon which to base a decision not to grant specific performance. The defendant entered into a sale and purchase agreement by which it has committed itself to sell the property in question to the defendant – for better or for worse.
24. I am not at all convinced that the income tax assessment by FRCS on the transaction, and the resultant higher-than-expected tax which will have to be

borne by the defendant, falls within the type of cases which will qualify as a “hardship” to justify the refusal of an order for specific performance.

25. I am also not satisfied that the agreement is frustrated by the higher tax assessment by FRCS. The mere fact that performance of a contractual obligation will result in some hardship does not necessarily establish frustration (Lindsay-Owen v Associated Dairies Pty Ltd [2000] NSWSC 1095).

26. In any event, I agree with Mr. Narayan’s submission that, in light of the fact that the defendant is engaged in the business of real estate consultancy and property investment, it was perfectly foreseeable to the defendant that it would be assessed on the basis of income tax rather than on CGT as the proceeds from the sale would constitute income for its business. **Cheshire & Fifoot, Law of Contract, 8th Australian Edition** states as follows at paragraph 886:

It is not infrequently suggested that frustration cannot be relied on if the alleged frustrating event was foreseen. What each party foresees must, of course, be an element in assessing the situation contemplated by the contract, with which the situation resulting from the actual course of events is to be compared: see [19.4]. Moreover, a party who foresees an event which would radically affect performance of the contract but does not provide for his possibility in the contract itself may by inference or implication have agreed to bear the risk of its concurrence: see [19.21]. However, this cannot always be the case. Failure to provide expressly for an event which was foreseen may be due to oversight, or to a deliberate decision to leave matters to be sorted out by the parties or by the law. Moreover, to restrict the operation of the doctrine of frustration to unforeseen events introduces unwanted complications. It is no easy task to specify the nature and degree of foresight which would prevent automatic termination. The better view is that foresight does not necessarily prevent frustration.

27. The learned authors warn as follows at page 882:

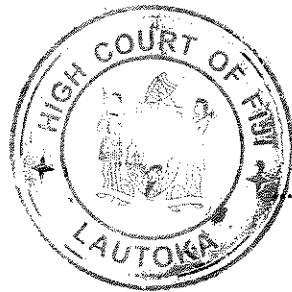
But all contracts involve the assumption of obligation in the face of an uncertain future. To excuse performance merely because events have turned out to the disadvantage of a party would be to strike at the institution of contract itself. After all, there can never be any guarantee that such events will not happen. Moreover, since contractual obligations are assumed voluntarily, a party can always guard against adverse events by express stipulation. In the absence of such stipulation, therefore, performance should not be excused just because it becomes difficult and unprofitable.

CONCLUSION

28. There are no triable issues of fact in this case. The issues of law presented are not so complicated as to warrant a postponement to a trial. Accordingly, I grant Order in Terms of prayers [1] i, ii, iii, iv, v, [2] of the Summons dated 07 March 2018.

29. Case adjourned to 20 September 2018 for mention on the other order sought for damages for breach of contract.

30. Costs reserved.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka". The signature is written over a horizontal dotted line.

Anare Tuilevuka
JUDGE
Lautoka

03 August 2018