

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 50 of 2017

BETWEEN : MEREULA CIRIMAITOGA of Waimalika, Nadi,

PLAINTIFF

AND : SARWAN KUMAR GOUNDAR formerly of Waimalika, Nadi, Cargo
Officer but now of Kulukulu, Sigatoka.

DEFENDANT

Appearances : (Ms) Ita Dolo Sauduadua for the plaintiff
: Mr Dorsami Naidu for the defendant

Hearing : Monday, 06th August, 2019
Ruling : Friday, 30th August, 2019

RULING

[A] **INTRODUCTION**

- (01) On 16th March, 2017 the plaintiff filed a Writ of Summons and Statement of Claim seeking amongst other things an Order for Specific Performance of the Sale and Purchase Agreement dated 19th July, 2011 or in the alternative Judgment in the sum of \$58,582.45.
- (02) The defendant filed his Statement of Defence and Counter Claim on 10th April, 2017 and the Reply to Statement of Defence on 4th May, 2017.
- (03) On 27th April, 2017 the plaintiff filed an Ex-Parte Notice of Motion and Affidavit in Support for Injunction which was heard on 2nd May, 2017 and Order in Terms was granted. The said Order was extended on 19th May, 2017.
- (04) On 29th May, 2019 the defendant filed Notice of Motion and Affidavit in Support to dissolve the Injunction. The plaintiff filed its Affidavit in Opposition on 26th June, 2019 and thereafter the Defendant filed his Affidavit in Reply on 23rd July, 2019.

[B] FACTUAL BACKGROUND

- (01) On or about 19th July, 2011 the parties entered into a Sale and Purchase Agreement for the purchase of the Native Land known as Legalega M/L 140 NLTB 7/10/4523 situated in Waimalika, Nadi in the island of Viti Levu being approximately half acre for the consideration of \$65,000.00.

[paragraph 3 of Mereula Affidavit in Support of Ex Parte Application filed on 27th April, 2017]

- (02) The Sale Agreement was subject to undertakings made by both parties in order to effect settlement and conveyance of the property as follows:
- (a) *Plaintiff to pay the deposit of \$25,000.00 by initial deposit of \$13,000.00 and the balance of \$12,000.00 within 12 months;*
 - (b) *Defendant to vacate on payment of deposit in full;*
 - (c) *Plaintiff to assume responsibility for the Defendants FDB payments on occupation of the property;*
 - (d) *Defendant entitled to reimbursement of all expenses for all Court Action regarding the disputed property;*
 - (e) *A defaulting party may take legal action;*
 - (f) *Legal costs of the Sale Agreement to be borne by the Plaintiff;*
 - (g) *Defendant to pay all electricity and water rates as up until the date of settlement;*
 - (h) *Defendant to take all reasonable care to prevent deterioration and damage to all improvements of the property;*
 - (i) *Defendant to deliver vacant possession of the property and confirm authority to sell property once he has cleared his Fiji Development Bank loan;*
 - (j) *Defendant to survey the property and provide a valuation for sale;*
 - (k) *Plaintiff to accept agricultural zoning of the property;*
 - (l) *Both parties to instruct one Solicitor Mr Joela Baledrokadroka and keep costs reasonable.*

[paragraph 5 of Mereulas Affidavit in Support of Ex Parte Application filed on 27th April, 2017]

(03) The Plaintiff deposed that she made payments as follows:

(a)	<i>Fiji Development Bank</i>	-	\$22,114.00
(b)	<i>iTLTB</i>	-	\$ 4,468.45
(c)	<i>Advances</i>	-	\$ 7,000.00
(d)	<i>Deposit</i>	-	\$25,000.00

[paragraph 6, 8, 9 of Mereulas Affidavit in Support of Ex Parte Application filed on 27th April, 2017]

(04) The plaintiff deposed that the defendant has failed to:

- (a) *Deliver vacant possession as his family members continue to occupy the property;*
- (b) *Maintain the property and prevent deterioration and damage;*
- (c) *Survey the property;*
- (d) *Provide the valuation report to the Plaintiff;*
- (e) *Obtain the necessary consent from iTLTB;*
- (f) *Take the necessary steps to transfer the Property to the Plaintiff.*

[paragraph 11 of Mereulas Affidavit in Support of Ex Parte Application filed on 27th April, 2017]

(05) The plaintiff submitted that there are serious questions to be tried. These are; (reference is made to paragraph 3.6 of the plaintiff's written submissions filed on 13.08.2019)

[1] The parties entered into a Sale and Purchase Agreement dated 19th July, 2011 and it is alleged by the Plaintiff that the Defendant was in breach of the Agreement as follows:

- (a) *Failure to fully secure and deliver vacant possession of the property;*
- (b) *Failure to maintain the property and prevent deterioration and damage;*
- (c) *Failure to have the property surveyed*
- (d) *Failure to provide a valuation report to the Plaintiff*
- (e) *Failure to obtain the necessary iTLTB consent*

(f) *Failure to take all steps necessary to transfer the property to the Plaintiff.*

[2] *The Defendant has refused to perform the Agreement and has failed to refund to the Plaintiff all monies paid under the Agreement in the sum of \$58,582.45 as follows:*

(a) *Deposit amount to \$25,000.00*

(b) *Fiji Development Bank payment amounting to \$22,114.00*

(c) *iTLTB payments in the sum of \$4,468.45*

(d) *Advances amounting to \$7,000.00.*

[3] *The Defendant did not perform his duties pursuant to the Agreement by not obtaining the iTLTB consent resulting in the Plaintiff ceasing all payments.*

(06) The defendant in his Statement of Defence pleaded that;

(a) *That the defendant had been ready to perform the agreement up until 2014 when the plaintiff instituted legal action against the defendant in Civil Action No. 160/2014 thereby bringing about the rescission and termination of the Agreement which had become unlawful.*

(b) *That the monies paid by the plaintiff of \$20,000.00 direct to the defendant as deposit is admitted.*

(c) *That the sums paid to the mortgage account of the defendant held with FDB and the rental to the iTLTB was earned by the rental collected by the plaintiff from the rental flat and the rental for the flat occupied by her which the plaintiff has failed to account to the defendant.*

(d) *That the plaintiff is not entitled to specific performance as there was no prior consent to the transaction nor has the same been obtained to date.*

(e) *That the Sale and Purchase Agreement between the parties speaks for itself as the plaintiff entered into possession and occupation of the property and started dealing with the same as her own prior to consent of the iTLTB.*

(f) *That the plaintiff by entering into possession and occupation prior to settlement committed a fundamental breach resulting in the Agreement becoming unlawful and the plaintiff carried out part performance of the Agreement and failed to give back vacant possession to the defendant when requested.*

- (g) *Instead the plaintiff remained in forcible and unlawful occupation and instituted Lautoka High Court Civil Action No. 160/2014 against the defendant but failed to prosecute the same resulting it being struck out on the 3rd day of November, 2016 by this honourable Court.*
- (h) *That the said Agreement was breached and became unlawful due to the actions of the plaintiff and her solicitors who failed and neglected to give effect to the Agreement resulting in there being no settlement with the plaintiff being in unlawful possession and occupation.*
- (i) *That the defendant had been ready at all times to perform the Agreement but was misled by the plaintiff and her solicitor who attempted to act as the common solicitor but was at all times biased against the defendant which has resulted in breach of the Agreement and hence the rescission of the same.*
- (j) *That the plaintiff by taking unlawful occupation and possession of the property and collecting rental and living free of rental has resulted in loss and damages to the defendant and not the defendant.*
- (k) *As the Agreement was made on 19th July, 2011 and apart from paying the initial deposit of \$12,000.00 the plaintiff failed to pay the 2nd deposit within twelve (12) months as agreed.*
- (l) *As well as failing to obtain prior consent of the iTaukei Land Trust Board before going into occupation of the property resulting in the Agreement being unlawful.*
- (m) *As can be seen there were no payments made towards the FDB mortgage from 2011 to 2012 and then again from 2014 to September 2016 was not paid until the defendant was informed by FDB that if payments towards the arrears and the mortgage was not paid that they would proceed to mortgage sale of the property and thereafter the defendant paid a sum of \$6,000.00 in 2016 to the FDB.*
- (n) *That the Defendant is not aware of the payments made by the plaintiff to the FDB since no account details have been provided to the defendant as to date.*

[C] LEGAL PRINCIPLES

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing “Interlocutory Injunction”.
- (2) The Plaintiff’s application is made pursuant to Order 29, rule 1 of the High Court Rules, 1988 which provides;

Application for injunction (O.29, r.1)

1.- “(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s writ, originating summons, counter claim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made *ex parte* in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.”

(3) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of “American Cyanamid Co v Ethicon Ltd”¹ as follows;

- (A) Whether there is a serious question to be tried?
- (B) Whether damages would be adequate remedy?
- (C) Whether balance of convenience favour granting or refusing Interlocutory injunction?

In that case Lord Diplock stated the object of the interlocutory injunction as follows at p. 509;

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial: but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies.”

In Hubbard & Another v. Vosper & Another² Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

¹ (1975) (1) ALL E.R. 504

² (1972) EWCA Civ. 9; (1972) (2) WLR 389

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in Fraser v Evans (1969) 1 GB 349, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”

[D] DISCUSSION

- (1) The question for the courts determination is whether the interim injunction granted herein be dissolved or not.
- (2) In any consideration of the issue before the court, the principles governing an application of this nature are stated in the well-known and leading case of ‘**American Cyanamid Co v Ethicon Ltd**’ (supra) where it is stated;

“.... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried...”

- (3) The basis of the defendant’s application for dissolution of the injunction order is; (Reference is made to paragraphs (05) to (10) of the affidavit in support of Sarwan Kumar Goundar sworn on 29/05/2019).

5. *THAT as a result of the injunction the Plaintiff has continued in occupation of my Native Lease property being Ref. number 4/10/4523 on which is constructed several dwellings free of rental and is uplifting rental from one of the tenants and such occupation is illegal as it is without the consent of the Headlessor, the iTaukei Land Trust Board as required by statute.*
6. *THAT as a result of the Plaintiff’s unlawful occupation I am suffering loss and damage as the said property is mortgaged to the Fiji Development Bank and I am making payment in reduction of the mortgage from my personal resources as the Plaintiff does not allow me access to the property to collect rental and is not herself paying rental for her occupation.*
7. *THAT the Plaintiff has failed to prosecute this action instituted by her with due diligence as she is in free occupation and in receipt of rental from one of the flats.*
8. *THAT this action was set down for hearing initially on the 17th and 18th day of July, 2018 but did not proceed due to the Plaintiff being sick resulting in the trial date being vacated.*

9. *THE next trial date was the 6th and 7th of December but was vacated on this Honourable Courts own volition.*

10. *THE matter was than assigned trail dates on the 22nd and 23rd of May, 2019 but this was vacated due to the Plaintiff's Counsel being taken ill in the early hours of the 22nd day of May, 2019 resulting in the vacation of the trial.*

- (4) Now dealing with the principles involved in considering the question of dissolution of an injunction, one of the grounds for discharge is where the continuing effect of the injunction has become oppressive. The balance of convenience has to be considered and in this regard the following passage from the Judgment of Lord Diplock in **American Cyanamid v Ethicon Ltd** is pertinent (at p. 406)

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where “the balance of convenience lies.”

- (5) The defendant's principal submission in support of the dissolution of the injunction is that the prior written consent of the ITLTB was not obtained by the plaintiff before she came on the property.

- (6) **The plaintiff took possession of the subject property in July 2011 pursuant to the sale and purchase agreement. The evidence disclosed that the defendant moved out of the property upon execution of the agreement and the possession was given and the plaintiff entered upon the land as the purchaser and the plaintiff continued to make requisite payments to the defendants' mortgage with Fiji development Bank. What is more, the plaintiff began making residential lease rentals to ITLTB (Annexure marked MG - 3 referred to in the Affidavit of Mereula Cirimaitoga, sworn on 25/04/2017). Thus, at the time of execution the parties intention is to establish the legal relationship necessary for there to be a contract for the sale and purchase of a leasehold interest in Native Land .** I feel compelled to add that nowhere in the agreement the parties have expressly stipulated that “ *this agreement shall not become a contract for either acquisition or disposition of land unless and until it has the consent of the Native Land Trust Board first had and obtained.*” There is no express provision in the agreement that “*there is no binding contract to purchase land unless and until the NLTB (now iTLTB) consent has been secured*”. **Nowhere in the agreement the parties have expressed that the dealing is subject to approval of consent by the iTLTB.** Under the Native Land Trust Act, the required consent is a condition precedent to formation and performance of the contract to purchase. What that means is that the

NLTB's (now ITLTB's) consent must be obtained before either party has incurred any obligations or acquired rights of any description in respect of the sale and purchase of land.

In the instant case, as per clause (4) of the agreement (annexure marked MC -1, referred to in the affidavit of 'Mereula Cirimaitoga, sworn on 25/04/2017) the plaintiff has incurred obligations and acquired rights in respect of the sale and purchase of land before obtaining the written consent of ITLTB.

- (7) Generally, a purchaser of land who purchases land under a binding and unconditional contract of sale, has an equitable interest in the land. The extent of that equitable interest is commensurate with the purchaser's ability to obtain specific performance. Of course, a legal estate will later vest in the purchaser upon payment in full of the purchase money and execution of a formal transfer document. The view is that a purchaser's equitable interest is commensurate only with his ability to obtain specific performance.

In **Legione v Hateley**³ for example, Mason and Dean JJ in their joint judgment sated at page 446

"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).

In **Stern v McArthur**⁴, Deane and Dawson JJ in their joint judgment stated at para 2:

"As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense."

Similarly, the New Zealand position is explained in **Sale of Land (2000) 2nd ed by DW McMorland** at page 299:

"In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without consideration of

³ [1983] HCA 11, (1993) 152 CLR 406

⁴ [1998] HCA 51, (1988) 165 CLR 489

any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest.”

Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a binding contract. Usually, one of the many factors to be considered is whether damages are inadequate in lieu of specific performance. If not, then the court may order specific performance. Part-performance is usually also relevant.

In **Re CM Group Pty Ltd’s Caveat**⁵ it was held that property did not pass in equity until the required municipal council approval was obtained. In **Brown v Heffer**⁶ an interest in equity did not pass because the required consent of the Minister had not been obtained.

- (8) **The ITLTB has not consented to the agreement to date.** The plaintiff says that she applied for consent and she paid the consent fees. The consent is still pending. Another factor that must be considered is that nowhere in the agreement the parties have expressed that the dealing is subject to approval of the iTLTB. The instrument between the parties was not conditional. It was absolute and operative. I cannot consider for a moment that any subsequent consent have a kind of retroactive effect making the instrument effective as from its date of execution.
- (9) The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an ‘interlocutory injunction’ is granted the plaintiff should satisfy the court that there is a “probability”, a “prima facie case” or a “strong prima facie case” that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried.

The plaintiff in the instant case must First satisfy the court that on the evidence presented to this court her claim to an equitable interest in the property does raise a serious question to be tried; and, having done so, she must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action.

As far as I can gather, the plaintiff’s entry upon the land in July 2011 pursuant to the sale and purchase agreement is illegal because she had not obtained the necessary prior

⁵ [1986] 1 Qd R 381

⁶ (1967) 110 CLR 344

written consent of the iTLTB which was necessary by virtue of section 12 of the Native Land Trust Act. **It appears to me** that the instrument is not enforceable by equity⁷. The equity is necessary to support an injunction. The contract did not create an equitable interest in the land. Therefore, the court has no general jurisdiction to restrain the defendant by injunction.

The result therefore is that the plaintiff is not entitled in equity to the land and cannot claim an equitable charge or lien on the land and as such there is no serious question to be tried. Equity would not assist illegality. The plaintiff has not met the First requirement of satisfying the court that her claim does raise a serious question to be tried. Then why continue the injunction ?

What is more, the writ in the action was filed on 16-03-2017, about 05 years and 8 months after the date of execution of the agreement. **That is a very long time.** Why did the plaintiff wait for 5 years and 8 months to file an application for specific performance of the agreement? Why is there a delay on the part of the plaintiff in bringing these proceedings? Has she abandoned her rights under the contract? The modern approach to **defenses of laches and acquiescence** was considered by mummery LJ in **Patel v Shah (2005) Times 2nd March.**

What is more damaging is that the sale and purchase agreement is not stamped. **Section 41 of the Stamp Duties Act 1920 provides:**

“Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situated or to any matter or thing done or to be done in any part of Fiji, shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.”

The plaintiff has clearly based her claim on the Sale and Purchase Agreement. There is no way the court can order specific performance of the agreement when the instrument upon which the plaintiff based her claim “shall” not be given in evidence. Therefore, it is not enforceable in equity by injunction. The equity is necessary to support an injunction. It all boils down to this; that there is no serious question to be tried. Then why continue the injunction?

In any consideration of the issue before the court the principles governing an application of this nature are stated in the well-known and leading case of “**American Cynamide Co. v Ethicon Ltd** (supra), where it is stated;

“..... the court no doubt must be satisfied that the claim is not frivolous or vexatious ; in other words that there is a serious question to be tried.....”

⁷ I do not desire to express a conclusive opinion on the question, which may be the subject of judicial decision hereafter.

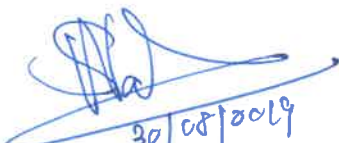
CONCLUSION

For these reasons, in the light of the facts and circumstances surrounding this case and upon considering the submissions of both Counsel and applying the principles applicable to the discharge of injunction, I do not consider that the interim injunctions granted herein should continue.

The injunction is hereby dissolved and the plaintiff is free to continue with her action under the Writ. The plaintiff is ordered to pay the defendant's costs of this application in the sum of \$1,000.00.



**At Lautoka
Friday, 30th August, 2019**


30/08/2019
.....
Jude Nanayakkara
Judge