

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 183 OF 2018

BETWEEN : **RAJENDRA PRASAD BROS PROPERTIES LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Pricewaterhousecoopers, 52 Narara Parade, Lautoka, Fiji.

PLAINTIFF

AND : **RAJEND INVESTMENTS LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Pricewaterhousecoopers, 52 Narara Parade, Lautoka, Fiji.

DEFENDANT

Appearances : Ms D. Singh with Ms S. Goundar for the plaintiff
Mr C.B. Young for the defendant

Date of Hearing : 13 November 2019

Date of Submission : 14 February 2020 (plaintiff), 26 February 2020 (defendant) &
02 March 2020 (plaintiff's reply)

Date of Judgment : 25 May 2020

J U D G M E N T

Introduction

[01] The plaintiff brings this action against the defendant seeking specific performance of an agreement made in June 1980 or alternatively damages for breach of the agreement.

[02] The action relates to a Crown (now State) lease. The plaintiff has obtained consent of the Director of Lands to initiate these proceedings against the defendant.

[03] The defendant has pleaded frustration, laches and waiver, as defence and counterclaimed for mesne profit and an order against the plaintiff to vacate Lot 1 on Lease No.831649.

[04] At the trial, the plaintiff called two witnesses and presented documents. The defendant closed their case electing not to adduce any evidence through witness.

[05] Both parties had filed their respective closing submissions which include the plaintiff's submission in reply to the defendant's submission.

The parties

[06] Rajendra Prasad Bros Properties Limited, the plaintiff is a limited liability company duly incorporated in Fiji and is engaged in the business of owning and operating several supermarkets in Fiji under the name and style of '*Super Foods Supermarket*'. The principle activity of the company is property investment, wholesaling and distribution of bagged raw sugar.

[07] Rajend Investments Limited, the defendant is also a limited liability company duly incorporated in Fiji and having its registered office in Lautoka.

The facts

[08] The following facts are alleged in the statement of claim:

8.1 The defendant at all material times was the registered Lessee and proprietor of a property legally described as Crown Lease/Lease No. 26318, being 'allotments 1 & 2', Section 13 and having an area of 1 rood, 17.7 perches which is situated in Lautoka City Centre [*"the Property"*], having acquired the same from Rajendra Prasad on or about 19 September 1980.

8.2 The Lease No. 26318 had been issued by the Director of Lands on or about 23 October 1941, for a term of 75 years, which was transferred to Rajendra Prasad on or about 24 March 1972, before the defendant's acquisition.

- 8.3 On or about 4 November 1942, a separate lease was issued in respect of 'allotment 1', legally described as Lease No. 28651 having an area of 26.7 perches, being part of Lease No. 26318 to one Mohammed Tawahir Khan.
- 8.4 On or about 18 April 1979, allotment 1 (Lot 1) of Lease No. 26318 was transferred to the plaintiff for valuable consideration. The plaintiff has since carried out substantial improvements to the said Lot 1 by constructing a multi-level commercial building from which it operates a supermarket and accommodates other retail shops and office space.
- 8.5 By a Deed made in writing on 30 June 1980, between the plaintiff, the defendant and one Rajendra Prasad [described as the "Owner"], the defendant agreed to transfer the said property [Lot 1] to the plaintiff together with all improvements thereon [*"The Deed"*].
- 8.6 Under the Deed, the defendant and one Rajendra Prasad acknowledge the following matters:
- i. that Lease No. 26318 comprised of Lots 1 and 2 on Section 13 in the Town of Lautoka.
 - ii. that sublease/lease no. 28651 had been issued out of Lease No. 26318 in respect of Lot 1, Section 13.
 - iii. that the plaintiff (described as the '*First transferee*') had purchased sublease/lease 28651 on 18 April 1979.
 - iv. that the plaintiff had at its own cost constructed a substantial commercial building on Lot 1, Section 13, sublease/lease no. 28651.
- 8.7 Pursuant to the terms of the said Deed, Rajendra Prasad agreed to transfer Lease No. 26318 to the defendant [described as the '*second transferee*'] and the defendant as the second transferee agreed and covenanted to transfer Lease No. 26318 to the plaintiff.
- 8.8 The integral terms and conditions of the Deed *inter alia* were:
- i. The defendant agreed and undertook to execute and do all things necessary including to surrender Lease No. 26318 to the Director of Lands to facilitate the issue of a direct and separate new lease for Lot 1 to the plaintiff.

- ii. The defendant agreed and undertook that in the event of sublease 28651 expiring before the issuance of a direct and separate new lease for Lot 1 to the plaintiff, the defendant having obtained an extension or renewal of Lease No. 23618[sic] for Lots 1 and 2, then the defendant will grant a fresh sub-lease for Lot 1 Section 13 to the plaintiff for a period of the extended or renewed lease pursuant to the terms and conditions contained in Clause 2 of the Deed.
- 8.9 In pursuance of the said Deed, Rajendra Prasad executed a transfer of Lease No. 26318 in favour of the defendant on 30 June 1980, which transfer was registered on 19 September 1980 with the Registrar of Titles office.
- 8.10 In further pursuance of the said Deed, the defendant on or about 2 August 2016 obtained a new lease from the Director of Lands in respect of Lots 1 and 2, Section 13, legally described a State Lease No. 831649.
- 8.11 The plaintiff relying on the agreement and covenants of the defendant continued to carry out improvements to its commercial building and the property described as sublease/lease No. 28651 to the extent that the plaintiff has expended time, resources and monies to prepare new development plan for the property comprised in Lot 1 Section 13.
- 8.12 The defendant in breach of the Deed has failed to grant a sub-lease to the plaintiff for Lot 1 Section 13 which is now subject of a new State Lease.
- 8.13 On 13 February 2018, the plaintiff through its solicitors issued and served on the defendant a notice to complete requiring the defendant to complete its contractual obligations under the Deed, in particular to comply with clause 2 of the Deed.
- 8.14 On or about 27 February 2018, a further notice to complete was served at the defendants solicitors Young & Associates, however no response has been received by the defendant[sic] to date.
- 8.15 By reason of the said breach or breaches of the Deed, the plaintiff has sustained loss and damage, which is continuing.

Particulars

- i. *In pursuance of the Deed, the plaintiff has continued to invest and carry out improvements on the property described at Lot 1 on Section 13 now subject of Lease No.831649, which building is currently valued at approximately \$3.5 million.*
- ii. *That it has invested its time, monies and resources in constructing plans for the further development of the commercial building that was to commence once the defendant would have executed a fresh sublease over Lot 1, Section 13.*
- iii. *The plaintiff has incurred and will be required to further incur legal and ancillary expenses to enforce the said Deed against the defendant.*

8.16 The plaintiff is ready and willing to acquire a fresh lease over Lot 1 Section 13 and fulfil its contractual obligations under the Deed.

8.17 The plaintiff has expended and invested its own monies to construct a multi-level commercial building and it risks losing its investment if the defendant fails to complete its obligations under the Deed.

Agreed facts

[09] The following facts were agreed between the parties at the pre-trial conference

Parte A

- 9.1 The plaintiff is a limited liability company and operates under the name and style of 'Super Foods Supermarket' in Fiji.
- 9.2 The defendant was the registered lessee and proprietor of a property legally described as Crown Lease/Lease No. 26318, being 'allotments 1 & 2', Section 13 and having an area of 1 rood, 17.7 perches which is situated in Lautoka City Centre [*"the Property"*].
- 9.3 The defendant acquired Crown Lease No. 26318 from Rajendra Prasad on or about 19 September 1980.

- 9.4 The Lease No. 26318 had been issued by the Director of Lands on or about 23 October 1941 for a term of 75 years.
- 9.5 Lease No. 26318 was acquired by Rajendra Prasad on or about 24 March 1972.
- 9.6 On or about 4 November 1942, a separate lease was issued in respect of 'allotment 1', legally described as Lease No. 28651 having an area of 26.7 perches, being part of Lease No. 26318 to one Mohammed Tawahir Khan.
- 9.7 On 30 June 1980, the plaintiff, the defendant and one Rajendra Prasad (*described as the "Owner"*), entered into a Deed whereby the Defendant agreed to transfer the said property to the plaintiff together with all improvements thereon [*"The Deed"*].
- 9.8 Under the Deed, the defendant and one Rajendra Prasad acknowledged the following matters:
- (i) that Lease No. 26318 comprised of Lots 1 and 2 on Section 13 in the Town of Lautoka.
 - (ii) that sublease/lease No. 28651 had been issued out of Lease No. 26318 in respect of Lot 1, Section 13 for a period of 72 years from 1 July 1943.
 - (iii) that the plaintiff (described as the '*First transferee*') had purchased sublease/lease 28651 on 18 April 1979.
- 9.9 That Rajendra Prasad executed a Transfer of Lease No. 26318 in favour of the defendant on 30 June 1980, which transfer was registered on 19 September 1980, with the Registrar of Titles office.
- 9.10 The defendant on or about 2 August 2016, obtained a new lease from the Director of Lands in respect of Lots 1 and 2, Section 13, legally described as State Lease No. 831649.

9.11 Lease 831649 is a protected lease.

The evidence

Plaintiff's evidence

[10] The plaintiff called two witnesses namely the Company Director, Ashneel Sandeep Chand (*PW1*) and a Valuer, Radhikesh Prasad (*PW2*).

[11] The following bundle of documents was admitted into evidence:

1. Common Bundle of Documents (Exhibit 1)
2. Plaintiff's Bundle of Documents Volume 1 (Exhibit 2)
3. Plaintiff's Bundle of Documents Volume 2 (Exhibit 3)
4. Plaintiff's Bundle of Documents Volume 3 (Exhibit 4)

[12] *PW1*'s evidence was that:

- a) Rajendra Prasad had majority interest in Rajend Investments Limited.
- b) The plaintiff company and defendant company gained momentum around 1992 and held substantial property investments around Lautoka, Nadi and Sigatoka including Lease No. 26318.
- c) The plaintiff's business is operated out of Lot 1 at the corner of Tukani and Yasawa Street. Lot 1 has a double story building. The ground floor has a supermarket and level 1 has office space which is partially occupied by plaintiff and another sister company Ramesh Investment Ltd. Third floor has facilities such as generator and freezer equipment.
- d) As far as he knows, when the plaintiff company was incorporated around 1978, the building was constructed on Lot 1 and completed in 1980 and the supermarket business was run by Rajendra Prasad Bros Properties Ltd. Both the companies had the same directors and the supermarket business was run by the plaintiff company.
- e) Lot 2 on Section 13 was occupied and used by defendant company.

- f) He became a Director of plaintiff company around 2017. BSP had a mortgage over Lot 1 Section 13 and the sublease No. 28651 was expiring. BSP wanted to register their mortgage over a fresh lease affecting Lot 1.
- g) Young & Associates were acting for BSP and the firm was instructed to liaise with Director of Lands to obtain a fresh lease.
- h) At that time, he was unaware of the Deed dated 30 June 1980. He said that as far as Lot 1 Section 13 was concerned that sublease was under the name of the plaintiff company and what was required to be done was either apply for extension of the terms of lease or obtain fresh lease over Lot 1.
- i) Around 2017 to 2018, when he visited Young & Associates, he was shown a transfer relating to Lot 1 which recorded that the transfer was pursuant to a Deed dated 30 June 1980. He stated that Ms Virisila, a lawyer with Young & Associates helped him locate a copy of the Deed.
- j) He saw a copy of the Deed dated 30 June 1980, in 2018. He stated:
- “Young & Associates had a city agent from Suva. They got a copy of the lease and that’s when I saw the page of the Deed but it wasn’t a complete deed so I physically came to Suva the very next day... this was probably around February 2018..... so I came down to Suva and I went to the Titles office and showed them the copy of the Deed dated 30/6/80... from there I retrieved a full set of the Deed.”*
- k) He said prior to the discovery of the Deed, the defendant company had taken steps to apply for renewal of sublease no. 28651. They had liaised with the Director of Lands for renewal by writing letters and calling them (Tabs 2, 3A, of Plaintiff’s Bundle of Documents Vol 1, Ex 2).
- l) On or about 22 April 2016, Ministry of Lands informed plaintiff in writing that the ‘renewal of lease’ had been approved.

- m) Young & Associates also on behalf of BSP wrote to Lands Department following up on the renewal of lease (Tab 5 Plaintiff's Bundle of Documents, Vol 1, Ex 2).
- n) Then Rajendra Prasad wrote a letter seeking a renewal of sublease No. 28651 and directing the Lands Department to issue it to the plaintiff company. (Refer letter dated 14 July 2015, Exhibit P5).
- o) The Lands Department subsequently informed that a new lease was issued to defendant company. He further said:

On the same day I contacted my father, Mr Ramesh Chand and we went to Mr Rajendra Prasad's Office which is at Lot 2, on this Section 13, we met him at his administration office and he was with his administration team doing work. My father asked him why has the new lease renewed to Rajend Investments. Are you aware of it? To that Mr Rajendra Prasad said he was currently occupied and busy as he was under audit from FRCS and needed time to deal with them first and later once his finished he will contact us to sort out the lease matter. My father asked him who does the property at Lot 1 and who is owner at Lot 1? Mr Rajendra Prasad said that property belongs to you and your company Rajendra Prasad Bros. Property Ltd. So at that point in time that information was suffice for my father and me and we came out of the office and he said Ashniel give his brother my brother sometime to sort out what he's doing he will come back to us. So I waited. This meeting happened somewhere around as soon as we found from Lands Department that new lease was being issued to Rajend Investment. So I waited and after some time I had gone and he is still contacting us regarding the transfer of this allotment one. So this time we requested Mr Pratap Chand who was the initial shareholder in this plaintiff company.

Who was Pratap Chand to Rajendra Prasad?

They are first cousins. So Mr Pratap Chand, Mr Deo Chand by now he's passed away so Mr Pratap Chand was left so Mr Pratap Chand and Mr Ramesh Chand my father both went to meet with Mr Rajendra Prasad at his office on and about early February to discuss his intentions regarding the transfer of allotment one to our plaintiff company."

- p) Thereafter, he learnt that the defendant had applied for and had been issued an entirely new lease (No. 831649) over both Lot 1 and Lot 2 on section 13 (*Tab 7, Plaintiff's bundle of documents, Vol 2, Ex 3*).
- q) Then his father and he approached Rajendra Prasad to transfer Lot 1 to the plaintiff company but he refused. He stated as follows:

"When Mr Pratap asked Mr Rajendra Prasad what is this and what is your intention. What do you want to do regarding this lease? And Mr Rajendra Prasad said that Director of Lands had already issued the new lease to my company.

Mr Prasad told us to seek that he would not be transferring ownership for Lot 1 to the plaintiff company and for us to go and see our lawyer.

After my father and Mr Pratap Chand finished at Mr Rajend Prasad's office straight after that they informed me this what happened. If I may add, these are the parties they are brothers so and every time they would talk about things and here again Mr Pratap Chand and my father tried to discuss and sort this matter out with Mr Rajendra Prasad within the family.

Yes round about the 13th or 14th February 2018, Neel Shivam wrote to the defendant company asking them to give them time to 14 days to complete the terms of the deed dated 3/6/80."

[13] Under cross examination, PW1 stated:

- a) He did not know what kind of improvement his father did to the property from April 1973. He had only seen the completion certificate. However, he admitted that he had no personal knowledge of it.
- b) He had been carrying out repairs including tiling and maintenance work to the building.
- c) He said 'yes' to the question that you are treating it as if you were the owner of that particular building.
- d) He said 'yes' to the question that it was actually the Minister of Lands who issued the lease to the defendant company. Later he said this lease was issued by the Director of Lands.

[14] PW2 was a Property Valuer. He was taken through his valuation report ('PE4' which is exhibit 4). He said the market value of the property according to his valuation was \$3,000,025.00.

[15] Under cross examination, PW2 states:

- a) He admitted that the remaining years on a lease has an effect on the market price.
- b) He did not cite a document to see how many years was left on this particular lease.
- c) He said in September 2019 when he was commissioned by Rajendra Prasad Brothers Property Limited the plaintiff was not the current lessee of lease No. 28651.
- d) It was his opinion that the value of the property depends on how much of the term was left.
- e) He did not directly note on date of the building and the amount. He only relied on the correctness of that particular summation.
- f) While admitting that he could not verify the correctness of the summation, said: *'whatever verbal discussion we've had I was aware of the building being built and the construction costs and we have similar buildings in Nadi that we are aware of the costs.'*
- g) He looked at the Nadi costs of similar buildings, 3 or 4, but he did not look at any for Lautoka.
- h) He admitted that it is bad practice not to set out the particulars of how he came to the conclusion of those 3 different summations.
- i) He agreed that he did not know any particulars to base that summation method-\$3,090,000.00.
- j) He did not have rental evidence to base his income approach conclusion of \$3,027,000.00.

Legal principles on specific performance

[16] The Fiji Court of Appeal in *Reddy v Devi* [2017] FJCA 25; ABU0026.2013 (23 February 2017) set out the applicable legal principles entitling a party for specific performance as follows [at 19]:

“Applicable Legal Principles entitling a Party for Specific Performance

[19] The following applicable principles or criteria may be discerned from the authorities.

(i) A purchaser (such as the Appellant in the instant case) cannot, on the vendor’s breach, obtain a satisfactory substitute, so that **specific performance** is available to him. (Vide: Fry, Specific Performance, paragraph 62). The 1st Respondent as the vendor could have repudiated the agreement only on the basis of Clause 12 of the Agreement. Consequently, the 1st Respondent was in breach of the Agreement when he refused to perform the bargain or dealing when the Appellant had been in the process of cultivating the farm for sugar cane, being his side of the bargain.

(ii) In those circumstances, damages could not have been a satisfactory substitute for **specific performance**.

(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.

(iv) Other grounds, on which **Specific Performance** might be refused are:-

Unfair Means

(a) Where a contract has been obtained by unfair means springing an element of surprise by the purchaser on the vendor: (Walters v. Morgan (1861) 3 D. f. & j. 7/8 cf: Quadrant Visual Communications Ltd. V. Hutchison Telephone (UK) Ltd [1993] B.C.L.C.442 and Contra: Mount Fond V. Scott [1975] Ch 258.

Lack of or inadequacy of Consideration

(b) Where there has been a lack of consideration in that where only a gratuitous promise had been involved (Vide: Jeffreys v. Jeffreys [1841] Cr & Ph. 138) or where there has been an inadequacy of consideration that shocks the conscience amounting to conclusive and decisive evidence of fraud (Vide: Coles v. Trecothick [1804] EngR 88; [1804] 9 Ves 234.

Unmeritorious Conduct

(c) *Unmeritorious conduct on the part of a claimant for specific performance is another ground on which specific performance might be refused. (vide: Gregory v Wilson [1851] 9 Hare 683).*

Impossibility

(d) *Specific performance will not be ordered against a person who has agreed to sell land which he does not own because “the court does not compel a person to do what is impossible” (Vide: Forrer. Nash [1856] 35 Beau 165,171.*

Vagueness

(e) *An agreement may be couched in vague terms that it cannot be enforced specifically. (Vide: Waring & Gillow v. Thompson [1912] 29T.L.R. 154 and Tito v. Waddell (No.2) [1977] Ch. 106 at 322-328.*

Unilateral Mistake, Misrepresentation and Delay

(f) *These are the other grounds on which an order for specific performance may be refused. (See: Chitty on Contracts, Vol 1 29th ED. (2004) P 1504.”*

Discussion

[17] As I said, the plaintiff brings this action seeking specific performance of the Deed executed in June 1980 or alternatively damages for breach of the same.

[18] I intend to deal with the question of specific performance.

[19] The issue then arises whether the plaintiff is entitled to specific performance of the Deed.

Whether the plaintiff is entitled to specific performance

[20] The defendant has admitted to the execution and existence of the Deed dated 30 June 1980. The Deed acknowledges and recognizes in its recital that:

“Whereas:

(i) Lease 26318 comprises of Lots 1 and 2 on Section 13 Town of Lautoka.

(ii) Lease 26318 is for a period of 75 years from 1 July 1940.

(iii) Sublease 28651 has been issued out of Lease 26318 in respect of Lot 1 Section 13 for a period of 72 years from the 1st day of January 1943.

(iv) The owner (Rajendra Prasad) purchased Lease 26318 on the 24th March 1972, and the first transferee (Rajendra Prasad Bros Properties Limited) purchased sublease 28651 on the 18th day of April 1979.

(v) The first Transferee (Rajendra Prasad Bros Properties Limited) has at its own cost constructed substantial commercial building on Lot 1 Section 13 sublease 28651.

(vi) The owner (Rajendra Prasad) has agreed to transfer Lease 26318 to the second transferee (Rajend Investments Limited) and the second transferee has agreed to accept that transfer upon, inter alia, the terms and conditions herein provided."

[21] The relevant terms of the Deed agreed between the parties are as follows:

"NOW THEREFORE THIS AGREEMENT witnesseth:

1. THE second transferee [Rajend Investment Limited, the defendant] hereby agrees and undertakes to execute and do all things necessary including to surrender Lease 26318 to the Director of Lands to facilitate issue of direct and a separate new lease for Lot 1 to the first transferee [Rajendra Prasad Bros. Properties Limited, the plaintiff].
2. THE second transferee hereby agrees and undertakes that in the event of Sublease 28651 expiring before the issue of a direct and a separate new lease for Lot 1 to first transferee as aforesaid and the second transferee obtaining an extension or renewal of Lease 23618 for Lots 1 and 2 then the second transferee shall grant a fresh sublease for Lot 1 Section 13 to the first transferee for a period of the extended or renewed less one month and upon other like terms and conditions as are contained in that extended or renewed

lease except rental which shall be apportioned between Lots 1 and 2 equally or in such other proportion as the parties may agree between them.

3. IN this agreement reference to the first transferee and the second transferee shall include their respective successors in title.

4. THE first transferee shall pay all costs and disbursements (including second transferee's solicitors costs) or either obtaining a direct and separate new Lease under Clause 1 or a new Sublease under 2 hereof."

[22] The Deed had been consented to by the Director of Lands on 22 July 1980. It had also been stamped.

[23] It has been the position of the defendant that the plaintiff is not entitled to specific performance as it is guilty of laches; the performance of the Deed is now rendered impossible and thereby frustrated, its conduct has waived the requirement of clause 2 of the Deed and it was required to seek consent of the Director of Lands in respect of Notices to Complete dated 13 February 2018 and 27 February 2018 issued by it.

[24] In order to protect its interest in Lot 1 Section 13, the plaintiff had registered a caveat No. 861602 on Lease No. 831649 (*Tab 14, Volume 1, Plaintiff Exhibit 1*).

[25] On 31 July 2018, the Director of Lands had, under section 13 of the State Lands Act, granted consent to the plaintiff to institute these proceedings against the defendant (*Tab 17, Volume 1, Plaintiff's Exhibit 1*).

[26] It is significant to note that the Deed acknowledges and recognises that: the plaintiff company has at its own cost constructed substantial commercial building on Lot 1 Section 13 sublease 28651. It translates that the plaintiff company had substantially contributed in terms of money in building the commercial building which is on Lot 1 Section 13 sublease 28651.

[27] On the evidence, I find the Deed had been executed in recognition of the plaintiff company's contribution to the building. Thus, it had been executed for valuable consideration not for a gratuitous promise.

- [28] The plaintiff company has been on the property in dispute and operating its business since 1979, prior to the execution of the Deed.
- [29] On 14 July 2015, realising its obligation under the Deed, the defendant wrote a letter to the Director of Lands requesting that separate subleases for Lots 1 and 2 on Section 13. Despite this request, the Director of Lands had issued a new State Lease covering both Lot 1 and Lot 2 on Section 13 in favour of the defendant (*State Lease No. 831649, see: Tab 7, PBD, Vol 2, Ex3*). Apparently, the Director of Lands had overlooked the defendant's request for two separate leases for Lots 1 and 2 on Section 13.
- [30] I would reject the defendant's submission that the letter dated 14 July 2015 written to the Director of Lands by the defendant relieved the defendant from its obligation under the Deed. The writing of a letter to the Director of Lands by the defendant requesting to issue separate subleases for Lot 1 and Lot 2 on Section 13 is not sufficient to fulfil its obligation under the Deed. Something more is required to fulfil that obligation.
- [31] Clause 1 of the Deed states: '*THE second transferee [Rajend Investments Limited, the defendant] hereby agrees and undertakes to execute and do all things necessary including to surrender Lease 26318 to the Director of Lands to facilitate issue of direct and a separate new lease for Lot 1 to the first transferee [Rajendra Prasad Bros. Properties Limited, the plaintiff]*'. This means the defendant must execute all things necessary including the surrender of Lease No. 26318 to the Director of Lands to facilitate issue of direct and a separate new lease for Lot 1 to the plaintiff.
- [32] Initially, Lease 26318 comprised Lots 1 and 2 on Section 13, Town of Lautoka and it (Lease 26318) was for a period of 75 years from 1 July 1940. The Sublease 28651 has been issued out of Lease 26318 in respect of Lot 1 Section 13 for a period of 72 years from 1 January 1943.
- [33] The head lease No. 26318 has now expired. As a result, the defendant has been issued a renewed lease No. 831649 over both Lot 1 and Lot 2.
- [34] It is common ground that the defendant applied for renewal of Lease No. 26318 and obtained a fresh lease over both the Lot 1 and Lot 2 in August 2016.

- [35] Even after obtaining a fresh lease (831639), the defendant's obligation under the Deed continues. Clause 2 of the Deed provides: *'THE second transferee hereby agrees and undertakes that in the event of Sublease 28651 expiring before the issue of a direct and a separate new lease for Lot 1 to first transferee as aforesaid and the second transferee obtaining an extension or renewal of Lease 23618 for Lots 1 and 2 then the second transferee shall grant a fresh Sublease for Lot 1 Section 13 to the first transferee...'*
- [36] Essentially, what the defendant, under clause 2 of the Deed, is obliged to do is that in the event of Sublease No. 28651 expiring before the issue of a direct and a separate new lease for Lot 1 to the plaintiff and the defendant obtaining an extension or renewal of Lease No. 23618 for Lots 1 and 2 then the defendant shall grant a fresh sublease for Lot 1 on Section 13 to the plaintiff.
- [37] The defendant has obtained in its favour a new State Lease by way of extension or renewal of Lease No. 23618 for Lot 1 and Lot 2 on Section 13. In that case, clause 2 of the Deed is triggered. It is that the defendant has to grant a fresh sublease for Lot 1 on Section 13 to the plaintiff because Sublease No. 28651 expired before the issue of a direct and a separate new lease for Lot 1 to the plaintiff and the defendant had obtained an extension or renewal of Lease No. 23618 for Lots 1 and 2.
- [38] On 13 February 2018, the plaintiff through its solicitors issued and served on the defendant a notice to complete requiring the defendant of complete its contractual obligations under clause 2 of the Deed. Thereafter, on 27 February 2018, the plaintiff served a further notice to complete at the defendant's solicitors Young & Associates. The defendant did not respond to these notices except for the plaintiff's solicitors asking for a copy of the Deed.
- [39] Mr Young on behalf of the defendant submits that these notices to complete had been issued without the consent of the Director of Lands. I would reject this submission as untenable. No consent of the Director of Lands would be required to the notice to complete an obligation of the Deed, which was consented to by the Director of Lands. Further, issuing a notice to complete an obligation under an agreement would not amount to dealing. Consent will be required only for 'sale', 'transfers' and 'sublease' (see: *Grant Robert Graham & Anr of Bank of South*

Pacific Ltd v Inspired Destination (Inc.) Ltd, Civil Appeal No.123 and 126 of 2018 (consolidated) (29 November 2019)).

[40] On the evidence, I find that the defendant has failed to comply with clause 2 of the Deed and breached the Deed thereby.

[41] The property is still available for specific performance of the Deed. The defendant has obtained the renewed lease in its favour. Therefore, it can grant a new sublease for Lot 1 on Section 13 to fulfil its obligation under Clause 2 of the Deed. The question of impossibility of specific performance or frustration does not arise.

[42] Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at p.700, indicating the nature of frustration:

“Frustration of a contract takes place when there supervenes an event ‘without fault of either party and for which the contract makes no sufficient provision’ which so significantly changes the nature (not mere expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the declares both parties to be discharged from further performance.”

[43] In this case supervening event did not take place making the performance of the Deed impossible. Since the defendant has obtained the renewed lease for Lot 1 and Lot 2, he could still grant a sublease over Lot 1 to the plaintiff in terms of the Deed.

[44] There has been no evidence before the court that severe hardship would be caused to the defendant by the granting of an order for specific performance.

[45] The Deed was admitted by the defendant. Thus, the question of unfair means (that it was obtained by unfair means springing an element of surprise by the plaintiff on the defendant), unilateral mistake or misrepresentation does not arise.

[46] The Deed is couched in clear and unambiguous terms that it can be enforced specifically.

[47] The plaintiff has been in occupation of Lot 1 on Section 13. The plaintiff came into occupation of the property even before the execution of the Deed doing its business therefrom. The plaintiff has expended and invested its own monies to construct a multi-level commercial building. The Deed itself acknowledges and recognizes that the plaintiff has at its own cost constructed substantial commercial building on Lot 1 Section 13 Sublease No. 28651. The plaintiff is ready and willing to acquire a fresh lease over Lot 1 on Section 13 and fulfil its obligations under the Deed. In my opinion, the property is a unique property to the plaintiff. In those circumstances, damages would not be a satisfactory substitute for specific performance.

[48] For one reason or the other, the defendant did not raise the issue of limitation as a defence. Instead, they have raised the issue of laches or undue delay as a defence for not granting of specific performance. Time was not essence in terms of the Deed. The Deed does not prescribe any time period within which each party is to fulfil their obligation. The defendant has renewed and acknowledged its obligation under the Deed by writing a letter dated 14 July 2015 to the Director of Lands requesting to issue separate subleases for Lot 1 and Lot 2 on Section 13. Moreover, PW1 (new director of the plaintiff) had become aware of the Deed and got a copy of it in 2018 when he visited Young & Associates. Until then he was under the impression that the sublease over Lot 1 Section 13 was under the name of the plaintiff and on that basis he thought he had to either apply for extension of the term of lease or obtain a fresh lease over Lot 1.

[49] The plaintiff's application to the Director of Lands for extension or for a fresh lease for Lot 1 would, in my opinion, not amount to waiver of its right under clause 2 of the Deed.

Conclusion

[50] For the reasons I have set out above, I conclude that the defendant had breached the agreement by failing to perform its obligation under clause 2 of the Deed. The property in dispute is still available for performance. The plaintiff is ready and willing to perform its obligation under the Deed. The property has been unique for the plaintiff given the fact that the plaintiff is in occupation and operating its business on the property from even before the execution of the Deed in 1980. In

those circumstances, damages would not be a satisfactory substitute for specific performance. As a matter of law land is unique, so that specific performance is available upon breach of a contract for sale or transfer of land. I would grant an order against the defendant for specific performance of the Deed. Accordingly, the defendant must do all things necessary to perform clause 2 of the Deed dated 30 June 1980 within 2 months.

- [51] Since I have concluded that damages would not be satisfactory substitute for specific performance, the claim for general damages for breach of the Deed has become redundant.

Hearsay evidence

- [52] Mr Young on behalf of the defendant submits that the hearsay evidence of PW1 that: *'Mr Prasad told us to seek that he would not be transferring ownership for Lot 1 to the Plaintiff Company and for us to go and see our lawyer.'* He contends that it is hearsay evidence for the plaintiff because it was only *'Mr Pratap Chand and Mr Ramesh Chand my father who went to meet with Mr Rajendra Prasad...'*

- [53] The Supreme Court of Fiji in *Mobil Oil (Australia) Limited v Laisa Digitaki*, Supreme Court Appeal No.8 (12.10.2010) observed [at para 33] that:

"33. Thus, even if the notice provisions of Section 4 are not complied with, the evidence is still admissible; however, the "considerations relevant to weighing of hearsay evidence" as outlined in Section 6 then apply..."

- [54] The hearsay evidence complained of appears to be the original statement that was made contemporaneously to PW1 by his father with the occurrence or existence of the matters stated and it does not involve multiple hearsay. The evidence is still admissible. However, the court will apply section 6 of the Civil Evidence Act when weighing of hearsay evidence.

- [55] The plaintiff's claim does not suspend on this hearsay evidence. Its claim is based on the Deed, which the defendant admitted. Indeed, in this case I need not consider whether or not to give weight to this piece of evidence because even if I disregard it I would have arrived at the same conclusion.

Counterclaim

[56] The defendant did not present any evidence, oral or documentary, in support of its counterclaim against the plaintiff. I would therefore dismiss the counterclaim.

Costs

[57] As a successful party, the plaintiff is entitled to the costs of these proceedings. I intend to assess the costs summarily. I consider all and assess the costs to be \$2,500.00, which would be fair and reasonable in the circumstances of the case.

The result

1. There shall be an order against the defendant for specific performance of the Deed dated 30 June 1980.
2. The defendant shall do all things necessary to perform clause 2 of the Deed dated 30 June 1980 within 2 months from the date of this judgment.
3. The defendant shall pay the plaintiff the summarily assessed costs of \$2,500.00 within 2 months from the date of this judgment.
4. The defendant's counterclaim is dismissed.



M. H. Mohamed Ajmeer
25/5/20

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

25 May 2020

Solicitors:

Neel Shivam Lawyers, Barristers & Solicitors for the plaintiff

Young & Associates, Solicitors for the defendant