

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

CIVIL ACTION NO. HBC 188 OF 2018

BETWEEN : **LALINI RANJANA DEVI SHARMA** of Navo, Nadi, Accountant.

PLAINTIFF

AND : **SHASHI PREM LATA PRASAD** of Navo, Nadi, Domestic Duties as the Administratrix of the **Estate of Rajesh Kumar** late of Navo, Nadi, Mechanic, Deceased.

FIRST DEFENDANT

AND : **THE DIRECTOR OF LANDS** of Suva, Fiji.

SECOND DEFENDANT (NOMINAL)

Appearances : Mr R. Charan for the plaintiff
Mr E. Maopa for the defendant

Date of Trial : 21 February 2020

Date of Judgment : 22 June 2020

J U D G M E N T

Introduction

[01] The plaintiff brings this action seeking orders, among other things against the first defendant for specific performance of the sale and purchase agreement dated 4 May 2018.

Parties

- [02] The plaintiff is the purchaser in the Sale and Purchase agreement ("*agreement*") dated 4 May 2018.
- [03] The first defendant is the registered proprietor of Crown Lease No. 14136 and the vendor in the agreement.

The facts

- [04] The following are the brief facts of the case (according to the statement of claim):
- 4.1 The plaintiff and the defendant had entered into a Sale and Purchase Agreement dated 4 May 2018 for all the piece of property on Crown Lease No. 14136 (LD 4/10/4025) being land known as part of Navo & Nacaqara, Lot 5 on SO 4008, in the Province of Ba in the District of Nadi and having an area of approximately 1017 square meters ("*Property*").
 - 4.2 The first defendant was facing difficulty to keep up with the loan repayment and agreed to sell the property to the plaintiff.
 - 4.3 The consideration sum as per the agreement for the sale of the property was \$70,000.00.
 - 4.4 The first defendant while in the process of selling the property fell behind in the loan repayment of the property. The loan repayment per month was \$516.00.
 - 4.5 The first defendant had requested the plaintiff to pay the arrears and loan repayment and the said sum to be deducted from the sale price on the date of settlement.
 - 4.6 The plaintiff to-date has paid loan repayments of \$2,760.00 into Westpac Banking Corporation loan account number 9803306928.
 - 4.7 The plaintiff was granted possession by the first defendant after the plaintiff agreed to carry on the loan repayments and the plaintiff since then has spent approximately \$40,000.00 in renovating the property.

- 4.8 The agreement was lodged for the consent of the second defendant, however, the second defendant informed the first defendant that since she is administratrix of the estate of Rajesh Kumar and there are other beneficiaries to the property the first defendant needs to obtain their consent to the sale of the property.
- 4.9 The beneficiaries of the estate of Rajesh Kumar are:
- a) Shweta Shital Lata;
 - b) Shivangni Lata; and
 - c) Rojesh Kumar
- 4.10 The beneficiaries are minors thus the first defendant was advised to obtain an Order by the High Court of Fiji for the sale of the property.
- 4.11 The first defendant in the month of July 2018, approached the plaintiff to pay her \$5,000.00 in-order for the first defendant to make necessary application to the High Court of Fiji for the sale of the property.
- 4.12 The plaintiff upon the request of the first defendant paid out \$5,000.00 to the first defendant and the plaintiff and the first defendant agreed that the said sum to be deducted from sale price on the date of settlement.
- 4.13 The first defendant then filed an application in Lautoka High Court on 24 July 2018, being case number miscellaneous Action No. 22 of 2018, for sale of the property.
- 4.14 The plaintiff has been informed by the first defendant that she has withdrawn her application in Lautoka High Court regarding sale of property and has found a new buyer for \$100,000.00.
- 4.15 The plaintiff alleges that: the first defendant refused to obtain order for sale of the property in order to proceed with the agreement by withdrawing her application in Lautoka High Court. The first defendant informed the plaintiff that she will sell the property to a third party for

\$100,000.00. The first defendant is unjustly enriching herself by trying to sell the property to a third party after property was renovated and the loan repayments made by the plaintiff in order to avoid mortgagee sale of the property. The first defendant has caused loss to the plaintiff by accepting part of the consideration sum and loan repayment and not taking steps to transfer the property to the plaintiff.

- 4.16 The first defendant has informed Westpac Banking Corporation not to accept loan repayment from the plaintiff and the property is at risk for mortgagee sale should the first defendant fail to pay the loan repayment on time.
- 4.17 It is in the light of the above facts the plaintiff seeks specific performance of the agreement.

The agreed facts

[05] At the pre-trial conference (“PTC”), the parties agreed to the following facts:

- 5.1 The plaintiff and the first defendant had entered into a Sale and Purchase Agreement (“Agreement”) dated 4 May 2018, for all pieces of property on Crown Lease No: 14136 (LD 4/10/4025) being land known as Part of Navo and Nacaqara, Lot 5 on SO 4008, in the Province of Ba in the District of Nadi and having an area of approximately 1017 square meters (“Property”).
- 5.2 The first defendant is the registered proprietor of the property.
- 5.3 The consideration sum for the sale of the property as per the agreement was \$70,000.00.
- 5.4 The plaintiff has paid a sum of \$2,760.00 to Westpac banking Corporation as loan repayment for loan account number 9803306928.
- 5.5 The plaintiff with consent of the first defendant has taken possession of the property.

- 5.6 The plaintiff had carried out \$40,000.00 (Forty Thousand Dollars) worth of renovation works on the property.
- 5.7 The property formed part of the estate of Rajesh Kumar to which the following persons are also beneficiaries:
- a) Shweta Shital Lata;
 - b) Shivangni Lata; and
 - c) Rojesh Kumar
- 5.8 The plaintiff, in the month of July 2018, had paid a sum of \$5,000.00 to the first defendant.
- 5.9 On 24 July 2018, the first defendant had filed an application at the High Court in Lautoka being miscellaneous action No. 22 of 2018 (“*Action*”) seeking an order for sale of the property.
- 5.10 The first defendant later withdrew the action.
- 5.11 The plaintiff paid off the ground rental arrears owed by the first defendant to Westpac Banking Corporation.
- 5.12 The first defendant had notified Westpac Banking Corporation not to accept loan repayment from the plaintiff.
- 5.13 The tenant on the property had been evicted.
- 5.14 The first defendant has refused to proceed with the Sale and purchase Agreement.

The principles on specific performance

- [06] An order for specific performance requires the performance of the obligation of a party to a contract. It is an equitable remedy and is not available as of right. An order for specific performance is an equitable remedy awarded at the court’s discretion where a legal remedy would be inadequate.

- [07] Specific performance is asked for most often in claims for enforcement of agreements relating to land.
- [08] The claimant must show that he is ready, willing and able to perform his part of the obligation under the contract.
- [09] In the ordinary run of cases where damages may be said to be an adequate remedy, specific performance will not be awarded. In many contracts for sale of goods, it is possible to purchase substitute goods in the market, and therefore damages, to cover the costs of obtaining substitute performance, will be adequate remedy (see: *Societe de Industries Matallurgiques SA v The Bronx Engineering Co. Ltd* [1975] 1Lloyd's Rep 465).

The issue

- [10] The principal issue at trial was whether the plaintiff is entitled to the specific performance of the sale and purchase agreement dated 4 May 2018.

The evidence

- [11] At trial, the plaintiff Lalini Ranjana Sharma (PW1) and the first defendant, Shashi Prem Lata Prasad (DW1) gave evidence in support of their respective case.
- [12] PW1 tendered in her evidence the following documents:
- 12.1 The copy of the executed Sale and Purchase Agreement dated 4 May 2018 ("PE-1").
 - 12.2 The original of the executed Sale and Purchase Agreement dated 4 May 2018 consented by Director of Lands ("PE-2").
 - 12.3 Copy of Crown Lease No. 14136 ("PE-3").
 - 12.4 Copies of Westpac Banking Corporation Deposit Slips ("PE-4").
 - 12.5 Copies of Lands Department receipts issued in the name of Plaintiff for ground rent arrears paid ("PE-5").
 - 12.6 Consent to institute proceedings letter dated 23 July 2019, from Ministry of Lands and Mineral Resources ("PE-6").

12.7 Consent Caveat Document by Director of Lands ("PE-7").

12.8 Letter dated 21 March 2018, by Westpac for arrears of loan repayment notice ("PE-8").

Plaintiff evidence

[13] PW1 in her evidence states:

- a) *The plaintiff approached to buy the first defendant's property, to which she agreed at the price of \$70,000.00.*
- b) *The first defendant wanted documents to be done by a common solicitor and the Sales and Purchase Agreement was done, the first defendant while in the process of selling the property fell behind in the loan repayment of the property. The loan repayment per month was \$516.00.*
- c) *The first defendant had requested the plaintiff to pay the arrears and loan repayment and the said sum to be deducted from the sale price on the date of settlement.*
- d) *She had paid \$2,760.00 loan repayments into Westpac Banking Corporation loan account number 9803306928.*
- e) *She was granted possession by Sashi after she (plaintiff) agreed to pay the loan repayments. She had spent approximately \$40,000.00 in renovating the property.*
- f) *The agreement was lodged for the consent of the DoL, however, the DoL informed Sashi that since she is the administratrix of the estate of Rajesh Kumar and there are other beneficiaries to the property she needs to obtain their consent to the sale of the property.*
- g) *The beneficiaries are minors. So, Sashi was advised to obtain an Order by the High Court of Fiji for the sale of the property.*

- h) In July 2018, Sashi approached her (plaintiff) to get \$5,000.00 to make an application to the High Court of Fiji for the sale of the property. She paid \$5,000.00 to Sashi on agreement that it will be deducted from the sale price.*
- i) Sashi filed an application in Lautoka High Court on 24 July 2018, HBM Action No. 22 of 2018 for sale of the property. Thereafter, Sashi told that she had withdrawn her application in Lautoka High Court regarding sale of property as she had found a new buyer for \$100,000.00.*
- j) She says that she is willing to purchase the property for \$70,000.00 and the sum paid towards mortgage repayment and deposit be deducted from the sale price.*

First defendant's evidence

[14] The first defendant (1DW1) testified that:

- a) She and her husband told Lalini to buy the property for \$100,000.00. Lalini said she will pay \$30,000.00 in cash and \$70,000.00 from bank loan. This arrangement was to avoid tax.*
- b) Lalini took her (1DW1) to the lawyers to sign the sale and purchase agreement. One agreement was signed in 2016 before Babu Singh & Associates and the other before Fazilat Shah on 4 May 2018.*
- c) Lalini threatened and abuse her (first defendant) for not selling the property to her.*

[15] Under cross examination 1DW1 states:

- a) She said she did not have any receipts to substantiate her claim for loss of rent due to the occupation of Lalini.*
- b) She wanted more money for the sale of the property and not \$70,000.00. She said 'yes' when it was put to her that the value to the property appreciated because Lalini did renovation.*

- c) She admitted that she was having difficulty paying mortgage repayment and Lalini assisted if not the property would have been repossessed by the bank.
- d) She agreed that she asked her brother to prepare the application to obtain court order for sale of the property as the beneficiaries were minors.
- e) She also agreed that she obtained \$5,000.00 from Lalini to pay the solicitors to file an application.
- f) She admitted that she refused to sign the transfer documents as she wanted more money for the sale of the property.

Discussions

[16] The plaintiff seeks specific performance of the sale and purchase agreement dated 4 May 2018 (“PEx2” or “the agreement”) whereby the first defendant agreed to transfer the subject property for the consideration sum of \$70,000.00 to the plaintiff. The relevant part of the agreement states:

“WHEREBY IT IS AGREED between the Vendor and the Purchaser as follow:-

1. ***THE** full purchase price of the said property shall be the sum of \$70,000.00 (Seventy Thousand Dollars).*
2. ***THE** purchaser shall upon the execution of these presents apply to the Westpac Banking Corporation, Namaka Branch for a loan for the full purchase sum of \$70,000.00 (Seventy Thousand Dollars).*
3. *The purchase price shall be paid to the Vendor on the date of settlement upon lodgement of the stamped Transfer for registration in favour of the Purchaser.*

4. *SETTLEMENT shall be effected at the Titles' office, Suva, the Purchaser paying the requisite Stamp Duty and the Vendor providing the appropriate Capital Gain Tax (CGT) exemption certificate or a receipt of payment for the same."*

- [17] The first defendant is the registered proprietor of Crown Lease No. 14136 and the vendor in the agreement.
- [18] It is an agreed fact that the consideration sum for the sale of the property was \$70,000.00. Since it is an agreed fact I reject the first defendant's oral evidence that the plaintiff and her husband told her (first defendant) that they would buy the property for \$100,000.00, and would pay \$30,000.00 in cash (to avoid tax) and \$70,000.00 from bank loan.
- [19] The date of settlement was 9 months after the execution of the agreement unless varied by mutual agreement in writing (see: cl. 7 of the agreement).
- [20] There is no complaint that the plaintiff had failed to settle within 9 months after the agreement was made.
- [21] It is common ground that the plaintiff paid the deposit of \$5,000.00 to the first defendant.
- [22] Thereafter, the plaintiff paid mortgage payment in the sum of \$2,760.00 to Westpac Bank and rental arrears from 2013 to the Lands Department in the sum of \$962.00.
- [23] In total, the plaintiff had paid \$8,722.00 inclusion of the deposit of \$5,000.00. I accept the plaintiff's evidence that that sum was paid towards the purchase price.
- [24] According to the agreement, the first defendant has to give possession of the property upon settlement, however, the first defendant gave possession of the property before the settlement. It appears to be a mutual agreement between the parties that the plaintiff take possession prior to the settlement.
- [25] It will be noted that by giving possession before the settlement date, the first defendant had confirmed the agreement with the plaintiff.

- [26] In order to complete the transfer, the first defendant was to sign the transfer document. Indeed, the transfer requires the consent of the Director of Lands (DoL) because it is a State Land. The first defendant refused to sign the transfer documents. This has resulted in the institution of the current action.
- [27] The DoL had, under section 13 of the State Lands Act, granted consent to the plaintiff to institute these proceedings against the first defendant.
- [28] The agreement (“PEx2”) had been consented to by the DoL on 18 December 2018 and it had been stamped.
- [29] It is submitted for the first defendant that the plaintiff cannot rely on the subsequent agreement (“PEX2) for the reason that there is no prior consent by the DoL to the dealing on the property hence contradicts section 13 of the State Lands Act.
- [30] I would reject the first defendant’s contention that the plaintiff cannot rely on the agreement executed by the first defendant because it has no consent of the DoL. I reject such argument because the agreement had been consented to by the DoL, although it was consented subsequent to the execution. A sale and purchase agreement is an arrangement between the parties. It does not transfer the property to another person. The consent under section 13 would be required when the property is actually transferred to another person through transfer documents.
- [31] In *Naicker v Karan* [2019] FJHC 969; HBC 196.2017 (4 October 2019), the High Court [I] said in paragraphs 35 and 36 that:

[35] Counsel for the first defendant attempted to demonstrate that the dealings between the parties with the State land was invalid as there was no consent of the Director of Lands.

[36] Section 13 issue does not arise here. The first defendant is not entitled to raise that issue after signing the transfer document with consent to transfer. The consent was never denied by the Director of Lands. The witness called by the second defendant (2DW1) told the Court that the consent was not refused but the

parties were requested to submit the correct application for consent to transfer with the transfer documents for further processing."

- [32] In the current case, the first defendant refused to sign the transfer documents demanding more money. As such, there is no evidence that the DoL refused to consent to the transfer of the property to the plaintiff.
- [33] It is an agreed fact that the plaintiff had carried out \$40,000.00 worth of renovation works on the property. It is also an agreed fact that the consideration sum for the sale of the property as per the agreement was \$70,000.00.
- [34] Obviously, the value of the property may have gone up because of the renovation works done by the plaintiff.
- [35] The first defendant gave evidence contradicting the written term of the agreement. She did not even call the solicitor who witnessed the agreement to support her case.
- [36] The plaintiff gave clear and straightforward evidence. Her evidence was supported by documents. I accept the plaintiff's evidence.
- [37] On the evidence, I find that the first defendant had failed to perform the agreement and breached it thereby.
- [38] The property is still available for specific performance. Specific performance is asked for enforcement of agreement relating to land. The plaintiff has shown that she is ready, willing and able to perform her part of obligation under the agreement.
- [39] The plaintiff has been in possession of the property. She had carried out significant renovation on the property. She had prevented mortgagee sale by settling the mortgage payment. It seems that the plaintiff consider this property to be unique. In the circumstances, I think damages would not be adequate remedy to the plaintiff.

Conclusion

[40] For the reasons given above, I conclude that the plaintiff is entitled to an order against the first defendant for specific performance of the agreement dated 4 May 2018. Accordingly, I grant an order for specific performance against the first defendant. This means that the first defendant shall do everything necessary to perform the sale and purchase agreement dated 4 May 2018, upon the plaintiff making payment of \$61, 278.00 (\$70,000.00 minus \$8,722.00= \$61,278.00), within 2 months of the date of this judgment.

Counterclaim

[41] The first defendant counterclaimed against the plaintiff in the sum of \$22,100.00, being loss of income (rental calculated at the rate of \$650.00 from November 2015 till August 2018). There is no evidence whatsoever in court that the plaintiff agreed to pay rent at the rate of \$650.00 a month for her occupation of the property. Therefore, counterclaim is bound to fail. I would accordingly dismiss the counterclaim.

Cost

[42] The plaintiff, as a successful party, is entitled to costs of these proceedings. I consider all and assess the costs at \$1,000.00.

Result

1. There shall be an order against the first defendant for the specific performance of the sale and purchase agreement dated 4 May 2018.
2. Within two (2) months of the date of this judgment, the first defendant shall do everything necessary to transfer the property in favour of the plaintiff upon the plaintiff making payment of \$61, 278.00.
3. The first defendant's counterclaim is dismissed.

4. The first defendant shall pay the summarily assessed costs of \$1,000.00 to the plaintiff.



Haj Mohamed
..... 22/6/20
M.H. Mohamed Ajmeer

JUDGE

At Lautoka
22 June 2020

Solicitors:

Ravneet Charan Lawyers for the plaintiff
Babu Singh & Associates for the first defendant