

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. 5 of 2014

BETWEEN : **WILLIAM THAGARD** of Lot 44, Kaunitoni Street, Waiyavi, Lautoka.

Plaintiff

AND : **HOUSING AUTHORITY** a body corporate duly constituted under the provisions of the Housing Act and having its Head Office at Valelevu, Suva

Defendant

Counsel : Victor Sharma of Vijay Naidu & Associates for the Plaintiff
: Ms. Christina Panikar for the Defendant
Date of Hearing : 07 July 2014
Date of Ruling : 07 February 2020

R U L I N G

INTRODUCTION

1. William Thaggard filed a Writ of Summons and Statement of Claim on 16 January 2014, together with an *inter-partes* Notice of Motion.
2. By that Notice of Motion, Thaggard was seeking various injunctive orders to stop the Housing Authority from charging or encumbering or transferring a piece of land over which he claims an interest.
3. The land in question is known as Lot 44, ND 4843. The said land is leased to Housing Authority ("**Authority**") from the *i*-Taukei Lands Trust Board (**i**-TLTB"). The Authority is in the business of sub-leasing such properties to tenants.
4. Erected on this land is a residential dwelling.
5. At the time Thaggard filed his writ of summons and statement of claim, he was already occupying Lot 44.

6. Thaggard also seeks an Order to restrain the Authority from interfering with his occupation of the land.
7. The Motion was fixed for hearing on 01 April 2014. However, there was no appearance by the plaintiff or his counsel on that occasion and I consequently struck out the motion and ordered \$500-00 costs in favour of the Authority and then gave directions to the Authority to file its statement of defence in 7 days and for Thaggard to reply in 14 days.
8. On 22 April 2014, Thaggard filed another application seeking to set aside the costs order and also to reinstate the Notice of Motion. On 25 June 2014, the said Notice of Motion was reinstated by consent and then adjourned to 22 July 2014 for hearing.
9. Whether or not I should grant the various injunctive relief sought depends on whether there was a real issue to be tried, whether damages were an adequate remedy if an injunction was not granted and if not, whether Thaggard would be able to give an undertaking in damages to the Authority and where does the balance of convenience lie?
10. All these rest ultimately on whether or not Thaggard has a sustainable proprietary claim over the property in question.

BACKGROUND

11. Thaggard's interest in the land stems from a series of dealings which happened between him and the Authority in 2006. The Authority had invited tenders for the property in 2006 because of a defaulting tenant. On 04 July 2006, Thaggard submitted a tender for the property for the sum of \$38,000-00.
12. Although Thaggard's tender was submitted late, the Authority, vide a letter dated 06 July 2006, responded to Thaggard's 04 July tender. Whether the Authority's response was an "acceptance" or a "conditional acceptance" or a "counter offer" is an issue which may need to be resolved. Generally, of course, an invitation for tenders is an invitation to treat and not an offer. The tender is the offer. When a tender is accepted, a contract is then formed.
13. Paragraph 1 of the Authority's letter is worded as follows:

We refer to your late tender dated 04 July 2007, where you offered to purchase the above-mentioned property for the sum of \$38,000. We have considered your tender and are

making this offer to transfer the above property to you subject to the following terms and conditions:-

[followed by 11 itemized conditions]

14. Condition 6 states that the Authority's "offer" is tentative and shall be confirmed only upon Thaggard's written acceptance within 7 days. Condition 9 required Thaggard to confirm his "acceptance" of the Authority's "offer" by signing and returning the duplicate letter within 7 days and condition 10 sets out that the Authority's "offer" is subject to the consent of the Director of Lands, Housing Authority or the Native Lands Trust Board (whichever is applicable).
15. Thaggard signed and returned the duplicate letter of acceptance on the same day, 06 July 2006.
16. Subsequently, a sale and purchase agreement was drawn up and entered into by Thaggard and the Authority on 22 July 2006.
17. However, at some point after that, the Authority would default in its obligations.
18. Thaggard highlights in his affidavit that he waited for some six years or so between 2006 to 2012 for the Authority to complete its end of the bargain and convey the property to him. However, in 2012, the Authority would again call for tenders for the property by re-advertising it in the Fiji Sun.
19. Thaggard deposes that when he protested against this move by the Authority, the Authority would then offer the property to him for \$50,000, which was \$12,000 more than the \$38,000 price he and the Authority had earlier agreed to.

THAGGARD'S AFFIDAVIT

20. The above background is chronicled as follows in Thaggard's supporting affidavit which swore and filed on 16 January 2014:

<u>04/07/06</u>	<u>Plaintiff put in a tender of \$38,000-00</u>
<u>06/07/06</u>	<u>Defendant accepted the Plaintiff's tender</u>
<u>22/07/06</u>	<u>Sale and Purchase Agreement entered into between the Plaintiff and the Defendant</u>
<u>Terms:</u>	
<u>(a) That Plaintiff will utilize his FNPF Housing eligibility to pay 2/3 of the agreed amount upfront. The remaining 1/3 was to be paid by monthly installments.</u>	

	(b) Plaintiff also pleads that he was informed by Defendant that the property would be transferred within 6 to 8 months of the signing of the document on 22/07/06
	(c) Plaintiff pleads that he was "asked to pay the sum of \$200 per month as ground rental until the transfer was done.
	(d) Plaintiff then took possession of the property with all the improvements
<i>August 2012</i>	Plaintiff had a meeting with Defendant. Defendant advised Plaintiff that the file has been located within its Legal Department. This allegedly was after the Plaintiff had visited the Defendant's Office to inquire about the progress of the matter.
	At some point after this, as pleaded in paragraph 13 of Statement of Claim, the property was advertised in a local newspaper.
	Apparently, the Plaintiff then went to the Defendant to inquire. He was advised to pay the outstanding amount of \$50,000.
<i>11/12/12</i>	Plaintiff's solicitors wrote to the Defendant to transfer the property to Plaintiff for \$38,000-00.
<i>06/02/13</i>	Defendant replied vide a letter to say that the conveyance could not be completed as the Plaintiff was unable to secure a loan from the Defendant for the tendered amount and that the Plaintiff and the Defendant had entered into a tenancy agreement on 14 July 2006 by which the plaintiff was to pay \$200 per month in rental payments.
<i>03/07/13</i>	Plaintiff replied denying that there was a tenancy agreement and sought discovery of the alleged agreement from the defendant.
<i>10/12/13</i>	Defendant served a Notice to Quit on the Plaintiff. Defendant also informed Plaintiff that the said property had been sold to one Nepote and Merewalesi Qio by mortgage sale.
	Plaintiff replied by giving notice to the Defendant that Defendant had breached their agreement dated 06/07/06 by not transferring the property to the plaintiff in the stipulated time.
	Plaintiff asserts that he was always ready, willing and able to pay the defendant the \$38,000.
	Plaintiff seeks specific performance and damages and also an injunction to restrain the Defendant from interfering with his possession of the property in question or to transfer the property. Also claims damages and costs.

AUTHORITY'S RESPONSE

21. The Authority responded on 14 February 2014 by an affidavit of Ameniyasi Navurai sworn on 13 February 2014. Navurai deposes the following:

(a) Thaggard had made a late tender for the property

(b) Housing Authority then made a "mortgagee sale offer" of the property to Thaggard "in response to the Plaintiff's late tender".

26/06/06	Thaggard re-submitted his tender
14/06/06	Thaggard and Housing Authority executed a tenancy agreement
05/03/10	Housing Authority "re-processed" Thaggard's loan application. This was "deferred due to discrepancies of the validation of the mortgagee sale offer dated" 06 June 2006.
04/10/12	Thaggard wrote to Fiji Commerce Commission
04/10/12	FCC mediated between the parties. Out of the mediation, Housing Authority:
To	
04/12/12	(a) offered property for sale to Thaggard (b) purchase price was \$50,000 (c) settlement to be effected within 60 days (d) Thaggard to make a formal letter of application/offer to be given to Housing Authority by 09 December 2012 (e) Thaggard to vacate property if proposal not met.

Parties signed off on the Mediation.

(c) Thaggard reneged on mediation agreement prior to Thaggard entering into possession of the property.

DELAYS BY HOUSING AUTHORITY IN PROCESSING THAGGARD'S APPLICATION

22. Navurai deposes in paragraphs 14 to 20 of his affidavit that:

14. *Delay occurred in processing the Plaintiff's application and in regards to completion of conveyancing matters such as transfer, FNPF Charge and a second mortgage in favour of the Defendant as the Plaintiff's file was misplaced and declared lost by the officers of the Defendant.*
15. *The Plaintiff knew of the delay, and was aware that his application was to be reprocessed. He was also aware that the Housing Authority loan was deferred on the 17th September 2007 which was re-submitted by him on August 2006. Such application was deferred for the purpose of updating the financial status of the Plaintiff for further consideration of the Defendant.*
16. *The Plaintiff's file was re-submitted to higher officers but the proposed loan to the Plaintiff was again deferred on the 4th day of September 2008 as the requirements of the Defendant were not met.*
17. *On or about the 16th day of April 2010 discussions took place between the Plaintiff and an officer Mr. Tomasi Buli of the Defendant when the Plaintiff was asked to provide*

further documentary information relevant to his financial status for the processing of his loan application.

18. *The Plaintiff's loan application has not been approved by the Defendant.*
19. *On the 11th day of July 2013 the Defendant's General Manager Lending on behalf of the Chief Executive Officer wrote to Messrs Vijay Naidu & Associates that since the Plaintiff had failed to accept the Defendant's offer to sell the property to the Plaintiff for the sum of \$50,000, it, the Defendant would proceed to Mortgagee sale and did advertise the property for Mortgagee sale in the Fiji Sun Newspaper on the 13th July 2013 and 20th July 2013.....*
20. *The Plaintiff paid rent to the Defendant under the tenancy agreement from the 10th day of July 2006 until the 18th day of February 2008. Thereafter he ceased payment of rental and still is in occupation of the property.*

COMMENTS

23. Thaggard's case is based on the argument that a valid enforceable contract was formed at the point when the Authority accepted his tender on 06 July 2006.
24. The Authority's case, on the other hand, runs on the theory that there was no valid enforceable agreement yet between the parties, at that point, because the agreement was subject to the consent of the i-TLTB and because Thaggard's application to withdraw his funds from FNPF had been declined.
25. The affidavit sworn by Navurai for the Authority contains some sweeping statements as to Thaggard's inability to meet the Authority's conditions and also to some allegations that put Thaggard's financial status to question. Thaggard however insists that he was always ready, willing and able at all material times to settle at the \$38,000 and on terms that he and the Authority had agreed on.
26. Then there is the misplacing of the relevant file(s) in the Authority's Lautoka Office. This is all shrouded in mystery. This threw matters into disarray and resulted in considerable delay in the processing of Thaggard's application.
27. There is a hint in the affidavits at the possibility that the Authority may have tactfully stage-managed the events to back out of the deal it had with Thaggard. This, however, is a triable issue that I best not comment on any further at this time.
28. Generally, an invitation for tenders is an invitation to treat and not an offer. The tender is the offer. When a tender is accepted, a contract is then formed. No contractual obligation crystallizes until an offer is accepted (see **Shivas & Westmark Investments**

Ltd v BTR Nylex Holdings NZ Ltd & Others [1997] 1 NZLR 318 (HC); Prime Commercial Ltd v Wool Board Disestablishment Co Ltd [2006] NZCA 295). On this general proposition, rests Thaggard's case.

29. However, as the New South Wales Court of Appeal sets out *inter alia* in Secure Parking Pty Ltd v Woollahra Municipal Council [2016] NSWCA 154, the acceptance of a tender will result in the formation of an enforceable contract only if the acceptance corresponds with the tender offer.

43 The primary judge also noted that it was open to the parties to negotiate variations to any tender offer, provided they were in accordance with reg 176. His Honour continued at [92]:

... If the parties could not reach agreement on particular matters, then the consequence of their failure to agree was that there would be no variation to the tender to be considered by Council in accordance with the conditions of tender and the Regulations. In the absence of that agreement, Secure may have been entitled to withdraw its tender in accordance with the conditions of tender. But absent withdrawal, the offer contained in its tender remained open for acceptance by the Council. The fact that particular issues raised by Secure were unresolved in the sense that the parties did not reach agreement in relation to them was irrelevant to the question whether an offer remained on foot that was capable of acceptance by the Council.

44 I respectfully agree with these further observations.

45 The question which then arose was whether the Council's communicated acceptance corresponded with Secure's offer.

30. Certainly, the question whether the parties did agree to vary Thaggard's offer, as it is open to them, does appear to arise in this case.

31. *Prima facie*, the language of the Authority's "acceptance" to Thaggard's tender offer appeared to be either a counter-offer, or, in the very least, was qualified and/or subject to various conditions. Notably, it required Thaggard to confirm his "acceptance" of it (Authority's letter containing the conditions), which Thaggard did.

32. Did the Authority's "acceptance" correspond with Thaggard's tender offer?

33. Quite apart from this, I accept the submission that since the land in question is i-Taukei Land leased to the Authority, by operation of section 12 of the i-Taukei Lands Act, a valid enforceable contract can only arise from a tender offer and the acceptance of that tender offer, after the i-TLTB has granted consent.

CONCLUSION

- 34. For the above reason, I refuse to grant the Orders sought by the Plaintiff.
- 35. The matter is adjourned to Friday 26th February 2020 for mention.



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Anare Tuilevuka
JUDGE
Lautoka