

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 275 of 2019

BETWEEN

NEEL KAMAL and **IRENE LATA PRASAD** both of Lot 103 Votua Road,
Narere, Nasinu, Tailor and School Teacher respectively.

PLAINTIFFS

AND

THE FIJI PUBLIC TRUSTEE CORPORATION LIMITED situated at
Public Trustee House, 83 Amy Street, Suva as Trustee for the estate
of the deceased Jagdish Chand formerly of
Saqali Road, Nadera, Businessman.

FIRST DEFENDANT

AND

WESTPAC BANKING CORPORATION a commercial bank registered

pursuant to the Banking Act having its registered office at

Thomson Street, Suva.

SECOND DEFENDANT

AND

FIJI REVENUE AND CUSTOMS SERVICE a statutory body established pursuant to

Fiji Revenue & Customs Service Act 1998 having its registered office at the

FRCS Complex, Nasese, Suva.

THIRD DEFENDANT

Counsel : Mr. Pal A. with Mr. Naidu S. for the Plaintiff
Ms. Lal P. for the 1st Defendant
Ms. Fong M. for the 2nd Defendant
Mr. Eterika E. for the 3rd Defendant

Date of Hearing : 18th January 2021

Date of Judgment : 29th January 2021

JUDGMENT

- [1] The plaintiffs in their amended statement of claim sought the following orders against the defendants:
1. An order that the 1st defendant effects settlement in respect of the Sale and Purchase Agreement dated 29th March 2019 between the plaintiffs and 1st defendant for the sale of the property comprised in Housing Sub-Lease No. 296873 being Lot 10 on DP 7689 (“the Property”) by attending before the office of the Registrar of Titles with the Duplicate Original Lease for Housing Authority Sub Lease No. 296876 together with the original Capital Gains Tax Clearance Certificate and such settlement to be effected at 12pm on 10th working day from the date of this order (the Settlement”);
 2. An order that the 2nd defendant provides to the plaintiff a Discharge of Mortgage and the Duplicate Original Lease for Housing Authority Lease No. 430906 at the settlement in exchange for a bank cheque for sums of monies that remain due and owing to the 2nd defendant 1st defendant where such sums of monies shall not exceed a net sum after deduction of Capital Gains Tax from the sum of FJD 290,000.00;
 3. An order that at the settlement the 3rd defendant provides to the plaintiff a Release of Charge / Discharge of Fiji Revenue and Custom Service Charge upon the provision of the bank cheque by the plaintiff for sums of monies owed by the 1st defendant to the 3rd defendant but not exceed the net balance of monies after the payment of Capital Gains Tax and monies owed to Westpac Banking Corporation;
 4. An order that the 1st defendant pays all outgoings in respect of town rates, electricity and water services as at the day of Settlement and provides evidence of the same at Settlement;
 5. An order that any balance sum remaining at Settlement be paid into court and such sums of monies be released to the 1st defendant and/or Trustees of the Estate of Jagdish Chand upon the Grant of Probate or Letters of Administration for the Estate;

6. An order that the plaintiffs be given vacant possession of the Property at Settlement;
7. An order that the Housing Authority renews the consent to the transfer for the Property upon the payment of the consent fees by the plaintiff in the event that Settlement falls outside the period of consent by the Housing Authority;
8. Costs of this action; and
9. Any further orders that this court deems just, fair and necessary.

[2] The order 7 above is sought against the Housing Authority which is not a party to these proceedings. The does not possess power to made orders of whatever the nature against or in favour of anyone who is not a party the proceedings.

[3] The plaintiff on 25th November 2019 filed summons seeking leave of the court to join two caveators to these proceedings and the learned Master of the High Court on 03rd December 2019 made order granting leave to join the caveators to the proceedings, however, I see no claim sought against the caveators.

[4] The plaintiff entered into a sale and purchase agreement to purchase the Property for \$300,000.00 with Jugdish Chand, on 29th March 2019. Before entering into this sale and purchase agreement Jugdish Chand mortgaged the property the 2nd defendant as security for the financial assistance provided to him and the said mortgage was registered on 01st October 2013. The details of the financial assistance provided to Jagdish Chand are as follows:

Business overdraft facility Account No. 9800822018	-	\$ 73,021.43
Business term loan Account No. 9801945412	-	\$133,951.94
Business term loan Account No. 9804689595	-	\$164,759.94

[5] The above sums of money are yet to be settled by the estate of the deceased Jadish Chand.

[6] The position of the 3rd defendant, Fiji Revenue and Custom Service, is that the late Mr. Chand personally and through his business has a tax liability of \$398,121.39. The 3rd defendant has place a charge over the property.

- [7] The submission of the learned counsel for the plaintiff is the 2nd and 3rd defendants have, so far, not done anything to recover the monies due to them from the late Jadish Chand.
- [8] The main issue to be determined here is whether the plaintiff is entitled to the specific performance of the sale and purchase agreement to the detriment of the 2nd and 3rd defendants.
- [9] Specific performance is a discretionary remedy and it is not a matter of right in the person seeking such relief.
- [10] The plaintiffs entered into the sale and purchase agreement in respect of a property which was already under a mortgage and the plaintiff should have known that whatever rights under the sale and purchase agreement was subject to the mortgage already in existence. Therefore, the mortgagee's rights under the mortgage take precedence over the rights of the plaintiffs under the sale and purchase agreement. The plaintiffs are not in a position to tell the 2nd defendant, the mortgagee, the manner in which it should recover the amount of money due under the mortgage.
- [11] For the above reasons the court makes the following orders.

ORDERS

1. The Originating Summons is struck out and the orders sought are refused.
2. The plaintiffs are ordered to pay the defendants \$3000.00 (\$1000.00 each) as costs of these proceedings.




Lyone Seneviratne

JUDGE

29th January 2021