

4. Plaintiff had realized the valuation of the Land was far below the expectation and this was obtained prior to expiration of ninety day time period under sale and purchase agreement.
5. Plaintiff did not want to perform the contract and tried to evade time period of validity of the said sale and purchase agreement, and then allege that Defendant failed its obligations under sale and purchase agreement.
6. Plaintiff's Director who was involved in this dealing stopped communicating with Defendant or its agent and did not appoint a solicitor on behalf of Plaintiff to deal till expiration of time period stated in sale and purchase agreement. By doing this Plaintiff broke communication with Defendant to proceed with the sale of the Land and upon expiry appointed a lawyer to communicate with Defendant requesting refund of the Deposit for non performance and also over valuation.
7. Plaintiff cannot create a situation and also benefit from that alleging Defendant did not take steps for the transfer. Plaintiff was not interested in proceeding with the sale and there was no evidence that Plaintiff had \$6 million or finance for that or even applied or such amount indicating it had abandoned the idea of purchase.
8. Plaintiff's claim for refund of the deposit after expiration of ninety days on the basis of nonperformance by Defendant and also the valuation. Time is the essence of the said sale and purchase agreement and it also contained a provision for extension of time period by mutual consent.
9. Both parties through lawyers communicated to each other that the sale and purchase agreement had lapsed or rescinded but each party allege it was due to other party's default.
10. Neither party took any step to review the sale and purchase agreement after ninety day time and both considered it had expired till 2023 when Defendant sought specific performance of it, in order to counterclaim.
11. Agreements cannot be fulfilled in a vacuum, by one party and non-appointment of solicitor for Plaintiff and failure to communicate show that there were no genuine efforts by Plaintiff to purchase the Land, after he became aware of the restrictions on development of the land and valuation. So Plaintiff's claim for refund of deposit for non performance on the part of Defendant also fails.
12. Defendant on 23.1. 2023 nearly after five years had sought to withdraw its Notice of Recession served to Plaintiff. After than Defendant amended its statement of claim and included a counter claim for specific performance of the sale and purchase agreement.
13. Both parties had acted as the sale and purchase agreement had lapsed due to ninety day

time period and also provision that time is the essence of the said agreement. Defendant cannot seek specific performance which is an equitable remedy as Defendant is estopped from seeking specific performance after informing the Plaintiff that sale and purchase agreement had lapsed and acted accordingly till 2023 including in this litigation. Defendant's counter claim for specific performance struck off.

14. Claims of both parties struck off.

FACTS

15. Following facts are admitted at pre trial conference

- a. Plaintiff is a company incorporated in Fiji.
- b. The Defendant is legal entity and was at all material time the owner of the Land.
- c. This Land was advertised in daily newspaper for sale by Harcourts inviting offers from interested parties.
- d. On 16.3.20218 Plaintiff and Defendant entered in to a sale and purchase agreement for the sale of the Land for a consideration of \$6.111.000 exclusive of VAT.
- e. Plaintiff paid \$100.000 as deposit under said Agreement to Harcourts.
- f. Plaintiff's Director never met with Defendant's Director.
- g. Settlement of transfer of the Land was 90 days from 16.3.2018 (before 14.6.2018).
- h. Defendants obligations under sale and purchase agreement were stated.
- i. Plaintiff did not sought an extension of time period beyond 90 days.
- j. Plaintiff through its solicitors on 17.7.2018 stated that sale and purchase agreement had expired and deposit should be refunded.
- k. Defendant issued a default notice of the sale and purchase agreement, on 7.8.2018.

16. At the hearing for the Plaintiff its director Winston Sun (Sun) gave evidence and another witness who made valuation of the Land called as witness.

17. For Defendant is current Director who was company secretary. at the time of sale and purchase agreement entered, gave evidence. Defendant is a family company and according to her. company was in need of cash and decided to dispose some of the capital assets of the Defendant to obtain cash for its business. So the Land owned by Defendant was offered for sale.

18. It had engaged Jasminder Singh for the sale of the Land and according to the evidence of Jasminder Singh he was not employed by Harcourts but an independent contractor and he listed the property for sale by tender.

19. He is a property agent and acted on behalf of Defendant for the sale of the Land and had no point representation to Plaintiff. Plaintiff admitted this but state another person from Harcourts made some false representations.

20. He also said after entering in to sale and purchase agreement he could not communicate with Defendant as a solicitor was not appointed and awaited a reply from Defendant. He said that Plaintiff's bid was accepted in tender as it was the highest tender.
21. Plaintiff in his evidence stated that he did not meet Jasmider Singh who was the property agent appointed by Defendant for the sale of the Land. He further stated
- (a) Harcourts, represented by Savinesh Mudliar (Mudliar) a sales consultant at Harcourts, had shown him the Land and on his instructions offered a price of 6.111 million.
 - (b) Sale and Purchase Agreement entered on 16.3.2018 on behalf of the Plaintiff offering \$6.111m for the property. A sum of \$100,000.00 was paid as deposit.
 - (c) Mudliar had represented to Mr Sun that the property had other buyers around 6 million.
 - (d) He had asked whether land could be subdivided for sale and also build a factory and this was answered affirmatively by Mudliar.
 - (e) He had inquired from local government body after entering sale and purchase agreement and he was told that development of this land has restrictions.
 - (f) He engaged a valuer who had valued the property at \$1m.

ANALYSIS

22. For Plaintiff its director Sun gave evidence. In his evidence stated that he had bought several properties earlier and was aware of the process of land sales.
23. The Plaintiff's first cause of action is that neither party fulfilled their requirements under the Sale and Purchase Agreement (Marked P2), both parties relied on sale and purchase agreement. It is admitted fact. This was due to Plaintiff's failure to appoint a solicitor and also avoiding communication with Defendant.
24. Sale and purchase agreement at clause 12.2 Plaintiff had admitted that it had caused the Land inspected and the same was purchased 'solely in reliance upon the Purchaser's own judgment and not due to any representation or warranty made by Vendor or any agent of Vendor'.
25. Apart from this Plaintiff's evidence was that he was familiar with the land sales and accordingly he knew the person who made representation to him that the Land can

be subdivided and development. He was not made aware of any restrictions on development on the Land by state.

26. After entering in to sale and purchase agreement Sun was informed the development restrictions on the land due to its location and also elevation.
27. It was evidenced at the hearing that after entering in to sale and purchase agreement Plaintiff had stopped communication with Defendant or its agent and no solicitor was appointed to act on behalf of Plaintiff.
28. It was admitted in evidence that Plaintiff was required to appoint a solicitor to complete the transfer and this was not done and Plaintiff engaged its solicitors after expiration of ninety days and another one month granted for seeking extension beyond time stipulated. Plaintiff's first communication after sale and purchase agreement was to write a letter on 17.7.2018 (marked P4)indicating
 - a. Ninety day time period lapsed.
 - b. There were some occupants on the Land
 - c. There were building restriction on the Land
 - d. Price was over inflated.
29. Plaintiff had the obligation to verify the above reasons given for the request for the deposit paid while entering sale and purchase agreement.
30. Defendant through its solicitors wrote a letter in reply to Defendant's letter on 6.8.2018(marked P6) stated that settlement date under sale and purchase had expired without either party seeking extension hence it had lapsed. It further stated that a notice of default will be issued and this was issued on following day 7.8.2018.
31. From the evidence there was no effort on the part of the Plaintiff to obtain transfer of the Land as it had avoided appointment of a solicitor. This was due to valuation and restrictions on development.
32. After Sun had come to know about the restrictions on development on the Land and its valuation no effort was made to obtain the Land. Valuation and information regarding restrictions on development were obtained before expiration of ninety day time period.
33. It is improbable to Plaintiff to take any action to proceed with sale after obtaining valuation. So in the analysis of evidence it is proved that Plaintiff had evaded Defendant or its agent till expiration of time for performance of the sale and purchase agreement on 17.7.2018.
34. Plaintiff admitted that it did not appoint a solicitor till 17.7.2018 for this dealing till

a day after expiration of ninety day time period and thirty day time period for seeking extension, expired to communicate with Defendant to seek deposit. No explanation was given for this long delay and strange behavior where a day after expiration of three months and thirty days a solicitor was retained to write the letter to Defendant on 17.7.2018.

35. This shows the intention of Plaintiff. There was no step taken by Plaintiff, while Defendant waited for the Plaintiff for the appointment of a solicitor for the steps to be taken for transfer. Since Plaintiff had paid a deposit Defendant had given Plaintiff ample time to complete the sale. This can be accepted as the purchase price was above \$6 million and needs some kind of finance. From the evidence of Defendant's director proved that Defendant was willing to sell the Land but Plaintiff could not be communicated for finalization of the dealing.
36. So the allegation Defendant had not taken steps to in terms of Clause 5 (a), (b) and (c) will not arise. These steps can be taken after Plaintiff shows genuine effort to purchase the Land. Plaintiff is required to pay \$6.111 million and had at no time got that amount of money.
37. Plaintiff had appointed a solicitor Plaintiff's letter of 17.7.2018 was nothing more than finding a reason to terminate sale and purchase agreement and to avoid forfeiture of the deposit amounting \$100,000.
38. In terms of clause 15 (b) of sale and purchase agreement on Plaintiff's default the Defendant could rescind the agreement and the deposit 'shall be forfeited to Vendor as liquidated damages'. So Plaintiff is trying to avoid the forfeiture of deposit paid as liquidated damages for its own default due to its own fault.
39. Plaintiff's first cause of action seeking deposit of \$100,000 fails as evidence shows that Defendant was willing to proceed with the sale and even had sought specific performance as counter claim in amended statement of defence in 2023. This is dealt later in this judgment.
40. Plaintiff submitted that upon the expiry of the 90-day period and settlement of the transaction not happening under the agreement, and there being no utilisation of the 30-day default provision under the agreement by either party, the agreement had lapsed and the deposit of \$100,000.00 should have been returned to the Plaintiff. This cannot be accepted as the agreement was breached by Plaintiff who did not want to proceed with the purchase after valuation and of the Land.
41. Plaintiff relied on *Chandra v Ward* [2008] FJHC 288 (Date of Judgment - 6 June 2008) and *Deep Sea Holdings Ltd v J. Santaram (Stores) Ltd* [2015] FJHC 367 (Date of Ruling - 19 May 2015). These are cases where vendor did not want to sell due to some reason and not where vendor seeks specific performance. So these are not applicable

to Plaintiff.

42. Defendant presented no evidence that the Plaintiff was ever sent any notice or communication in relation to the agreement during the currency of the agreement. The reason given was that Plaintiff did not appoint a solicitor to communicate till the expiration of time period in sale and purchase agreement.
43. By their letter dated 17 .7. 2018 the Plaintiff's solicitors had written to the Defendant asking for the deposit back due to the expiry of the time allowed for settlement under sale and purchase agreement.
44. After that Defendant's solicitors letter dated 7.8. 2018 sought to rescind the sale and purchase agreement. on the basis of default by Plaintiff.
45. The letter of 17.7.2018 was responded to by the Plaintiff's solicitors by their letter of 6 .8. 2018 (marked P6) and admitted that the sale and purchase agreement had expired. So both parties admit that the said contract between the parties had expired but the dispute was as to who was at fault. It was clear Vendor was willing to transfer the land and Purchaser was the reluctant to proceed. Plaintiff did not prove default by Defendant. Defendant was prevented from proceeding with sale due to actions of Plaintiff. Letter of 17.7.2018 alleges overvaluation and misrepresentation hence Plaintiff was not willing to complete the transfer.
46. Alternatively, Plaintiff is seeking damages for misrepresentation by a person named Savinesh Mudaliar for the same amount.
According to amended statement of claim misrepresentations are as follows.
 - a. Representation was made on behalf of Defendant knowing the market value of the property.
 - b. The said representation placed the value of the property at an exorbitantly higher level than its true market value.
 - c. The Defendant through its agent represented that exorbitant value of the property that was sought by the Defendant was reflective of the current market value of the property.
 - d. The said representation was relied upon by the Plaintiff before it made an offer and before signing the sale and purchase agreement.
 - e. The Defendant through the misrepresentation failed to deal in the transaction in a fair and transparent manner.
 - f. The Defendant also failed to inform the Plaintiff that two illegal structures were built on the property and that the land was occupied by squatters.
 - g. The Defendant failed to disclose that majority party of the property cannot be utilized for commercial use.
47. Alleged representations were made by Mudliar but Defendant's Director did not

state that Mudliar was appointed as property agent for the sale of the land. According to her only Jasminster Singh was asked to sell the Land and this was confirmed by Jasminster Sing's evidence.

48. either Mudliar nor Harcourts are parties to this action. Mudliar did not give evidence in Court. Plaintiff is claiming misrepresentation by Mudliar as agent of Defendant. The burden of proof was with Plaintiff to prove that Mudliar was acting as agent of Defendant for the sale. Plaintiff had not done so.
49. Without prejudice to what was stated, from evidence Sun said that he was told that there were other prospective purchaser for the Land by Mudliar. Assuming such statement was made. Plaintiff cannot rely on such a statement as misrepresentation based on valuation. The fact that there were other buyers was a speculative statement not regarding actual price on valuation. Plaintiff who relied on speculative statement cannot later rely on valuation for claim for misrepresentation.
50. Sun also said that he informed about his intention to develop the land for a factory and subdivision. According to Sun he was told that this can be done by Mudliar. Plaintiff had relied on such a statement which according to him could be verified easily. According to Sun after entering in to sale and purchase agreement he was able to find out restrictions on the land and also few squatters. Why he could not find these facts before entering in to sale and purchase agreement was not stated. Purchaser in the sale and purchase agreement in clause 12.2 acknowledged that

‘The Purchaser acknowledges that it has caused the property to be inspected and that the same is being purchased “as is” and solely in reliance upon the Purchaser’s own judgment and not due to any representation or warranty made by the Vendor or any agent of the Vendor. The Purchaser has made its own enquiries as to the zoning of the property and is purchasing the property subject to possession and possession date as stipulated.

51. In the absence of fraud such a clause releases the Vendor from warranties as parties had agreed. In this action there is no allegation of fraud or claim based on fraud. Plaintiff relied on *Mothil v North (Fiji) Group Ltd* [2013] FJHC 446 (Date of Judgment - 27 August 2013) which can be distinguished as it was based on fraud.
52. Defendant in the amended statement of defence filed five years after litigation, seeks specific performance. Defendant by its letter of 6.8.2018 informed the Plaintiff’s solicitors that sale and purchase agreement had expired to non performance within stipulated time period by Plaintiff. The notice of default was dated 7.8.2018.
53. Specific performance is an equitable remedy and Defendant who had taken the position

that the sale and purchase agreement had expired for five years since letters of 6.8.2018 and 7.8.2018 and estopped from deviating from that position as Plaintiff had taken actions based on the position that sale and purchase agreement had rescinded.

CONCLUSION

54. Plaintiff's claim based on breach of contract by default of Defendant failed. Plaintiff did not want to purchase the Land for \$6.111 million after he obtained valuation which was one million. The default was from Plaintiff and the Director of Plaintiff had not communicating with Defendant or its property agent. So the beach of the contract was by Plaintiff. Plaintiff was unable to prove that sale and purchase agreement entered due to misrepresentation by agent of Defendant. Alternate claim also fails. Defendant's claim for specific performance also fails as Defendant had notified that Defendant had rescinded the sale and purchase agreement by 7.8.2018 and both parties had acted accordingly. Hence Defendant is estopped from seeking specific performance by withdrawing that statement made on 7.8.2018 nearly after five years on 23.1.2023. Considering circumstances of the case parties to bear their own cost.

FINAL ORDERS

- a. Plaintiff's statement of claim is struck off.
- b. Defendant's counter claim for specific performance is struck off.
- c. o costs.

Dated at Suva this 6th day of November, 2023.



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Justice Deepthi Amaratunga
High Court, Suva