

**IN THE HIGH COURT OF FIJI AT SUVA**

**IN THE CENTRAL DIVISION**

**CIVIL JURISDICTION**

**Civil Action No. HBC 279 OF 2019**

**BETWEEN:**                      **WAH LUNG INVESTMENT COMPANY PTE LIMITED**

**PLAINTIFF**

**AND:**                                **JITEN KUMAR**

**FIRST DEFENDANT**

**AND:**                                **SURESH CHANDRA t/a MC LAWYERS**

**SECOND DEFENDANT**

**Date of Hearing**                    :    **16 July 2024**  
**For the Plaintiff**                    :    **Mr Kumar. S**  
**For the Defendants**                :    **Mr Chand. A**  
**Date of Decision**                    :    **28 November 2024**  
**Before**                                    :    **Waqainabete-Levaci, S.L.T.T, Puisne Judge**

**J U D G E M E N T**

***(CLAIM FOR DEPOSIT PAID FOR A SALE AND PURCHASE AGREEMENT)***

## **PART A – INTRODUCTION AND FACTS**

### ***Plaintiffs Claim***

1. The Plaintiff company, a foreign investor (with a foreign investor investment certificate valid for 12 months) and the First Defendant entered into a Sales and Purchase Agreement (“Agreement”) on or about 14 December 2017 for the sale of the property described as Lot 2 in DP 9779 containing a land area of 38.5357 Hacs or more comprised of CT 20833 and balance of CT 23543 known as Naisoqo (“Naisoqo land”).
2. The First Defendant was the Executor and Trustee of the Estate of Ram Deo who was the registered proprietor of Naisoqo Lands and was also the late Director and Shareholder of Ram Sharan and Sons Limited (“Ram and Sons”).
3. The Plaintiff paid \$125,000 in compliance with the Agreement which was subject to a ministerial consent to be obtained prior to the issuance of the new Certificate of Title within 90 days from execution of the Agreement.
4. The Plaintiff alleges that the Second Defendant has refused to release and instructed the First Defendant not to release the deposit although the ministerial consent was not approved in 2018. The Plaintiff thereafter claimed for the deposit of \$125,000 to be refunded and an order to MC Lawyers to release the said monies.
5. On the day of Trial, the Plaintiff’s counsel was unable to obtain any witnesses for the Plaintiff having failed to obtain instructions from their Counsel. On this basis they were unable to proceed to prove their Claim and the Court thereafter struck off the Statement of Claim and Reply to Statement of Defence and Defence to Counterclaim

### ***Statement of Defence by 1<sup>st</sup> Defendant and Counterclaim***

6. The First Defendant denied that there was a condition for ministerial consent to be obtained. Furthermore the new title was lodged and under process and registered surveyors were undertaking their responsibility for the issuance of the Title. The time frame was beyond the 90 days agreed upon by both parties.

7. The First Defendant claimed the sum of \$50,000 as loss sustained from December 2017 until the filing of the Counter Claim for loss sustained from the Farm as earnings to generate income and Specific performance for the purchase of the Naisoqo land;
8. Alternatively the First Defendant sort Orders for the Plaintiff to forfeit of the deposit for the sum of \$125,000 as entitlement to the 1<sup>st</sup> Defendant and a Declaration that the emails sent to cancel the Sale and Purchase Agreement be rendered null and void.
9. The First Defendant was ready to proceed to trial.

***Statement of Defence of 2nd Defendant***

10. The Second Defendant denied allegations by the Plaintiff alleging that the ministerial consent was the obligation of both parties in accordance with clause 10.1 of the Agreement to be obtained in 90 days from execution;
11. The Second Defendant argued that the parties would settle once the consent was granted 30 days from the date of agreement or on a date mutually agreed by the parties and sort for the plaintiffs claim to be dismissed or to Order release of the monies held in Trust Account of the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant.
12. The 2<sup>nd</sup> Defendants sole business was wound up and a receiver was appointed. The deposit which was previously held in the 2<sup>nd</sup> Defendants Trust Account had now been transferred to the Chief Registrar in their Trust Account.
13. The Court therefore found that the 2<sup>nd</sup> Defendant was no longer operating as a business and had wound up. However since the decision would affect the 2<sup>nd</sup> Defendants directly, the orders that emanate from this Court will made directly to the Receiver for the 2<sup>nd</sup> Defendants.
14. Therefore the Court struck out the Statement of Defence for the 2<sup>nd</sup> Defendant.

### ***Preliminary Issues prior to Trial***

15. At Trial, the Plaintiff's counsel formally applied for withdrawal of representation on the basis that there was no instructions from their client despite ongoing contact attempts. The Counsel had not called any witnesses and was not ready to proceed to trial.
16. The Court refused to grant the withdrawal of counsel as there was no formal application and there was nothing to suggest to Court from when the trial date was affixed that the Counsel was intending not to represent their client.
17. The 1<sup>st</sup> Defendants applied to Court to proceed to trial for their Counter-Claim putting the Court on notice that they would call the 2<sup>nd</sup> Defendant for the purposes of their evidences.
18. The Court granted liberty to the Plaintiff to cross-examine the Defendants evidence only for credibility and veracity purposes.

### **PART B: EVIDENCES AT TRIAL**

#### ***Defendants Evidence***

19. The First witness for Defendant was Shalen Kumar who confirmed he was from Naitasiri and is currently a member of parliament and a school teacher by profession. In 2017 the Plaintiff was introduced to him when they visited the farm to propose purchasing the property. He worked closely with the 2<sup>nd</sup> Defendant who is their lawyer. The Plaintiff was in a position to enter into a Sale and Purchase Agreement despite the witness still in the process of obtaining title from Jiten Kumar the Trustee for his father Ram Deo. From then he was the key contact person with the lawyers as he continued to reside on the property. The 1<sup>st</sup> Defendant left for New Zealand in 2017 and he was carrying out responsibilities to facilitate requests from Counsel and from the Department of Lands. The property is a dairy farm registered to Ram Sharan & Sons who is his father and 4 brothers. They are also directors and run the day to day business. The assets were registered to the company. On the death of their father, they decided to sub-divide the land with equal share of the said piece of land. There is 487 acres consisting of 3 titles – CT 20833, CT 20834 and CT 3543. The Agreement was only for CT 20833 Lot 2 to be assigned to his late father, Ram Deo. The lots from the other titles belong to the Directors and their

beneficiaries. The Agreement was executed in 2017 when the Plaintiff came to Fiji. CT 20833 was adjacent to CT 23543 there was a reference to both titles because the 2 Directors were getting share from both the 2 lands. His lot was CT 20833. When the 1<sup>st</sup> Defendant left for New Zealand he attended the work at the far. Since 2017 he facilitated all the responsibilities. The purchase of the property included the dairy shed and livestock. Sale price was \$1 million. The Plaintiff paid \$125,000 to the 2<sup>nd</sup> Defendants trust account and they were made aware of the cheque payment on execution of the Agreement. He was also asked to fulfil the ministerial consent to be obtained. He facilitated all documents requested and many meeting were held between them and Ministry of Lands. A few times they had to amend the documents as the title owners name was in error and consent form returned to the Counsel for the Plaintiffs. The consent was never refused or granted when they withdrew the deal. The Plaintiff indicated time was of the essence and consent was taking too long. They decided to cancel the Agreement. The Defendants were not at fault as they had no control over the delay in the consent. He had spoken to the Minister for a meeting but was difficult to get to the Minister. Prior to the meeting, he was informed over the phone that the plaintiff had withdrawn. The consent was lodged in 2018 and can't recall the exact date. He attempted to meet the Minister in October. The lawyers corresponded with each other and he had checked with the Lands Department himself who confirmed it was with the Minister. In accordance with clause 10 of the Agreement the consent was lodged between February and March 2018 but that the delay in lodging was from the Plaintiffs. After 90 days his lawyer corresponded to ask for an extension from the counsel for Plaintiffs. There was a verbal agreement to extend the Agreement. On receiving the cancellation of the Agreement, he felt disappointed having worked hard to complete the sale and was unable to do anything. As the Defendant they were not at fault and had facilitated all requirements. The process at lands department was beyond his control. He considered that \$125,000 if given back consideration should be taken for the losses and process to where it was at. The farm need further developments and upgrade which outweighed the deposit price. The losses sustained from the farm was far more than the deposit. Since they had agreed to the Agreement, any loss was sustained by them and he thought there was no point in further investment was the value of the farm would not be the same. The price fixed 6 years ago would have increased now to \$6 million. He argued that the Plaintiff had defaulted when he tried to meet the condition of the Agreement and thereafter decided to cancel the Agreement with a simple email. Agreement tendered as **D MFI-1**.

20. In cross-examination he admitted that the manner in which the Plaintiff behaved and portrayed it was not easy to carry on the development on the land. They could lose

the sale price of \$1 million which was its value 6-7 years ago. They were ready to complete the same.

21. PW-2 was Jiten Kumar who was educated in Viria, worked as a police officer at Naqali Police Station and returned to the land after 12 years when the family asked him in 2017. He admitted there was a dealing for sale of the land and was awaiting paperwork. He moved in June 2018 to New Zealand for further studies and secured a job in the dairy industry. He had executed the Agreement dated 14 December 2017 and can confirm his initials and signature. It was made between him and the Plaintiff. The Agreement was made for Lot 2 on CT 20833 and balance of CT 23543 for a price of \$1million. A deposit of \$125,000 was to be made. The balance was to be paid up within 3 months of execution of the Agreement and Tendered as **D Exh 1** was the Agreement. The 1<sup>st</sup> title was CT 20833 was initially registered to Ram Sharan & Sons Ltd and later transferred to his name under Transfer No 892874 for Lot 2 of DP 9779. CT 23543 title is tendered as **D-Exh 2 (a)**. CT 20834 is the same title that appears on the Agreement. It was initially owned by Balgovind of Central Transport Busses and transferred on 4 June 1982 to Ram Sharan and Sons Ltd. The title belongs to his father who is the grandfather of his father and his siblings. CT 20834 is tendered as **D Exh 2 (b)**. CT 44591 refers to CT 20833 and CT 20834 which were both amalgamated to become CT 44591. Tendered as **D Exh 2 (c)** is CT 44591. CT 20833 is registered under Ram Swaran, Raj Bali and Ram Deo, his father, who are all siblings. It was transferred to Ram Sharan and Sons Ltd on 2 June 1982 and partial transfer to him under transfer number 892374 made on 26 June 2020. Despite the Defendants complying with the Agreement the Plaintiff withdraw their interest and the Defendants suffered loss of income. The deposit was not refunded, as the failure to obtain the ministerial consent was not their mistake.
22. He admitted he was unable to develop the land further but planted quality grass. He did not do any developments as the Plaintiff could come at any time. He returned to diary farming in 2013 and between 2014 to 2016, he planted variety of grass. The diary farm is still in operation even though he has migrated overseas. The production was 800 to 900 litres annually but has reduced when he went overseas. He use to send to Fiji Dairy Company Limited ('FDCL') 64 litres per day at 640 litres per week. In 2018 it was close to 800 to 900 litres a day in the morning. The diary would e transferred to Naluluwai as there was no close chilling station. From 25 December to 26 December 2016 there was a lot of milk produced and gross income was 694.74 as net income. Yearly they earned \$27,267.60 tendered as FDCL accounts for **D Exh 3 (a)**. In 2017 between 24 to 30 December 2017, 837 litres of milk was sent. Total income earned was \$24,452.17 and net earnings of \$21, 296.29. From 2018 to 2019 not enough production in milk. Tendered 2017 FDCL accounts as **D Exh 3**

- (b).** The witness claimed \$125,000 should be forfeited to the 1<sup>st</sup> Defendants as per the Agreement and for loss of income from the farm. Although the Agreement was for 90 days, the sale was beyond the 90 days and should be rendered null and void. The Defendant seeks for specific performance to pay for all expenses and \$50,000 compensation for loss of income as well as costs and interests.
23. In cross-examination the Defence admitted that consent of the Minister was outside of the control of the parties and that consent was conditional to the completion of the Agreement in 90 days as per clause 10. Defence witness denied that the Plaintiff was entitled to a refund. He denied that clause 10.5 meant that Agreement was of no effect if the conditions were not met. He did not know when the Agreement was terminated. He admitted the lawyer had advised him the \$50,000 was made in 2019 for release of deposit. He denied he could not develop land despite the Plaintiff cancelling the Agreement because of the deposit. He admitted he was awaiting the Plaintiff's return. He admitted there was no statements for milking in 2023 as FDCL did not buy their milk. He admitted he had not planted grass for cattle in order to continue milk production. He admitted nothing stopped him from planting grass.
24. Defendant called the second witness, Mr Suresh Chandra who admitted he was the principal for MC Lawyers and admitted he had operated the firm from 1993 to 2020. He admitted the Agreement was entered and prepared by the 2<sup>nd</sup> Defendant for \$1 million and a deposit of \$125,000 was made by the Plaintiff and is in the Trust Account for the Defendant until 10 September 2020 when the Chief Registrar appointed a receiver for which the monies were deposited in its Trust Account. According to his understanding, the Agreement was unconditional unless mutually agreed by parties. The Agreement had conditions in paragraph 10.1 in accordance with section 6 and 7 of the Land Sales Act where consent is to be obtained if land is sold to a foreigner who is not resident for more than an acre. Both parties' lawyers made efforts to obtain the consent. He could not recall who lodged the application but the Agreement was signed on 14 December 2017. Clause 10.2 of the Agreement required that both parties obtain the consent of Minister. He could not recall if the Defendant counsel assisted although they had written to Minister to expedite proceedings.
25. Clause 10.3 of the Agreement required that the Minister advertise for locals to have the first option to purchase, which he thought was not mandatory. There was a common understanding between Solicitors that the land would be advertised although this was not mandatory. Under clause 10.4 the Estate property was to be transferred to Shalin and Salen Kumar. This clause was complied with as the property was transferred to the Trustee, Jiten Kumar. In clause 10.5 a pre-condition must be satisfied and if not satisfied the deposit is liable to the purchaser and the

Agreement is of no effect. We sent a notice of cancellation to the Agreement but unaware when it was made and who made it. Defendant disputed to the notice and hence the deposit was not refunded. Tender as **D Exh 4** is the notice. Letter of 29 October 2018 referred to the sale of Lot 2 of DP 9779 on CT 20833. It was written after notice of cancellation was received, where they were asking for further time for the Agreement. Tendered as **D Exh 5**. On 6 February 2018 a letter from the Plaintiff consenting to transfer and to get Ministers consent. The Defendant filed cancellation although consent was still pending. Consent was refused by Minister. The Defendants were not at fault. Tender **D – Exh 6**. Deposit was paid and hence cancellation could or could not be valid. Defendant did not want to cancel the contract. We had advised the 1<sup>st</sup> Defendant. The funds were paid to MC Lawyers Trust Account but from 4 August 2020 a receiver was appointed by Chief Registrar on 10 October 2020.

26. In cross-examination he admitted his office drafted the Agreement. He admitted Ministry of Lands was not required to advertise locally to sell the land before consenting to sale but there was already an existing policy for freehold lands to be advertised and sold locally prior to sale to foreigners. They were not informed by Ministry of Lands to advertise. In the D Exh 6 dated 6 February 2018 they admitted that they were undertaking to pay costs if advertisement was required. In clause 10.2, on 6 February 2018 the application to transfer was awaiting consent and hence exceeded the 90 days requirement under the Agreement. He admitted a letter of cancellation was issued for by the Defence counsels and he admitted seeking further 60 days extension. Correspondences were done after the letter of cancellation. Clause 10.5 required either party to prove fault for the pre-condition not to be satisfied in order not to be refunded the \$125,000. Cancellation notice cancelled the contract as per clause 10.5. Clause 10 is subject to sub-clauses (1) (2) (3) (4) (5) and hence time was of the essence, Plaintiff was entitled to refund and cancellation.
27. In re-examination the Defendant witness admitted the Plaintiff paid the deposit a little later. He confirmed office accepted the deposit on 6 February 2018. He admitted the Plaintiff did not pay within 21 days as per the Agreement. After receiving notice of cancellation, a letter was written to the Plaintiffs on 29 October 2018 that the Agreement was cancelled unilaterally and that since Defendant had not cancelled, that an extension of 60 days be sort.
28. The Defendants then closed their case.



## **PART C: SUBMISSIONS BY PARTIES**

29. In its written submissions, the Defendants have argued that the Plaintiff have failed to establish that they were correct in cancelling the Agreement as there was no default by the Defendant. They had provided all documents for the Ministerial Consent. There was nothing from Lands Department to argue that the parties had not complied with the process. It was the Plaintiff who cancelled the Agreement as their Foreign Investment Certificate was on the verge of expiration. The Defendants argue that they had established that they suffered loss from the deal and that the 1<sup>st</sup> Defendant never consented to the cancellation. There were evidences of losses sustained and \$10,000 was the amount from earnings lost. The 1<sup>st</sup> Defendants thereafter sort an amount of \$10,000 for losses sustained with costs against the Plaintiff. That the \$125,000 be forfeited to the Defendants as well.
30. The Plaintiffs written submissions is that the Defendants failed to fulfil clause 10 within the time lines required and the consent by the Minister which was necessary. The 90 day period required under clause 10 for which the Agreement was to be completely fulfilled was not satisfied and that they issued a notice to cancel on 25 October 2018, 5 months after the 90 days had expired. The property was transferred to the Defendants on 26<sup>th</sup> June 2020 and not according to the time lines required failing to fulfil clause 10.4 and rendered a breach. Under clause 10.5 that the sale condition was of no effect because the pre-condition requiring ministerial approval and transfer of the title to the Defendant was not satisfied. Therefore the deposit of \$125,000 should have been refunded to the Plaintiff.
31. For the purposes of awarding damages reference was made by the Plaintiffs to the case of Manohan Aluminium and Glass (Fiji) Ltd -v- Fong Sun Development Limited Civil Appeal No ABU 0018 of 2015:
- [19] whereas in tort, the right to award damages depends on the position of the claimant had the tort not been committed, in awarding damages for breach of contract, it would depend on the position that the claimant would have been, had the contract not been broken.”
32. The plaintiffs submit that the Defendant had failed to prove the damages claimed nor losses sustained and should not be awarded any reliefs. That the monies deposited should be refunded to the Plaintiff.

## **PART D: LAW AND ANALYSIS**

33. The Court must consider three pertinent issues:
- (i) Was there a Sale and Purchase Agreement;
  - (ii) Was this Sale and Purchase Agreement correctly cancelled;
  - (iii) Is the Defendant entitled to losses sustained from the cancellation of the Agreement;
  - (iv) Can the deposit be forfeited to the Defendant.
34. From the facts and evidences, it is not contested that a Sale and Purchase Agreement was entered into between the Defendant and the Plaintiff on 14<sup>th</sup> of December 2017 for the sale of the property inclusive of the livestock, farming equipment and farm house. The First Defendant gave oral evidence that he was the Executor and Trustee of the Estate of Ram Deo. He thereafter tendered the CT 44591 containing 38 hac 357 sqm for lot 2 on DP 9779. This lot amalgamated part of CT 20834 and CT 23543 which registered his name as Executor and Trustee.
35. From the evidences vide letter dated 6 February 2018, the court accepts that the Plaintiff had deposited \$125,000 to the 1<sup>st</sup> Defendants lawyers who deposited into their Trust Account.
36. As part of the requirements in the Agreement, the parties were to have finalized and completed the conditions in the Agreement within 90 days or at a time mutually agreed by the parties.
37. The clause is below:

### **10 SPECIAL PRE-CONDITIONS**

10.1 This Sale Contract shall not comprise nor become a contract to purchase any land nor a contract for the disposition of any land for the purposes of sections 6 and 7 of the Land Sales Act (Cap 37) unless and until the necessary written consent of the Minister of Lands of Fiji has been obtained under the Land Sales Act within 90 (ninety) days of execution of this Sale Contract or a date mutually agreed by the parties.

10.2 The parties agree to assist each other and to obtain work in good faith in preparing and executing relevant applications form to obtain the consent of the Minister of Lands pursuant to this clause and any extension of such consent.

10.3 The Vendor will be required to advertise and offer the said property for purchase by an iTaukei person as required by the Department of Lands before the grant of the Minister of Land's consent and consequently Vendor maybe required to sell the said property to an iTaukei person or persons offering to purchase the said property equal to or higher than the said property price, and in which case the Vendor may give notice of cancellation under this Sale Contract before the Sale Contract becomes unconditional in which case:

(i) It will be void and of no effect

(ii) The purchaser shall be entitled to the return of the Deposit and any other monies paid by it (other than consent fees or stamp duty paid on its behalf) and

(iii) Neither party shall have any further right or claim against the other under this Sale Contract (except in respect of any prior breach of the Sale Contract).

10.4 The Vendor shall immediately on execution of the Sale Contract take all necessary steps to have the said property transferred in his name as executor and trustee of the estate of Ram Deo deceased from Ram Sharan & Sons Limited as present registered proprietor of the said property and transfer the said property to the Purchaser with the written approval and consent through the Deed of Renunciation of the other two beneficiaries namely Jai Nand Kumar and Shalen Kumar also known as Salen Kumar named in the Will of the said Ram Deo deceased within a period of thirty (30) days from the date of execution hereof or any reasonable extension of time to be mutually agreed upon between the parties.

10.5 In the event any of the special pre-conditions herein is not satisfied and if the failure to satisfy the relevant condition is not as a result of the default or fault of a party, this Sales Contract –

(i) will be void and of no effect

(ii) the Purchaser shall be entitled to the return of the Deposit and any other monies paid by it (other than consent fees or stamp duties paid on its behalf) and

(iii) neither party shall have any further right or claim against the other under this Sale Contract (except in respect of any prior breach of this Sale Contract).

38. From the Agreement, it is apparent that there are conditions that the parties must comply with to render the Agreement enforceable. The conditions were:

- (i) Advertisement to iTaukei for the purchase of the land as required by the Department of Lands;
- (ii) Transfer of the property from Ram Sharan and Sons to himself as Executor and Trustee of the said property;
- (iii) Ministerial consent for sale of land pursuant to the Land Sales Act;

39. In interpreting the essence of the Agreement, the court considers the principles in interpreting Agreements as elucidated in the case of Digicel (Fiji) Limited -v- Fiji Rugby Union [2016] FJSC 40; CBV 0004;2015 (26 August 2016) where Justice Mansoof in the Supreme Court held that:

76. “It is in this context relevant to note that Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 346 distinguished between an implication of a term into a contract and the rectification of the contract, pointing out that while rectification gives effect to actual intention of the parties, the implication of a term by court is designed to give effect to the presumed intention of the parties. For that reason, as Mason J went on to observe that-

“.....the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents *the totality of their willingness to agree*; each may be prepared to take his chance in relation to an eventuality for which no provision is made. *The more detailed and comprehensive the contract, the less ground there is for supposing that*

the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.”(Emphasis added)

77. As Lord Pearson stressed in the course of his judgment in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, when a party, as does Digicel in this case, calls upon a court of law to imply a term into a contract to give it business efficacy, the court “does not make a contract for the parties.” As his Lordship went on to explain-

“The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term

40. Taking these principles into consideration, I consider the Agreement.

***Was the plaintiff correct to cancel the Agreement?***

41. Clause 3 prescribes the settlement date for the Agreement to sell the property. The provisions are as follows:

3.1 The date of settlement shall be within 30 (thirty) days from the date this Sale Contract becomes unconditional or any other date mutually agreed between the parties in writing. Settlement shall take place at the Registrar of Titles Office, Suva. At settlement –

(a) the Vendor will hand over all relevant transfer documents of the said property in favour of the Purchaser and the Certificate of Title document of the said property to the Purchaser in exchange for the payment of the sum of \$1,000,000.00 ( One Million Dollars) for the balance purchase price of the said property; and

(b) the Vendor will hand over to the Purchaser receipts (or show sufficient evidence of payment) of water, electricity and telephone charges paid up to the date of settlement.

42. From clause 3, it is quite clear that the terms and conditions of the Agreement can be read with clarity.
43. Clause 3 therefore required that all conditions in clause 10 be fulfilled in order to enable the parties to effect the settlement date.
44. Clause 10.1 of the Agreement required that ministerial approval be obtained in 90 days from the date of execution or at a date mutually agreed by the parties.
45. In the evidences, the Defendant admits that they had facilitated the application for consent to sell the lands as evident from the Agreement that was signed on 14 December 2017 and the letter of correspondences by the Defendants Counsel to the Plaintiff Counsel on 6 February 2018 confirming receipt of the deposit, forwarding the application for consent to transfer as well as undertaking to pay for advertisements to sell the land to itaukei in compliant with the conditions of the Agreement.
46. On 25 October 2018 the Plaintiff forwarded a letter to cancel the Agreement on the basis that 'time was of the essence' and that the Defendants had failed to obtain consent within the requisite 90 days from date of execution thereby not fulfilling the conditions enabling settlement.
47. In evidence, the Defendants submitted a letter of 29<sup>th</sup> October 2018 from their counsel seeking a further 60 days extension to await the consent by the Minister, admitting it was beyond their control.
48. On 21 August 2019 the Plaintiff thereafter filed their Claim against the Defendant for the refund of the deposit and for costs as time was of the essence and that the Defendant had breached the terms of the Agreement by not obtaining the ministerial consent within the 90 days timeline.
49. In the case of Union Eagles Ltd -v- Golden Achievement Limited [1997] 2 ALL ER the Privy Counsel determined that where a party had cancelled the Agreement on the basis that the other party had committed a repudiatory breach, the innocent party is entitled to be tendered performance. Where the innocent party waives the requirements in an anticipatory breach and repents and performs the contract, he is

not entitled to unilaterally tender performance according to some terms. In that case the Appellant purchaser entered into a written contract for the purchase of a flat in Hong Kong from the Respondent for \$HK 4.2 m and paid a 10% deposit. The contract prescribed the completion before 5pm on 30 September 1991. The purchaser was 10 minutes late in tendering cheques for the purchase money and relevant documents when the Vendors counsel informed the purchaser that the contract would be rescinded and deposit forfeited and returned the cheque and relevant documents via the messenger. When the purchaser commenced proceedings for specific performance his action was dismissed in the High Court of Hong Kong and on appeal it was affirmed. In the Privy Council it was held that on an absence of conduct amounting to waiver or estoppel, the Courts cannot intervene to provide an equitable remedy such as specific performance where cases of rescission of an ordinary contract of sale of land for failure to comply with the condition of time as an essential condition since the purpose to rescind was to free the property for resale which could be valuable. The Appeal was dismissed as the performance of the contract was not possible. Lord Hoffman had this to say:

“The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the Courts have rejected such generalizations are founded not merely upon authority (see Lord Radcliffe in Campbell Discount Co Ltd -v- Bridge [1962] 1 ALER 385 at 397, [1962] ACA 600 at 626) but also upon practical considerations of business. These are, in summary that in many forms of transaction it is of great important that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.”

50. In this instance, the Plaintiff had paid for the deposit and was awaiting ministerial approval. The letter dated 6<sup>th</sup> February 2018 confirmed receipt of the deposit 42 days after the execution of the Agreement.
51. In having accepted the deposit evidenced from the letter of 6<sup>th</sup> February 2018, the Defendants had accepted part payment towards the performance of the Agreement.

52. The Defendants thereafter facilitated the application for consent of the Minister by providing all necessary documentations.
53. It was when the application had not been determined, that the Plaintiff forwarded a letter on 25 October 2018 seeking to cancel the Agreement pursuant to section 10. The letter of cancellation was 1 month and 18 days after the 90 day period had expired.
54. In the case of Ward -v- Chandra [2016] FJSC 30; CBV 00010.2016 (9 August 2016) the Supreme Court stated that:

Sargent v. A.S.L. Development Limited [1974] HCA 40; [1974-75] 131 CLR 634 at p.641.

[34] The principle relied on by the Court of Appeal was the dictum of Stephen J in Sargent v. A.S.L. Developments Limited (supra):

“It is not by mere delay that it is said the right of rescission was lost but rather by conduct evincing an intention to keep the contract on foot at a time when the alternative, but inconsistent, right of rescission had become available. The vendors having two inconsistent rights were, it is said, bound to elect as between them and having elected to treat the contract as subsisting they were thereafter bound to the election and thus forfeited their rights of rescission.”

55. On receipt of the letter of 25 October 2018, the Defendants had written seeking a further 60 days extension to enable them to await the ministerial consent. From the evidences the Court finds that the Defendant had accepted that eventually, the Plaintiff would cancel the Agreement if the ministerial approval was not forthcoming.
56. The Court therefore finds that without any evidence to contradict otherwise, that the Plaintiff by their conduct, had accepted the request for extension.
57. Calculating the period of extension from when the 90 day period lapsed, there was only 8 days left from the date of the letter. Even if the Court were to calculate the application of the 60 day extension from the date of the letter, a ministerial decision would have been forthcoming by December of 2018.



58. I therefore find that the inability of the Defendants to fulfil their obligations clauses in 10.1, 10.2 and 10.3 resulting in the Agreement being unenforceable.

***Was the Plaintiff entitled to their Deposit?***

59. Accordingly, the Court finds that the Plaintiff was at liberty to seek for the refund of their deposit in accordance with clause 10.5 of the Agreement.

***Should the Defendant be awarded damages for losses sustained or be awarded Specific performance?***

60. The Defendant seeks to be awarded for damages from losses sustained when the Agreement was cancelled as the Defendants reduced cultivation and operations of the farm in expectation of the sale of the property.
61. They also seek if possible, for specific performance.
62. In accordance with the principles of equity as per the case of Union Eagle Ltd -v- Golden Achievement Ltd (Supra) it was held that an absence of conduct amounting to a waiver or estoppel, the courts would not intervene to provide an equitable remedy such as specific performance in cases where the Vendor had rescinded the contract for non-compliance with time and was entitled to resale. Therefore it was correct for the Purchaser to forfeit his deposit as he had committed the breach.
63. In this case the Plaintiff purchaser had rescinded the contract on the basis that the sale of land was in non-compliance with the time lines. The Vendor had not made good the requirements for the ministerial approval.
64. The Agreement could therefore not be enforceable for the sale of the property as the ministerial approval had not been obtained. It is therefore trite in law that the equitable remedy of specific performance is not available to the parties.
65. The Defendant suffers damages from losses sustained from reducing operations in the dairy farm having had a legitimate anticipation that the farm would be sold.
66. Despite the Defendant providing evidences of losses from the dairy sales, they were unable to prove that the Plaintiff had conducted itself in a manner to create a legitimate expectation that the Agreement would be fulfilled.


67. The Agreement itself was very clear on the compliance and fulfilment of the conditions in order to render the Agreement enforceable.
68. The Court therefore holds that the Defendant is not entitled to any award for losses suffered as damages from an unenforceable Agreement.

## **PART E: ORDERS**

69. The Court orders as follows:

- (a) **Statement of Defence and Counterclaim be dismissed;**
- (b) **Costs to the Plaintiff summarily assessed at \$1000;**
- (c) **That the Deposit of \$125,000 be refunded to the Plaintiff and released from the Chief Registrar's Trust Account to the Plaintiff.**



  
Justice Senileba Waqainabete-Levaci

Puisne Judge

28 November 2024