

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 113 OF 2015

BETWEEN : **ORIX HOLDING LIMITED**

Plaintiff

AND : **DINESH CHAND MAHARAJ and PRAVINESH CHAND
MAHARAJ**

Defendants

Counsel : **Mr R Singh for the Plaintiff**
Mr S Kumar for the Defendants

Hearing : **19 & 20 September 2024**

Judgment : **24 February 2025**

JUDGMENT

- [1] The parties entered into a Sale and Purchase Agreement in September 2013 for the sale of a Crown lease – the Plaintiff purchased the lease from the Defendants.
- [2] In December 2014, the Defendants cancelled the contract. The Plaintiff filed these proceedings in March 2015 seeking specific performance of the contract and, in the alternative, damages.
- [3] The timeline for the material events is as follows.

Date

31 August 2004

Event

The Defendants become the registered proprietors of a residential lease on Crown Lease number 1778, Lot 11, Wainibuku subdivision. The residential lease term is 75 years from 1 July 1948. The property is situated in Nasinu, Suva.

25 May 2010 Dinesh Maharaj (first named Defendant) writes to Director of Lands applying to rezone the lease from residential to commercial.

7 October 2011 Department of Lands responds to Mr. Maharaj granting consent to rezoning, but setting out a number of conditions.

25 July 2012 Department of Lands writes to the Defendants approving a commercial lease on the property for 99 years, effective from 1 January 2012, but subject to a number of conditions including payment of \$14,200, being LMV, and the surrendering of the residential lease (being Crown Lease No. 1778).

31 March 2013 The Defendants sign an exclusive agency authority with Rohit Chand of R Hookers Limited to sell their lease.

10 April 2013 An offer to purchase is signed by the Plaintiff and Defendants. The Plaintiff agrees to purchase the lease for the amount of \$600,000. The Plaintiff is required to pay a refundable deposit of \$10,000. Three conditions are stipulated, being that the agreement is to settle after 180 days, the Defendants are to arrange a new commercial lease from 2012 for 99 years, and there are no default clauses.

12 August 2013 The Plaintiff's solicitors (Parshottam & Co) write to the Defendants' solicitors (R. Patel Lawyers) enclosing the unsigned Sale and Purchase Agreement and a cheque for \$25,000 being a deposit for the lease. I note that the Defendants had legal representation before signing the Sale and Purchase Agreement.¹

¹ Mr Maharaj informed the Court that he did not engage lawyers until after he signed the sale agreement – it is possible he was referring to signing the offer to purchase and not the Sale & Purchase Agreement.

10 September 2013	The Sale and Purchase Agreement is signed by the parties. ²
12 September 2013	Parshottam & Co. writes to R. Patel Lawyers attaching the signed Sale & Purchase Agreement.
18 September 2013	R. Patel Lawyers write to the Director of Lands advising of the sale of the lease and requesting that given the new commercial lease is yet to be registered, requests approval to process and register the lease in the name of the purchaser with the same terms and conditions.
5 June 2014	Rohit Chand ³ from R. Hookers Ltd writes to the Director of Orix (Parveen Prakash ⁴) providing an update.
30 June 2014	Rohit Chand seeks an update from Defendants' lawyers.
1 September 2014	The Director of Lands responds to the Defendants' application of 18 September 2013, declining to register the new commercial lease in the name of the Plaintiff (the correspondence is received by R. Patel Lawyers on 10 September 2014) ⁵ .
22 September 2014	Defendants solicitor sends an email to Rohit Chand, Parveen Prakash and the Plaintiff's Solicitor seeking an urgent meeting to progress the sale.
Date unknown	A meeting is held with the parties and their solicitors, and Rohit Chand. There is agreement to make a variation to the agreement - the variation is to be prepared by the Plaintiff's Solicitor. ⁶

² Plaintiff Exhibit 7.

³ Plaintiff Witness 2.

⁴ Plaintiff Witness 1.

⁵ As indicated by the firm's date stamp on the letter.

⁶ This is evidenced by an email on 27 October 2014 from Rohit Chand to the two lawyers.

- 10 November 2014 Email from Rohit Chand to the two parties lawyers and Parveen Prakash advising that the *'vendor called me this morning and advised me you Vendor Lawyers need instruction from Purchaser for use of funds'*. It appears that the Plaintiff agreed to this and funds from the deposit made by the Plaintiff were released to the Defendants for payment of ground rent etc. This was confirmed in an email from Parveen Prakash on 10 November 2014.
- 11 November 2014 The Plaintiff's solicitor confirm the Plaintiff's agreement to release funds to the Defendants. Later the same day, the solicitors send a copy of the draft memorandum, varying the Sale & Purchase Agreement, to the Defendants' solicitor for their consideration.
- 3 December 2014 The Plaintiff's solicitor emails the Defendants' solicitor seeking an urgent update. This is followed up by an email reminder on 8 December.
- 8 December 2014 The Defendants' solicitor emails the Plaintiff's solicitor advising that, *'Let me discuss with Dinesh and Lands on the total amount to be paid before we can agree on the figures and get this rolling off the ground'*.
- 12 December 2014 The Plaintiff's solicitor emails the Defendant's solicitor seeking an update. The Defendant's solicitor responds the same day advising that Dinesh Chand *'came to collect the agreement today and will get back to me'*.
- 16 December 2014 Email from the Defendant's solicitor to the Plaintiff's solicitor advising that, *'Dinesh does not want to proceed any further with the dealing. Please advise your client. If need be we can set a meeting to sort this out'*.
- 16 December 2014 Plaintiff's solicitor responds by email to advise, *'My client considers that a deal is already in place and that*

your client cannot unilaterally pull out of this transaction'.

5 March 2015

The Plaintiff files the present proceedings against the Defendants in the Suva High Court.

19 March 2015

The Department of Land writes to the Defendants to advise that the amount of \$11,742 is outstanding (being the balance of LMV required to be paid before a commercial lease could be issued) and that under s 17 of the State Lands Act, *'the Lease may be cancelled if it is not executed within 6 months of Notice that such lease is ready for execution*'.

23 March 2015

The Defendants pay the outstanding amount of \$11,742.

20 April 2015

R Patel Lawyers writes to the Plaintiff's solicitors confirming that the Defendants did not wish to proceed with the sale of the property and enclose a cheque in the amount of \$30,000, being the deposit previously paid by the Plaintiff.

15 May 2017

The Director of Lands writes to the Plaintiff's solicitors advising that it consents *'to institute legal proceedings against Dinesh Chand Maharaj and Pravinesh Chand Maharaj and Orix Holdings Ltd. on 26/02/2015*'.

31 March 2023

A Commercial Lease, being **Commercial Lease No. 932218**, is registered in the name of the Defendants by the Director of Lands for 99 years from 1 January 2016.⁷

Pleadings

- [4] These proceedings were filed in March 2015. The Statement of Claim is brief. The Plaintiff pleads that the Defendants *'have neglected and refused and continue to neglect and refuse to take any steps towards the completion'* of the Sale and Purchase Agreement. By way of relief, the Plaintiff seeks specific performance of the agreement, or alternatively damages for breach of contract.
- [5] The Defendants have filed an Amended Statement of Defence. Their defence is that the agreement was frustrated by the Director of Lands refusing to grant a new commercial lease to the Plaintiff.
- [6] The proceedings were ready for trial in 2019 but the parties sought a determination on a legal issue, hoping that this would determine the substantive dispute. Mansoor J issued a decision on 28 July 2023 determining that the claim could not be decided without hearing the evidence.

Trial

- [7] Immediately before trial, the Plaintiff filed a Summons to amend their pleadings. It had come to their attention that the Defendants had, during the somewhat prolonged life of the proceeding, secured a Commercial Lease over the Crown Land and registered the same in their names in March 2023. The Plaintiff wished the same to be recorded in their pleadings. The Plaintiff did not intend to amend the relief sought. The Defendants opposed the late application. I heard the application at the start of the trial, and dismissed the application on the basis that the amendment was unnecessary.
- [8] The Plaintiff called 3 witnesses, being Pravin Prakash (Director of the Plaintiff Company), Rohit Chand (from R Hookers Ltd) and Ms Ivamere Mataitini (an employee with the Department of Lands).
- [9] Mr Prakash explained that Orix Holding Ltd signed the Sale and Purchase Agreement in September 2013 for the purchase of the lease. He took the Court through the documents in the Plaintiff's bundle which are self-explanatory and summarized in the above timeline. He understood that the Defendants would arrange to have the new commercial lease registered in the Plaintiffs name and that if this was not possible

then the new commercial lease would be registered in the Defendants name and later transferred to the Plaintiff. He left the matter to the lawyers to sort out and was eventually advised in December 2014 that the Defendants no longer wished to sell the lease. No reasons were provided by the Defendants for this. He also produced the new Commercial Lease registered in the Defendants name in March 2023.

[10] Rohit Chand also spoke to the documents in the Plaintiff's bundle. He confirmed that Dinesh Maharaj (the first named defendant) approached him to sell the property on the Defendants' behalf and that Mr Chand was directly involved in all the communications that led up to the signing of the Sale and Purchase Agreement and thereafter. He stated that he had communicated extensively with Dinesh Maharaj over that period – the second named defendant had given power of attorney to Dinesh Maharaj to negotiate on his own behalf. Mr Chand stated that after the email of 22 September 2014 the parties and their lawyers held a meeting at the Plaintiffs solicitors' office and there was agreement to vary the Sale and Purchase Agreement. He later received a call from Dinesh Maharaj advising him that he wanted to use the funds and this was later agreed by the Plaintiff in November 2014. He stated that he was talking with Dinesh Maharaj regularly in order to make the sale happen. He stated that after the email of 16 December 2014 he spoke to Dinesh Maharaj who advised him that he was looking at other options with his brother and they were not keen to sell.

[11] In cross examination, it was put to Mr Chand that he had suggested that the Defendants use R Patel Lawyers. Mr Chand denied this.⁸

[12] The Plaintiff's third witness was Ms Ivamere Mataitini. She is a Lands Officer with the Ministry of Lands. She has been with the Ministry for 10 years and was subpoenaed to attend with the file for the Crown Lease in question. She stated that the process for rezoning was as per the documentation produced at trial. If the new Commercial Lease had been approved by the Director of Lands in 2012 then it just remained for payment to be made and the surrendering of the Residential Lease. The payment was made in 2015 but the commercial lease was not issued until March 2023. Up until that time, the residential lease remained in place. She stated that there was never an application by the Defendants to transfer the lease to the Plaintiff. No consent was sought. In cross examination, she confirmed that the refusal by the Director in

⁸ I note that the Defendants continued to use same firm in 2023 when the Commercial Lease was registered. The signatures of the Defendants on the Commercial Lease were witnessed by their lawyer from R Patel lawyers.

2014 to register the new commercial lease in the Plaintiff's name could have been appealed.

[13] The Defendants relied on evidence from Dinesh Maharaj⁹. He stated that he and his brother had inherited the property from their parents. He was referred to R Patel Lawyers by the real estate agent. The solicitors made the application for the transfer to the Plaintiff which was refused. He then went to the Lands Department to find out why and was informed by an officer that because of his application he could lose the lease. He stated that he had done his best to secure the consent for the Plaintiff but the application was not successful.

[14] In cross examination, it was put to Mr Maharaj that he had not done what was required under clauses 23 and 24 of the Sale and Purchase Agreement. Mr Maharaj stated that he left it to his lawyers to organise and relied on them. He stated that after the Lands Department informed him that he could lose the lease he advised his lawyer that he did not want to sell.

Decision

[15] The issue in this proceeding concerns the Sale and Purchase Agreement. The Defendants agreed to sell the property to the Plaintiff. However, the Defendants unilaterally cancelled the contract in December 2014, they say because the sale was frustrated by the Director of Lands refusal to register a commercial lease in the name of the Plaintiff. The Plaintiff seeks specific performance of the Agreement.

Terms of Sale & Purchase Agreement

[16] The determination of the dispute in this case requires an analysis of the terms of the Sale and Purchase Agreement.

[17] The Defendants were, at the material time, the owners of a residential lease over Crown Lease No 1778. By 2012, the Defendants had secured a commercial lease subject to the condition that they pay the premium of \$14,200 and surrender the residential lease. It was at this time they instructed a real estate agent to arrange a sale

⁹ The first named defendant.

of their lease. The Plaintiff agreed to purchase the lease but on the basis that they would obtain the new commercial lease.

- [18] A Sale and Purchase Agreement was executed by the parties on 10 September 2013. In consideration for the amount of \$600,000 the Defendants agreed to transfer to the Plaintiff, Crown Lease No 1778 being Lot 11 Wainibuku Subdivision, situated in the Province of Rewa in the Tikina of Suva. The sale price was to be paid by the Plaintiff in two initial deposits of \$10,000 and \$20,000 and then payment of the balance of \$570,000 at the date of settlement. The Defendants agreed to provide a commercial lease to the Plaintiff at the date of settlement. Clause 10 of the S&PA read:

THE Sale is subject to a special condition that the Vendors shall procure a commercial lease for 99 years from the Director of Lands which Lease to the name of Purchaser and this shall be registered with the Registrar of Titles Office on the date of settlement upon payment of the balance purchase price.

- [19] Clauses 23 and 24 are also relevant and read:

23. THE application for consent to transfer and executed transfer shall be submitted to Director of Lands for approval of consent once approval has been obtained for the issuance of commercial 99 lease directly to the Purchaser and the parties agree that they will cooperate with each other to provide necessary requirements for approval.

24. IF in any event the application is refused by Director of Lands for the issuance of Lease directly to the Purchaser then the parties will make application to Director of Lands seeking consent for the sale and Premium to be paid to the Lands Department once consent has been approved to facilitate the processing of the commercial lease from the deposit held with R Patel Lawyers Trust Account who is indemnified from any claims or demands for the reason in so doing.

- [20] It is clear from the evidence at trial as well as the content of the Sale and Purchase Agreement that the Plaintiff intended to purchase the property with a commercial lease. To this end, the preferred course, as per clause 23, was for the Defendants to

obtain the Director of Lands' consent to process and register the commercial lease directly in the name of the Plaintiff. However, if this was not approved by the Director of Lands, then, as per clause 24, the Defendants were to themselves obtain the commercial lease in their own name and then obtain the consent of the Director of Lands to transfer the commercial lease to the Plaintiff.

[21] The fact that the Sale and Purchase Agreement envisaged, and was contingent upon, the Defendants seeking the consent of the Director of Lands to the transfer is evident from clauses 10, 23, 24, and, most explicitly clause 21, which reads, '*THIS agreement is subject to the consent by the Director of Lands*'.

[22] There was express provision for either party to rescind the Agreement in specified circumstances. With respect to the Defendants, they were entitled to rescind the contract if the Plaintiff was in default of any of the payments stipulated in the Agreement.¹⁰ There is no suggestion that the Plaintiff was in default of its obligations in respect to the payments. It had made the two initial deposits of \$10,000 and \$20,000 and was not required to pay the balance until the date of settlement, when the commercial lease had been transferred to the Plaintiff.

[23] The Plaintiff was entitled to sue for specific performance if the Defendants were in default of its obligations under the Agreement.¹¹ The Plaintiff has in fact brought these proceedings to obtain orders for specific performance.

[24] The Defendant's position is that they complied with clause 10 of the Sale and Purchase Agreement. Their solicitors applied to the Director of Land for consent but the application was refused. In light of the refusal, the Agreement was frustrated, and they were, therefore, entitled to cancel the contract in December 2014.

[25] I agree with the Defendants that the outcome of this proceeding turns on the terms of the Sale and Purchase Agreement. However, I am unable to accept that the Director's refusal on 1 September 2014 frustrated the Agreement. I make this finding for the following reasons:

¹⁰ Clause 14 of S&PA.

¹¹ Clause 15 of S&PA.

- i. The Agreement envisaged an alternative course should the Director refuse, as he did, to register the commercial lease directly into the name of the Plaintiff. In such circumstances, the Defendants were to then process the already approved Commercial Lease and have it registered in their names and once done then apply to the Director of Lands to transfer the same to the Plaintiff. Ms Mataitini confirmed in her evidence that the Defendants did not take these steps in 2014 and 2015, although did ultimately register the commercial lease in their names in March 2023.
- ii. The Defendants cancelled the contract on 16 December 2014 without any proper explanation for doing so. They did not inform the Plaintiff that the Agreement had been frustrated. I accept Rohit Chand's evidence that the first named defendant, Dinesh Maharaj, informed him that he had simply changed his mind because the property market had improved and the Defendants were exploring better opportunities.

[26] As the Defendants have now registered the commercial lease in their names, there is no impediment to them applying to the Director of Lands to transfer the commercial lease to the Plaintiff.

[27] The Plaintiff relies on the Supreme Court decision of *Naicker v Chand & Anor* [2024] FJSC 11 (26 April 2024). The facts of that case bear some resemblance to the facts and issues that arise in the present proceedings. That case also involved the transfer of a lease and an application to the Director of Lands for consent pursuant to s 13 of the State Lands Act 1945. The vendor has applied to the Director for consent but the application took some considerable time to process during which time the vendor had a change of mind and sought to escape his contractual obligation to transfer the property to the purchaser. Eventually, the lease expired and the vendor was able to secure a new lease in his own name. The purchaser sought orders for specific performance to have the lease transferred to him. The High Court granted such orders but the Court of Appeal quashed the High Court's decision on the basis that the High Court could not compel specific performance in the absence of the requisite consent from the Director of Lands. The Supreme Court found that the High Court's orders were not well drafted but did not accept that the absence of the Director of Lands consent was fatal to the making of orders for specific performance. Keith J determined that the absence of the Director's consent did not make the agreement null and void.

The Supreme Court found that in that case the application for consent had simply not been properly made or concluded and as such the vendor ought to be compelled to do so. The Supreme Court also considered the effect of the lease having expired and a new lease having been issued to the vendor. Keith J saw no impediment from this as the language in the agreement to transfer envisaged the same lease.

[28] The Supreme Court's findings have equal application to the present case. The absence of the Director's consent does not make the 2013 Sale and Purchase Agreement null and void or frustrate the same. The fact is, that the Defendants have not yet made the required application to the Director of Lands for consent to transfer the commercial lease to the Plaintiff. Nor is it fatal to the Plaintiff's claim that Crown Lease 1778¹² has expired and been substituted with Commercial Lease No 932218. The wording of the Agreement envisaged a commercial lease being issued to the Defendants and then transferred to the Plaintiff.

[29] Accordingly, the Plaintiff's claim succeeds. I make the following orders:

- i. The Plaintiff is entitled to specific performance of the Sale and Purchase Agreement dated 10 September 2013.
- ii. Within 28 days of the date of this order, the Defendants shall apply on the prescribed form to the Director of Lands, for the Director of Lands' consent to the transfer to the Plaintiff of Commercial Lease No 932218. Certificate of Title X1/05 6 (Part Of), Wainibuku Subdivision (Part Of) in the Province of Rewa, Suva, Lot 11, Plan 1669 ('the said lease') issued to the Defendants on 31 March 2023 for a term of 99 years from 1 January 2016.
- iii. Within 14 days of being advised that the Director of Lands has given his consent to the transfer of the said lease to the Plaintiff by the Defendants, the Plaintiff shall pay the balance of the sale price, being \$570,000, to the Defendants.
- iv. Within 2 months of payment of the amount of \$570,000, the Defendants shall execute all such documents as may be necessary to effect the transfer of the said lease to the Plaintiff.

¹² Which is the lease described in the Sale and Purchase Agreement.

- v. In the event of the Director of Lands refusing to consent to the transfer of the said lease to the Plaintiff, the Plaintiff shall have liberty to apply to this Court for such further or additional orders as the Court thinks just. The parties also have leave to apply for any further orders as may be necessary.
- vi. The Plaintiff is successful and therefore entitled to costs summarily assessed in the amount of \$5,000 to be paid by the Defendants within 28 days.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Parshotam Lawyers for Plaintiff

Sunil Kumar Esquire for Defendants