

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 002/2010

BETWEEN: CHIEF REGISTRAR

Applicant

**A N D: VIPUL MISHRA 1st Respondent
MEHBOOB RAZA 2nd Respondent
DR MUHAMMAD SHAMSUD-DEAN SAHU KHAN 3rd Respondent
SAHU KHAN & SAHU KHAN 4th Respondent**

Applicant : Ms V. Lidise & Mr A. Chand
1st Respondent : In Person
2nd Respondent : Mr M S D Sahu-Khan
3rd Respondent : In Person
4th respondent : Dr M S Sahu-Khan
Date of Hearing : 24th January 2011
Date of Ruling : 24th January 2011

**EXTEMPORE RULING ON NO CASE TO ANSWER
SUBMISSION WITH RESPECT TO THE 1ST RESPONDENT**

1. In this application there are three allegations against the 1st Respondent.

2. Those allegations are:

1. Vipul Mishra a legal practitioner, between the period from the 11th day of April 2006 and the 23rd day of October 2006, being the solicitor appointed by one Ambika Nand, the vendor, in the Sale and Purchase Agreement with one Sashi Kiran Pratap, the purchaser, for the sale and purchase of Crown land situated at Nukudrala, Ba, registered under Crown Lease No. 16375, being Lots 10 and 13 on BA2298 and BA2301 leased to Ambika Nand, which land was previously leased to the said Ambika Nand under Crown Lease 5375, having received correspondence from Cromptons on behalf of the Reserve Bank of Fiji concerning Mortgage No. 201344 registered against Crown Lease 5375 held by the said Ambika Nand, failed to properly inquire or cause proper inquiry into the matter of

Mortgage No. 201344 and Crown Lease 5375, which mortgage was subsequently brought forward against Crown Lease 16375 and subsequently transferred to the said Sashi Kiran Pratap, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

2. Vipul Mishra a legal practitioner, on or about the 23rd day of October 2006, being the solicitor appointed by one Ambika Nand, the vendor, in the Sale and Purchase Agreement with one Sashi Kiran Pratap, the purchaser, for the sale and purchase of Crown land situated at Nukudrala, Ba, registered under Crown Lease No. 16375, being Lots 10 and 13 on BA2298 and BA2301 leased to Ambika Nand, failed to disclose to either Sashi Kiran Pratap or her appointed solicitor, all the material facts concerning the said lease, which the said Vipul Mishra knew or ought to reasonably have known, in particular, that an undischarged mortgage and a caveat had been registered against Crown Lease No. 5375, the initial lease issued to Ambika Nand over the same said land at Nukudrala Ba, which Vipul Mishra knew or ought to reasonably have known, which conduct involved a substantial failure to reach or a reasonable standard of competence and diligence.

3. Vipul Mishra a legal practitioner, between the period from the 24th day of March 2006 and the 25th day of October 2006, being the solicitor appointed by one Ambika Nand, the vendor, in the Sale and Purchase Agreement with one Sashi Kiran Pratap, the purchaser, in the transaction for the sale and purchase of Crown land situated at Nukudrala, Ba, registered under Crown Lease No. 16375, being Lots 10 and 13 on BA2298 and BA2301 leased to Ambika Nand, facilitated the preparation, execution and settlement of the said Sale and Purchase Agreement between the said Ambika Nand and Sashi Kiran Pratap which Agreement executed on the 28th of July 2006 clearly stipulated that the land in question was sold free from all mortgages, charges and encumbrances, when in fact the said land was the subject of a mortgage and an encumbrance, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

BACKGROUND

3. The Complainant Sashi Kiran Pratap negotiated the purchase of Lot 10 BA2301 and Lot 13 BA2298 having an area of 4.3756 hectares and being the land in Crown Lease 16375 from Ambika Nand.

4. Ambika Nand had as his lawyer the 1st Respondent and the clerk in the employee of the 1st Respondent, Mohammed Kazim Yasin drafted an agreement for Sale & Purchase and submitted it to the 2nd Respondent who was instructed by the purchaser.

5. The agreement provided for a consideration of \$130,000 and in paragraph 6 stated "the property is sold free from all mortgages, charges and encumbrances."

6. In paragraph 4.2 it further stated that *"The vendor will hand over a registrable transfer of the said property in favour of the purchaser..."*
7. The vendor initially held the land under CL5375 which was granted on the 1st of January 1974 for a term of 10 years.
8. The lease was extended from 1 January 1974 for a period of 20 years.
9. The vendor mortgaged the land to British American Insurance Company Limited by mortgage dated 6th September 1982 which mortgage was registered on 17th of May 1983.
10. The mortgage was for an advance in the sum of \$30,000.
11. By transfer of mortgage dated 31st December 1998 the mortgage was transferred to the Reserve Bank of Fiji.
12. The mortgagee was at all times represented by Cromptons Barristers & Solicitors of Suva.
13. On the 30th of May 1988 the Director of Lands registered a caveat on CL5375 with respect to Lot 13 BA2298.
14. The caveat no. 260056 seeks to protect the interest of the Director of Lands *"by virtue of a Sales and Purchase agreement dated 26th September 1986."*
15. Sometime prior to 26th May 2005 the vendor borrowed money from Mohammed Ali and Air Terminal Services Employees Trust and granted to the lenders a Bill of Sale and crop lien.
16. The 1st Respondent commenced to act for the vendor in or about May 2003 when given instructions to appeal the High Court judgment in favour of Mohammed Farouk.
17. The 1st Respondent also acted for the vendor in or about April 2006.
18. Cromptons by letter dated 11th April 2006 [Ex A33] wrote to the 1st Respondent and said *"We act for the Reserve Bank of Fiji as mortgagee under registered mortgage no. 201344 over Crown Lease 5375 and understand that you act for the registered proprietor of Crown Lease 5375, Mr Ambika Nand."*

We have also been advised that on behalf of Mr Nand you have instituted eviction proceedings against a Mr Tuivita to remove him from the property. Mr Tuivita was engaged by our client as caretaker of the property to protect our client's interest in the property as mortgagee.

Our client only became aware of the eviction proceedings when it was contacted by the Ba Magistrates Court advising that they were holding a writ of possession for Mr Tuivita's eviction. Can you please let us know why these eviction proceedings were instituted without reference to our client and let us have copies of the documents filed in those proceedings.

Can you also advise what plans you client has to pay off the mortgage debt with our client which is secured by mortgage no. 201344 registered over Crown Lease 5375. Your client is in default under the mortgage and our client reserves all its rights in this regard including the appointment of a caretaker to look after the property."

19. By letter dated 2nd December 2003 the vendor applied to the Divisional Surveyor Western for a renewal of CL5375 "which expires on 1/01/2004".
20. The Director of Lands issued CL13675 over the land for a term of 30 years from the 1st January 2004.
21. The lease was registered on the 5th of April 2006 by the Registrar of Titles and the duplicate lease was returned to the lodging party, the Director of Lands.
22. The duplicate lease when returned bore no endorsements or memorials.
23. CL5375 at the time of its expiry bore mortgage 201344, caveat 260056 and extension of lease 483357.
24. At the time of preparation of the Sale & Purchase agreement with respect to the land the 1st Respondent obtained the duplicate lease from the Director of Lands.
25. The duplicate furnished bore no endorsements or memorials.
26. On the 19th October 2006 Cromptons delivered a letter by hand to the Director of Lands requesting that the mortgage on CL5375 be endorsed on the new lease CL16375.
27. This letter was forwarded to the Registrar of Titles by the Director of Lands.

28. For reasons not clear the purchaser delivered the settlement monies to the office of the 1st Respondent in Ba on 23rd of October 2006 and settlement was organised to take place in Suva on the 24th of October 2006.
29. The purchaser was given a receipt on the 1st Respondent's trust account for the funds and a receipt of the 1st Respondent's office account for the vendor's costs.
30. At 4.30 pm on 23rd October 2006 Cromptons forwarded by facsimile transmission to the 1st Respondent a letter [Ex A46] detailing the monies owing under the mortgage by the vendor and advising that the mortgage has not been endorsed on CL16375 as it should have been.
31. The letter said: -
- "We refer to your letter of 6th June.*
- Your client owes our client the sum of \$56,468.53 as at 31st October 2006 which was secured by Mortgage Reg No. 210344 over Crown Lease 5375. Enclosed is a statement showing how this figure is arrived at.*
- We note with grave concern that your client has acquired a new lease over the property being Crown Lease 16375 but that the mortgage has not been endorsed on the new lease as it should have been.*
- Please advise us a matter of urgency how your client intends to clear the mortgage debt to avoid further action being taken."*
32. On the 24th of October 2006 the 1st Respondent proceeded to settle the sale and purchase and disbursed to the vendor the settlement monies.
33. On the 25th of October 2006 the 2nd Respondent lodged the transfer handed over on settlement and the duplicate copy of CL16375 with the Registrar of Titles.
34. The transfer did not contain endorsements or limitations and registration was rejected and the documents ultimately uplifted by the purchasers solicitor on the 7th of May 2007.

THE NO CASE TEST

35. The 1st Respondent refers the Commission to *Director of Public Prosecutions v Thirpathi Gounder and Another* 17 FLR 118 at page 120 Tikaram J quotes Lord Parker CJ and says
- "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence;*

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

36. The issue of the appropriate test has also been considered by the full bench of the Federal Court of Australia in *Rasomen Pty Ltd v Shell Company of Australia Ltd* [1997] 75 FCR 216 the court at 227 quoted *Protean (Holdings) Ltd v American Home Assurance Co* [1985] VR 187 and said.

"And Tadgell J (at 238 - 239) referred to three kinds of submission of no case that could be made: (1) that there is no evidence at all in support of the respondent's case; (2) that although there is some evidence in support of the respondent's case, the judge should not act on it, because, for example, it is so unsatisfactory or inherently unreliable or equivocal that he should find that the burden of proof resting on the respondent party has not been discharged; or (3) a combination of (1) and (2). Tadgell J said:

"If a judge sitting alone received a submission of the second kind and decided to rule on it, whether the moving party is put to or makes his election or not, he must be entitled in doing so to assess the quality of the evidence. Were it otherwise the judge, being the tribunal of fact, would be placed in an impossible position: he would have to assess the validity of the case for the respondent party without being able to assess the worth or weight of the evidence led in support of it. It has been said that 'when there is no jury, the proposition 'no case to answer' may obviously mean far more than, 'is there evidence on which a jury could find for the plaintiff?': *Jones v Dunkel* (at 330 - 331), per Windeyer J. If it falls to the judge to decide whether he could find for the respondent party on the evidence so far led, it is quite unrealistic to expect him to do so without being able to consider all questions which bear on the sufficiency of the evidence and without power to draw or to decline to draw all inference from the evidence given on which the respondent party might seek to rely. Moreover (or perhaps this no more than another aspect of the same view) the judge, being also the arbiter of the law, could not sensibly be required, in considering a submission of the second kind, to say whether the evidence could establish the case in favour of which it was adduced while shutting his mind to the question of its sufficiency in terms of quality. It might be possible to achieve such a measure of detachment in a clear case but in most or very many cases it would not."

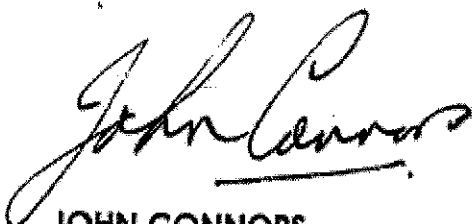
37. Prior to the making of the submission by the 1st Respondent I indicated that it was inappropriate in proceedings before this Commission for a party making a no case submission to be required to make an election.

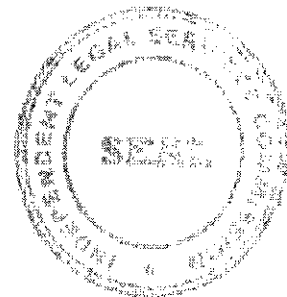
CONCLUSION

38. The submissions made in support of the application rely heavily on the proposition that as the encumbrances were not on CL16375 at the time the Sale and Purchase agreement was drawn and delivered there is no case to answer.
40. The complaint does not, in my opinion, express the allegations against the 1st Respondent in such terms and there is, in my opinion, evidence sufficient, when assessed in the light of the authorities referred to, to establish a case to answer.

ORDERS

1. There is a case to answer.
2. The 1st Respondent's submission as to no case to answer is dismissed.


JOHN CONNORS
COMMISSIONER



24 JANUARY 2011