

**KOSOL CORPORATION LIMITED -V- IELE MOSESE  
& PATRICIA MOSESE**

HIGH COURT OF SOLOMON ISLANDS  
(PALMER J.)

CIVIL CASE NUMBER 375 OF 1999

HEARING: 13<sup>TH</sup> APRIL 2000  
JUDGEMENT: 13<sup>TH</sup> APRIL 2000

**A. RADCLYFFE FOR THE PLAINTIFF  
R. TEUTAO FOR THE DEFENDANTS**

**PALMER J.:** I gave judgement straight away after hearing the evidence and brief submissions of learned Counsels in this case. I said I would give reasons later. I now do so.

The Plaintiff, Kosol Corporation Limited (*hereinafter referred to as "Kosol"*) seeks orders for inter alia, specific performance of the contract dated 28th January 1998 (*hereinafter referred to as "the Contract"*), or damages. A copy of that Contract is annexed as "Document No. 6" in Agreed Bundle of Documents filed 13th March 2000. Clause 1 and 2 of the Contract provided inter alia, for the transfer of the Property in favour of Kosol.

**Facts**

The facts leading to the signing of that agreement can be summed up as follows. First Defendant ("Ieli") worked as an employee of Kosol in 1997 and 1998. Kosol provided rental accommodation for Ieli as part of his benefits. Various houses were rented over a period of time. After sometime, Ieli and wife (*second Defendant*) decided to buy a house. Moving from house to house had become a burden. Sometime in November 1997 an advertisement for the sale of a house by tender, appeared in the Solomon Star Newspaper. The Defendants decided to put in a tender. Unfortunately they could not secure funding from the Solomon Islands National Provident Fund ("NPF"), of which they were members and would have been entitled to obtain a housing loan. They were told when they enquired that the housing loan scheme had been temporarily suspended and would be re-opened in six months time. Part of the tender terms required evidence of funds to be included in the application. Both decided then to approach their employers for financial assistance. Patricia Mosese approached her employer, Boral Gas Solomons Limited only to be told there was no company policy covering such situations. Ieli was more successful. The Managing Director of Kosol, Mr Durk Kee Kim ("*Mr Kim*") agreed to finance the purchase of the Property should Ieli's tender prove successful. This has not been disputed. Mr Kim and Ieli agreed in evidence before this Court of a verbal arrangement entered into, that the money provided would be repaid when the housing loan scheme from NPF was re-opened in six months time. The evidence adduced showed quite plainly that Kosol was merely to act as financier. It was never in doubt who applied for the Property and was to have possession of the Property. This point was made very clear to the Defendants when they lodged application for tender at the Home Finance Corporation of Solomon Islands ("*the Corporation*"). It was made plain to them that past experiences had shown that tenders had simply been put in place for others instead of the Applicants themselves and

that this was defeating the aims of the Corporation in seeking to provide cheap and reasonable homes for indigenous Solomon Islanders. The Applicants had assured the Corporation that Kosol was merely acting as financier and that they were going to repay Kosol's money. It seems quite clear that had the tender been made on behalf of Kosol and not the Defendants, their tender application would never have been accepted. But that is not in issue because all parties agreed it was never intended to put in a tender on behalf of Kosol, or that the Defendants were to acquire the Property for Kosol. Rather, it was a tender made jointly by the Defendants. The question whether it was known by Mr Kim that it was a joint tender or a sole tender by Ieli is immaterial. Mr Kim's contribution to the transaction was purely and foremost as a financier. Of-course it must be accepted his uppermost concern in such circumstances was the repayment of his money. Had everything occurred as arranged, no problems would have occurred it seems. Mr Kim would have been refunded his money and the Defendant's title to the Property secured. Unfortunately, things did not work out as intended. The housing loan scheme from NPF did not re-open within six months. It remains suspended to date. Attempts to raise the necessary finance from commercial banks appear never to have gone beyond enquiries stage, on the belief (*mistaken though*) by the Defendants, that they first needed to obtain title before any applications for a loan would be considered.

The Defendants made a joint tender for the Property for \$145,000-00 (*"Document No. 2" in Agreed Bundle of Documents*). Kosol was named as the financier in that agreement. See also letter dated 3rd December 1997 (*"Document No. 3"*) in which Kosol had confirmed its role as the financier for Ieli. I quote:

*"This is to certify that Kosol Corporation Ltd will be the financier for Mr Ieli Moses should his application for the tender of property is accepted by your company."* (Paragraph 1 - emphasis added)

It was made clear in no uncertain terms what was the role of Kosol in that letter. This was confirmed in evidence before this Court by Mr Kim. Ieli was successful in his tender and informed of this by letter dated 19th January 1998 (*"Document No. 4"*). Mr Kim was also informed by letter of 20th January 1998 (*"Document No. 5"*) and asked to remit the amount of \$145,000-00 within 14 days. Ieli told this Court that when he spoke to Mr Kim about his successful tender he was shocked to learn that it was not company policy to buy houses for its employees. Mr Kim however told him that the only way this could be done was to have title transferred to the Company. Ieli told Court he felt let down badly by Mr Kim. He felt he had been used by Mr Kim to acquire the Property for Kosol. At the same time, he was in dire straits. There was no way out. He either had to accept the terms put to him by Mr Kim or lose the Property by default. He told Court he agreed to sign the Contract under the circumstances. Ieli does not dispute having signed the said contract but that it did not reflect correctly the original terms in which they had been agreed upon. Learned Counsel for the Plaintiff did explain that the Contract had been signed to secure Kosol's money. One thing was made quite clear though in the evidence before this Court. It was never intended to acquire the Property for Kosol. That I am satisfied on the balance of probabilities. Mr Kim in his evidence before this Court does not dispute that position.

The Contract was signed on 28 January 1998. The cheque for \$145,000-00 was paid by Kosol on 30th January 1998. It is clear to me things would have turned out differently if Ieli had been able to raise the necessary funds from NPF or from any commercial banks to repay Kosol for the money paid. As is now common knowledge, NPF has not reopened its housing loan scheme. No loans either were obtained from any commercial banks. Ieli and wife accordingly could not repay Kosol the money lent for the purpose of purchase of their Property. It was then that

Kosol sought to implement the Contract towards August of 1999 (*see Documents No. 8 and 9*). The Defendants however refused to sign the transfer documents though they knew very well they owed Kosol the amount of not less than \$145,000-00.

It is not in dispute the Defendants had been residing in the Property since, to the present time. Evidence had been adduced which showed that some repair work had to be done on the Property before it could be occupied by the Defendants. This came to some \$33,000-00. Other costs incurred included insurance and stamp duty.

The Plaintiff now comes to Court seeking an order for specific performance of the Contract. The remedy of specific performance is discretionary. Normally it would not be granted where damages would be an adequate remedy (*Harnett v. Yielding (1805) 2 Sch. & Lef. 549, at p. 553; Ryan v. Mutual Tontine Westminster Chambers Association [1893] 1 Ch. 116, at p. 126.*). Having heard the evidence in this case, I am satisfied on one hand, damages would be an adequate remedy. To that extent a proper order would have been to refuse the order for specific performance and grant alternative relief for damages. I am satisfied however on the other hand, that since 1998, (for almost two years) the Defendants had done little in seeking to repay the money owing to Kosol. Mr Kim had assisted the Defendants to buy a house of their own out of the goodness of his heart but that the Defendants had not reciprocated by repaying promptly monies belonging to Kosol. In all the circumstances presented before me, I am satisfied justice would be achieved if the order for specific performance should be granted but suspended on certain conditions. In my respectful view, the Defendants should be given one last opportunity to raise the necessary finance to repay Kosol.

As to the question whether there had been wrongful occupation of the Property I do not think it has ever been denied that the Property had been acquired for the Defendants. The Property was never intended to be acquired for Kosol. There was therefore no wrongful occupation of the Property by the Defendants. What the Defendants owed Kosol, was money.

I am satisfied the orders made on 13th April 2000 were justified and appropriate in the circumstances of this case. Those orders read:

**THAT JUDGEMENT BE ENTERED FOR THE PLAINTIFF FOR SPECIFIC PERFORMANCE OF THE CONTRACT DATED 28TH JANUARY 1998, BUT SUSPENDED ON THE FOLLOWING CONDITIONS:**

1. THAT WITHIN THIRTY (30) DAYS, THE DEFENDANTS REPAY TO THE PLAINTIFF THE AMOUNT OF DAMAGES OWED; BEING THE PURCHASE PRICE OF THE PROPERTY, THE COST OF LABOUR AND MATERIALS FOR RENOVATION, COSTS OF INSURANCE AND STAMP DUTY, AND INTEREST AT 5% WITH EFFECT FROM JULY 1998.
2. FAILING WHICH, THE PROPERTY BE SOLD BY TENDER WITH RESERVE PRICE FIXED AS THE AMOUNT OF THE DAMAGES CLAIMED, AND TENDER TO REMAIN OPEN FOR ANOTHER THIRTY DAYS WITH SANCTION OF THE COURT TO BE OBTAINED FOR FINAL APPROVAL OF TENDER ACCEPTED.
3. FAILING WHICH, THE PROPERTY BE TRANSFERRED FORTHWITH TO THE PLAINTIFF, REGISTRAR OF HIGH COURT TO EXECUTE TRANSFER INSTRUMENT IF DEFENDANTS REFUSE TO SIGN.

4. CONSEQUENTIAL ORDERS FOR POSSESSION WITHIN SEVEN DAYS.
5. DENY CLAIM FOR MESNE PROFITS FOR WRONGFUL OCCUPATION OF THE PROPERTY.
6. TIME LIMITS MAY ONLY BE VARIED WITH LEAVE OF COURT.
7. DEFENDANTS TO BEAR COSTS OF THE PLAINTIFF.

**ALBERT R. PALMER**  
THE COURT