

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 273** of **2016**

BETWEEN : SWEET RAINBOW INVESTMENTS (FIJI) LIMITED

PLAINTIFF

AND : MOHAMMED AFZAL KHAN

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. S. Devan for the plaintiff

: Mr. D. Sharma and Ms. N. Choo for the defendants

Date of Trial : 24 June 2019

Date of Judgment : 15 February 2023

JUDGMENT

BREACH OF CONTRACT

Agreement for the sale and purchase of land – Validity of

the agreement – Vendor's breach – Specific performance – Damages

1. The plaintiff filed action seeking *inter alia* an injunction to restrain the second defendant, Silver Fern Investments Limited (Silver Fern), from disposing the subject property, an order for specific performance of the sale and purchase agreement dated 5 March 2013, a declaration that the first defendant, Mohammed Afzal Khan, is in breach of the sale and purchase agreement, an order requiring the second defendant to transfer the property to the plaintiff, and an order directing both defendants to execute documents to transfer the property to the plaintiff. In the alternative, the plaintiff sought damages for breach of contract and /or for refusal to complete the sale.
2. Both defendants filed their statements of defence denying the plaintiff's claims. Subsequently, Silver Fern filed a summons to strike out the plaintiff's claims. By order dated 19 February 2018, Silver Fern was removed from this action. Silver Fern is the current registered proprietor of the property which is situated in Denarau, Nadi. The plaintiff's statement of claim has not been amended to reflect the second defendant's removal. In the following paragraphs, the first defendant will be referred to as the defendant.

The plaintiff's case

3. The present parties entered into a sale and purchase agreement on 5 March 2013. Thereby, the defendant agreed to sell and the plaintiff agreed to purchase three and a half acres out of a larger land described in certificate of title No. 16663 as lot 1 on deposit plan No. 8805. The sale and purchase agreement provided *inter alia* that the defendant would sell and the plaintiff will purchase the said property. The parties agreed to take all necessary steps as may be necessary for the purpose of carrying into effect the matters set forth in the agreement. The agreed consideration was \$650,000.00. The plaintiff was required to deposit \$50,000.00 in its solicitor's trust account upon execution of the sale and purchase agreement. The balance purchase price of \$600,000 was to be paid upon

settlement of the sale transaction. The plaintiff pleaded that settlement was to be effected within 90 days from the date of signing or on a date mutually agreed in writing between the plaintiff and the defendant. Time was stipulated to be of the essence of the agreement.

4. By letter dated 27 June 2013, the defendant stated the measures he had taken to sell the property, and confirmed that a new separate title would be issued. In reply, the plaintiff through its solicitors informed the defendant by letter dated 2 July 2013, that its solicitors will require the new title number in order to prepare the transfer and mortgage documents. There was no correspondence between the parties after this letter until April 2016. By letter dated 14 April 2016, the plaintiff demanded that the defendant act in terms of the sale and purchase agreement. The plaintiff states that in breach of the sale and purchase agreement, the defendant failed to disclose to the plaintiff details of the new certificate of title.

The defence

5. The defendant pleaded that he asked the plaintiff to forward the transfer document to him and to confirm the plaintiff's readiness to effect settlement. He stated that he informed the plaintiff's officers that as the settlement or part payment was not made to him by 30 June 2013, the land could not be sold to the plaintiff. The defendant denied having acted in breach of the terms and conditions of the sale and purchase agreement, and pleaded that he informed the plaintiff that the Registrar of Titles would issue a separate certificate of title after seeking verification of land boundaries from the director of lands. He stated that the plaintiff failed to confirm that it was in a position to settle by 2 July 2013, and that the plaintiff had shown no further interest in purchasing the land within the stipulated 90 days. He pleaded that the plaintiff took no further step until he received the letter of 14 April 2016 putting him on notice to settle.
6. The defendant said that the trustee of the estate of Ran Narayan, Nilam Kumar, obtained a new title and transferred the land to Ajit Dushiyan Rahut. The defendant also pleaded that although he was not able to comply with the sale and purchase agreement, clause 14 of the agreement operated to prevent any claims against him. The declaration in the clause relied upon is that if the vendor

defaults in performing his obligations, the sale and purchase agreement will be deemed cancelled and of no effect.

Evidence

7. On behalf of the plaintiff, two witnesses gave evidence: Mr. Rajendra Sami and Mr. Neel Shivam. The defendant chose not to lead evidence.

8. Mr. Rajendra Sami is the managing director of Ram Sami & Sons Fiji Ltd, a poultry farm. He claimed to own several investment companies including the plaintiff. Mr. Sami said he purchased the plaintiff as a shelf company. He signed the sale and purchase agreement to buy the subject land and paid a deposit to the trust account of Neel Shivam Lawyers on 6 and 14 March 2013. The payments were in sums of \$25,000.00 each. The property was not transferred to the plaintiff in terms of the agreement. Mr. Sami said the plaintiff is still willing to purchase the property. The witness said the plaintiff proposed to build apartments for occupation by tourists. He said that the plaintiff did not have funds to purchase the property, but the businesses that he and Mr. Sekran owned had funds for the purpose.

9. The next witness for the plaintiff was Mr. Neel Shivam. The witness managed his own law firm, Neel Shivam Lawyers. He has been a lawyer for 20 years, working mostly in conveyancing. His firm was engaged in general practice. It also prepares shell companies. The witness said the land in question was owned by one Ram Narayan. Upon his death, Nilan Kumar was appointed the trustee of his estate. The land was a large plot in excess of 25 acres. The plaintiff wanted to purchase a portion having an extent of 3 ½ acres. His client was aware that the defendant had a back to back agreement to purchase the property and the power to sell the property. The agreement required the defendant to issue a separate title for the land to be purchased. Mr. Shivam said that by letter dated 27 June 2013, the defendant stated that he was ready to transfer the property, and requested the plaintiff to proceed with the completion of the transfer and mortgage documentation for financing.

10. By letter dated 2 July 2013, Mr. Shivam called upon the defendant to prepare a separate title number and told him that this would be needed to prepare transfer and mortgage documents. He said that the defendant did not inform him that a separate title bearing the number 41486 was issued in respect of the property. On 22 May 2014, the trustee transferred the land in CT 41486 to Ajit Dushiyant Rahut, a beneficiary of the estate. The land in CT 41486 was transferred to Silver Fern on 1 December 2014. The vendor's agent informed him of the transfer to Silver Fern. Thereupon, his firm did a search and found that a separate title was issued. Mr. Shivam said he was still within time to settle the transaction when he sent a notice to complete in April 2016.

Was the plaintiff in breach?

11. According to the evidence, the defendant was to purchase the property out of the larger land from the estate of Ram Narayan and sell it to the plaintiff for a sum of \$650,000.00. The defendant had an agreement with the trustee of the estate of Ram Narayan. He had made an advance payment and the balance was to be settled on or before 30 June 2013.
12. The plaintiff was to purchase the property from the defendant within 90 days of all pre-conditions of the sale and purchase being met. Time was of the essence of the contract. The preconditions required the defendant to obtain all government and statutory approvals for rezoning and to issue a new certificate of title in the name of the vendor.
13. The defendant informed the plaintiff that he had obtained extensions of approvals for rezoning and subdivision of CT 16663, that he lodged an environmental management plan with the Director of Environment, that a registered surveyor had surveyed and carried out pegging of the land, a subdivision plan was duly drawn up and approvals obtained, the subdivision plan was lodged with the Registrar of Titles, and confirmed that the Registrar of Titles was ready to issue a new separate title to the three and half acres of land.
14. The plaintiff was not provided with a separate title as required by the sale and purchase agreement. There is no evidence that the defendant replied the letter of

2 July 2013 sent by the plaintiff's solicitors asking for a separate title. There was no correspondence between the parties from 2 July 2013 to 14 April 2016. The defendant was in breach of the agreement when he failed to provide a separate certificate of title in response to the plaintiff's letter dated 2 July 2013 and in terms of the sale and purchase agreement.

Remedies sought by the plaintiff

15. The sale and purchase agreement of 5 March 2013 required settlement to take place within 90 days from the date of signing of the agreement. The settlement date was not extended, although this could have been done by mutual agreement. The evidence establishes that the defendant did not comply with the sale and purchase agreement.
16. The statement of claim sought orders from court to transfer the property from Silver Fern to the plaintiff. Mr Shivam explained the reasoning for asking this remedy in these terms. Mr. Shivam told court that when he carried out a search of Silver Fern, he found that 95% of the shares of Silver Fern belonged to the defendant's wife. Mr. Shivam says, the defendant's wife has control of the property, and through her the defendant, over the property at the time his letter of 14 April 2016 reached the defendant. He said that the plaintiff assumed the transfer was made to the defendant's nominee. On that reasoning, the plaintiff assumed that the nominee, Silver Fern, could transfer the property to the plaintiff. These assumptions are, however, not found in the letter of 14 April 2016 sent by Neel Shivam Lawyers. There is also no reference to the supposed nominee, Silver Fern, by the plaintiff's lawyer.
17. Issuing court orders to transfer the property from Silver Fern to the plaintiff is not possible as Silver Fern is not a party to these proceedings anymore and orders cannot be made against the company in its absence. The sale and purchase agreement between the plaintiff and the defendant made no provision for specific performance. Mr. Neel Shivam conceded that the omission of this provision was deliberate, but did not explain the context in which the remedy was left out of the agreement. Silver Fern is the current registered proprietor of

the property. Specific performance will not lie against the defendant in respect of a property owned by Silver Fern, which is not a party to this action.

18. Ordinarily, the breach of a contract would have raised the consequential question of damages. In this instance, the defendant relied on clause 14 of the sale and purchase agreement and denied that he was liable for non-performance of the agreement except for reasonable legal costs. The clause provides:

“If the vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor’s part therein contained then in such case the Sale and Purchase Agreement shall be deemed to be cancelled and of no effect and any monies paid by the purchaser on account of or in reduction of the purchase price shall be refunded to the purchaser by the vendor without any deductions whatsoever. The Vendors shall pay the purchaser’s solicitors reasonable legal costs”.

19. In submissions, the plaintiff said that the defendant could not rely on clause 14 of the agreement as he did not give evidence to prove his default under the agreement. However, clause 14 leaves little ambiguity in terms of the vendor’s liability arising from his default. Mr. Sami and Mr. Shivam agreed in their testimonies that damages would not be available to the plaintiff as a result of clause 14 of the sale and purchase agreement.

20. There is also the question whether the plaintiff made a serious attempt towards settlement. Between 2 July 2013 and 14 April 2016 there was no correspondence between the parties. Mr. Shivam explained that he did not take steps from 2 July 2013 to 14 April 2016 as he believed that the defendant was trying to procure a separate title as title issuance is a long process. Mr. Sami said the company kept aside a sum of \$600,000.00 to invest in the property. No evidence of this was produced. According to Mr. Shivam his law firm did not have \$600,000.00 in its trust account at the time of putting the defendant on notice to settle by letter of 14 April 2016. However, these considerations are not important in view of clause 14 of the agreement, the legal effect of which is clear.

21. Consideration must be given to awarding damages on account of legal costs incurred by the plaintiff, which is permitted by clause 14 of the agreement. In his testimony, Mr. Shivam said he would bill the client at the end of the matter, and that he was looking at a fee of \$25,000.00 to 30,000.00. In cross examination, Mr.

Shivam was unable to put a figure to the bill of costs to be sent to the plaintiff. In the absence of evidence of the actual legal costs incurred by the plaintiff, a sum assessed as \$15,000.00 is reasonable to be paid by the defendant as damages to cover legal costs incurred by the plaintiff in executing the sale and purchase agreement.

Validity of the sale and purchase agreement

22. The defendant took the position that the sale and purchase agreement of the signatories on behalf of the plaintiff were not properly authorised. Mr. Sami and Mr. Shivam were cross examined at length on the matter. Mr. Sami initially said in his testimony that he and Mr. Satya Sekran of Cope Construction Limited were directors and shareholders of the plaintiff. Mr. Sami and Mr. Sekran signed the sale and purchase agreement on 5 March 2013 in the presence of a senior lawyer. They did so voluntarily. They were represented by Neel Shivam Lawyers. They certified themselves as proper officers of the company. Mr. Shivam at one point called them acting directors. He said that they ran the company and took all the decisions as his law firm sold them the shelf company.
23. Mr. Neel Shivam was the majority shareholder of the plaintiff. Ms. Punam Maharaj was the minority shareholder. Mr. Neel Shivam and Ms. Punam Maharaj were the directors of the plaintiff from 21 January 2013 until 30 August 2016, when Mr. Sami and Mr. Sekran were appointed. Ms. Wong was also named as the director of the plaintiff until 30 August 2016. In cross examination, Mr. Sami agreed that he and Mr. Sekran were not officers of the company on the date the agreement was signed, although the agreement describes them as proper officers of the company. When company documents before the court are considered, it is clear that Mr. Sami and Mr. Sekran were not directors of the plaintiff when they signed the sale and purchase agreement.
24. Mr. Sami's testimony at the outset was that he purchased the plaintiff. In cross examination, he agreed that he was not a shareholder. The evidence shows that Mr. Sami and Mr. Sekran are not shareholders of the plaintiff. Mr. Shivam said the shares of the plaintiff were held in trust for Mr. Sami and Mr. Sekran. The trust arrangement was not in writing. He was the legal owner; not the beneficial

owner, he explained. Although their names were not lodged as directors of the plaintiff, the witness said, Mr. Sami and Mr. Sekran took all decisions of the plaintiff.

25. What emerges from the evidence is that Mr. Sami and Mr. Sekran were not appointed directors of the plaintiff until 30 August 2016. They were not directors of the plaintiff when the sale and purchase agreement was executed. Even at the date of trial, they were not shareholders. At most, Mr. Shivam held shares on their behalf on trust.
26. In my view these factors will not render the sale and purchase agreement invalid. The plaintiff and the defendant entered into a binding agreement. Mr. Sami and Mr. Sekran signed documents on behalf of the company. The plaintiff did not produce a board resolution authorising them to sign on behalf of the plaintiff. Nevertheless, the documents were executed with the knowledge of the board. The action of the signatories in executing the documents has never been challenged by the company. The defendant believed Mr. Sami and Mr. Sekran to be the proper officers of the company. They acted as agents of the plaintiff's board. If they lacked actual authority in the form of a board resolution, the overall circumstances show that they had ostensible authority to enter into a binding contract on behalf of the plaintiff. Nothing turns on the fact that Mr. Sami and Mr. Sekran are not shareholders of the company.

Conclusion

27. The action was filed seeking specific performance of the sale and purchase agreement, and injunctive and declaratory relief. Injunctive relief against Silver Fern does not arise as the company is not a party to this action. An order for specific performance against Silver Fern cannot be granted for the same reason. An order for specific performance will not lie against the defendant for the reasons stated above. The defendant and Silver Fern will, therefore, not be called upon to execute any documents in respect of the property. Damages are assessed in terms of clause 14 of the agreement. In view of the circumstances and the orders to be made, costs will not be imposed.

ORDER

- A. Injunction is refused.
- B. Order for specific performance of the sale and purchase agreement dated 5 March 2013 is refused.
- C. Declaration granted that the defendant is in breach of the sale and purchase agreement.
- D. Order requiring Silver Fern Investments Limited to transfer the property to the plaintiff is refused.
- E. Order requiring the defendant and Silver Fern Investments Limited to execute documents of transfer or for appointment of the chief registrar to transfer property to the plaintiff is refused.
- F. A sum of \$15,000.00 as damages for legal costs to be paid to the plaintiff within 21 days of this judgment.
- G. The parties will bear their own costs.

Delivered at **Suva** on this **15th** day of **February, 2023**



M. Javed Mansoor
Judge