IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 16 of 1978

Between:

IMAM HUSSAIN s/o Nur Buksh — Appellant

- and -

SHIU NARAYAN s/o Hanuman — Respondent

Dr. M.S. Sahu Khan with S.D. Sahu Khan for the Appellant

G.P. Shankar for the Respondent

Date of Hearing: 18th July, 1978

Delivery of Judgment: 28/7/78.

JUDGMENT OF HENRY AND SPRING, JJ.A.

This is an appeal and cross-appeal from a judgment of Stuart J. who dismissed an action brought by appellant for specific performance of an agreement for sale and purchase of a leasehold interest in native land, and, on a counterclaim, granted an order for possession. Appellant was the purchaser and respondent was the vendor. The action concerned a block of land containing approximately 40 acres and known as Lot 3 Tagi Tagi Subdivision. It was native land in respect of which control and administration were vested in the

Native Land Trust Board (hereinafter called "the Board") by virtue of the provisions of the Native Land Trust Ordinance Cap. 115 (hereinafter referred to as "the Act").

In 1970 respondent made an application to obtain a lease the said land in terms of the Act and the regulations made thereunder. On February 25, 1970 his application was provisionally approved by the Board by a formal notice sent to respondent on that date. The area was subject to survey. The intended lease was for a period of 30 years from May 1, 1963. It will be noticed that this date was some seven years earlier. This back-dating of the proposed lease is unimportant. There seems to have been an earlier "approval notice" in 1965 which was cancelled. The rental was £40 per annum. The approval notice contained the following provision:

> "3. You will not receive final notice of approval nor may you occupy the land provisionally approved for lease until the first six months rent and the estimated survey fee have been paid."

It is clear that respondent complied with the condition and was lawfully in possession of the land in terms of the said approval notice of 1970 and presumably had been in possession for some time past.

The approval notice contained a term that respondent accepted "This approval of lease" on the terms set out. There was also a requirement that the lease be registered

under the Land (Transfer and Registration) Ordinance. The regulations provide for a registrable memorandum of lease to be executed.

The approval notice also contained the following provision:

> "The lease will be subject to the conditions set out in the Native Land (Leases and Licences) Regulations, and where applicable the Agricultural Landlord and Tenant Ordinance, a summary of which conditions appears on the back hereof."

One of the conditions was that the lessee may not transfer, sublet, mortgage or assign the lease without the written consent of the lessor. For some unexplained reason no registrable lease was executed until September 30, 1975 (and registered on November 10, 1975) but in the meantime the events with which these proceedings are concerned took place.

On August 24, 1974 appellant entered into an agreement to buy the leasehold interest of respondent for $12,000. This will be called "the 1974 agreement". It was a term of the 1974 agreement that the consent of the Board should be applied for. A formal application was completed and appellant paid to the solicitors, who were acting for both parties, the sum of $30.20 being the consent fee. A receipt dated August 20, 1974 was produced. The solicitors failed to file the application with the Board. No explanation has been given for this failure. Appellant moved on to the land. It was held that appellant entered as

a purchaser under the 1974 agreement. The learned Judge said that appellant realised his tenure did not begin until the consent of the Board was given. Between August 1974 and March 1975 appellant built a house on the land. The leaned Judge accepted that appellant did not regard the land as his until the consent of the Board was given and that the sugar cane production was regarded in the same way. Reference will later be made to sugar cane produced from the land.

On February 24, 1975, the solicitors who had acted for both parties and who, so far as appellant knew, still acted for him, wrote appellant as follows:

> "We act for SHIU NARAYAN son of Hanuman of Tagi Tagi, Tavua, Cultivator and are instructed to address this letter to you. Our client says that you are living on our client's Native Lease without paying any rent and without any colour of right. Our client requires you to vacate the land and premises and give vacant possession to our client within 7 days, failing which our client will take out Court proceedings against you for eviction."

On March 9, a "panchayat", which is a local arbitration, was held. As a result a document was prepared and signed by both parties on March 14, 1975. At this stage appellant had separate legal representation although the solicitors, who formerly acted for both parties, continued to act for respondent and still so act. The learned Judge held, and it has not been challenged

on appeal, that this document was, apart from questions of illegality, intended by the parties to be a final and binding agreement. The learned Judge also held that it was also agreed that it was subject to the consent of the Board. He said:

> "I think that the first thing about this contention is that both parties knew that any sale of the land was subject to the consent of the Native Land Trust Board and they both signed an application for consent which they realised had to be obtained before their sale agreement would have any efficacy."

The document signed on March 14, 1975, which will be called "the 1975 agreement", is in the following form:

" INSTRUCTIONS

Vendor: SHIU NARAYAN s/o Hanuman of Tagi Tagi, Tavua Farmer.

Purchaser: IMAM HUSSAIN s/o Nur Buksh of Tagi Tagi, Tavua Cultivator.

Property: Native Lease land being Lot 3 Tagitagi Sub-Division, containing 40 acres, situated at Tagitagi, Tavua. Cane Contract No. 3054.

The following improvements are sold with the land:

(a)	One pair of working bullocks;	$600.00
(b)	1 Decree Plough	$100.00
(c)	1 harrow	$ 40.00
(d)	Yoke, chain, pin	$ 50.00
(e)	40 bags, sulphate of Amonia	$300.00
(f)	4 coil barbed wire	$150.00
(g)	Building materials	$200.00
(h)	Bulldozing work done	$900.00
(i)	Well	$ 50.00
(j)	Road built	$130.00
	11 acres ratoon	$3,000.00

Price: Sixteen thousand dollars ($16,000.00)

Mode of Payment:-

(1) $400 - deposit within 7 days of Native Land Trust Board's consent.

Purchaser to plant and grow sugar cane on the land. Vendor is to receive all proceeds to satisfy purchase price. Purchaser is to produce at least cane equal to basic quota allotted to the land. The purchaser shall do so until 31.12.1979 when the whole purchase price or so much owing shall be fully paid.

No interest until 31.12.79.

If full price is not paid by 31.12.79, the Vendor shall forfeit all moneys paid by the Purchaser and the Purchaser shall be required to vacate the land."

On March 20 the solicitors for respondent worte to the Board enclosing all necessary documents in support of an application for consent to the sale and ended by saying, "We shall appreciate it very much if you would let us have your consent for Sale and Purchase agreement at your earliest." The Board replied by letter dated April 29, 1975 which reads:

" re Sale and Purchase Agreement
Shiu Narayan - Imam Hussain

This is to acknowledge your application dated 20th March, 1975 and please note that this is approved subject to the parties concerned in accepting in writing an enhanced rental of $280.00 with effect from 1st July, 1975.

If this is agreeable to your client then you are to submit your document for endorsement of consent thereon together with a cheque for $10.00 being consent fee.

Please note that we will be retaining a copy for our record."

On July 31 the solicitors for appellant replied enclosing a written document signed by appellant undertaking to pay the enhanced rental of $280 and stating that appellant accepted the new rent.

The solicitors for respondent took no action until September 15 when they apologised for (but did not explain) the delay and asked for the consent within 7 days. On October 3 the solicitors for appellant wrote as follows:

> " re Shiu Narayan & Imam Hussain
>
> We refer to our letter dated 31st July, 1975 and to the telephone conversation between our Mr. S.D. Sahu Khan and your Mr. Anand of 16th September 1975. We were assured that matters were with the Native Land Trust Board would be expedited so the necessary documents had been already forwarded to Suva.
>
> Could you please say what the present position is. Our client is anxious to have the transaction completed at an early date.
>
> If the delay is caused at Native Land Trust Board could you please advise us accordingly."

To this the following reply was sent on October 10, namely:

> " re Shiu Narayan Vrs Imam Hussain
>
> We are in receipt of your letter dated 3rd October 1975 concerning Native Land Trust Board consent in respect of transfer of Native Land Trust Board land in favour of Imam Hussain.

> We are instructed to inform you that our client Shiu Narayan now no longer wishes to transfer his Native Land Trust Board land to Imam Hussain, who was informed per letter dated 24th February 1975, and further when he called personally at this office on 30th September 1975. We understand from Imam Hussain that he also no longer wishes to have the land transferred from Shiu Narayan.
>
> In the above circumstances, our client has informed the Native Land Trust Board that he does not wish to proceed with the transfer and consequently all documents have been cancelled.
>
> We are in process of informing Imam Hussain to give up vacant possession of the land he presently occupies."

The solicitors for appellant wrote on October 16, protesting against the proposed action and stated:

> "We do request that your client without fail have the consented documents handed over to us to have the relevant transfer completed within 14 days from date hereof, failing which our client will be forced to institute proceedings to enforce his rights."

As earlier stated a registrable memorandum of lease had already been signed on September 30, 1975. The rental was fixed at the original sum of $80. It would appear that the Board must have realised that section 94 of the Real Property Act 1971 forbade such an imposition of an increased rental as a term of granting consent and carried out the terms of the original approval notice.

It was disclosed by the Secretary of the Board that the solicitors for respondent sent the following telegram to the Board:

> "Reference 4/4/983 your letter of 29/4/75 Shiu Narayan and Imam Ali Shiu Narayan instructs to withdraw application for consent to dealing rental not acceptable to our client who no longer wishes to transfer his land. Please withdraw consent to transfer documents and return to our office. Letter following. G.P. Shankar & Company."

No letter followed. This telegram is less than true. Appellant had agreed to the increased rent. Respondent's solicitors had led appellant's solicitors to believe that the only question was the agreement of appellant and undoubtedly appellant was let to believe that respondent was taking all steps necessary to get the consent.

The evidence of the Secretary to the Board made it clear that the consent given is still effective. It is interesting to note the procedure adopted by the Board on the sale of a leasehold interest before the formal memorandum of lease is executed. Once the documents are presented and consented to, the existing approval notice is cancelled and new notice is issued to the purchaser. A registrable memorandum of lease is later executed by the Board in the name of the purchaser as lessee. It was made clear by the Secretary that this procedure could be carried out and no further consent to the proposed sale is necessary. He said:

> "The same consent would stand. The Board's consent is unconditional and it remains now for a transfer to be presented to effectuate the completion of the transaction."

In the Supreme Court the learned Judge rejected a plea that the 1975 agreement was illegal but held that appellant had not proved that he was willing and able to perform the contract and further that appellant's breaches of contract "were so considerable as not to entitle" him to specific performance or to damages.

The learned Judge also went on to hold that the 1975 agreement was "properly terminated". There was no claim by respondent that the 1975 agreement had been terminated. The pleadings are clear that he, at all times, maintained there was no agreement and that appellant was a trespasser. Some of his pleading is evasive and difficult to follow. On respondent's counter-claim an order for possession was made. There was no order for costs.

If the cross-appeal, which is based on illegality, succeeds it will dispose of the appeal so we will deal with it first. The ground put forward is:

> "1. <u>THAT</u> the learned trial Judge ought to have held that the dealing between the Appellant and the Respondent was illegal, null and void for want of Native Land Trust Board's consent as required by Section 12(1) of the Native Land Trust Ordinance Cap. 115 in that:-

(a) the appellant having taken possession and performed part of the contract before grant of the purported consent;

(b) the purported consent was conditional upon compliance with conditions stated therein, and therefore it was not a consent within the meaning of Section 12(1) above."

Section 12(1) reads:

"12(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

Then a proviso, which does not affect this appeal, follows. Subsection (2) extends the meaning of the words "lessor" and "lessee".

The learned Judge held that from August 1974 appellant occupied the said land by virtue of the 1974 agreement. The 1974 agreement was, in our opinion, null and void by reason of the operation of section 12(1). It is clear, from the decision of the Privy Council in Chalmers v. Pardoe (1963) 3 All E.R. 552, that the actions of appellant constituted a "dealing with" the land and therefore the 1974 agreement was unlawful and struck down by section 12(1). When appellant was given notice on February 24,

1975, to quit the land he had no right, either in law or in equity, to remain in occupation. However, on March 14, 1975 the 1975 agreement was signed. Some reference was made in the judgement to a claim by counsel for appellant that the 1975 agreement superseded the 1974 agreement. It did not. The 1974 agreement was null and void by reason of the actions of appellant in 1974. There was nothing for the 1975 agreement to supersede.

The 1975 agreement was entered into subject to the granting of the consent of the Board. The parties took steps forthwith to obtain that consent. This was so found in the Court below and has not been challenged on appeal. If this condition as to obtaining consent was a condition precedent then the contract did not come into force until the condition was fulfilled. On the other hand if it were a condition subsequent the contract came into force when it was signed by both parties. A condition subsequent would discharge the contract if it were not fulfilled. Whether or not the condition was a condition precedent or a condition subsequent depends, not on technical words, but on the plain intention of the parties to be determined from the whole instrument: Porter v. Shepherd (1796) 6 Term. Rep. 665, 101 E.R. 761; Roberts v. Brett (1865) 11 H.L. Cas. 337; 11 E.R. 1363. It is not now important to determine the nature of the condition.

A perusal of the application for consent shows that it was minuted on April 24 and notice of consent was given by better April 29, 1975. This consent was subject to a condition requiring payment of an increased rental. Since the condition imposed was unlawful by reason of section 94 of the Real Property Act 1971 it was of no effect. However, in any event by acceptance its terms were fulfilled. Thus the consent became fully effective. In our opinion the contract became legally effective as soon as consent was granted.

The evidence of the Secretary to the Board is instructive. He said:

> "My letter of 29/4/75 is conditional upon rent of $280 being accepted from 1st July 1975. The condition which the Board sought to impose is not one which they can insist upon by law, and if the parties had resisted it, it would have been withdrawn. The Board therefore regards the condition as independent of the consent. I can understand the parties taking the view that the consent was conditional.
>
> If transfer had been presented to Native Land Trust Board the next day consent would have been endorsed because in the mind of the landlord a consent had been granted. I agree that the wording of the letter A21 is unfortunate. I say that in spite of that letter A21 the consent is still extant."

In our opinion the legal result of the events which happened is correctly stated by the Secretary.

Their Lordships said in Chalmers v. Pardoe (supra) p. 557:

> "It is true that in Harnam Singh and Backshish Singh v. Bawa Singh (7) [1958-59] F.L.R. 31, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s.12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent."

In Jai Kissun Singh v. Sumintra No. 18/74 Fiji Court of Appeal, Gould V.P. said at p.7:

> "If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strick reading of section 12 in the light of its object, an agreement for sale of native land would become void under the section as soon as it was implemented in any way touching the land, without the consent having been at least applied for."

These authorities demonstrate that the inquiry is into the question whether or not the agreement was performed in a manner in which it could be said that there was a "dealing with" the land. This will involve a question of fact in each case upon a consideration of the true meaning of that term in section 12(1). Where the transaction is subject to a condition precedent with no act of performance no difficulty arises. On the view which I hold of the facts this question need not be pursued further.

It is clear that the 1974 agreement was partly performed by appellant and that, in the circumstances, it became illegal by virtue of section 12(1) as applied in Chalmers v. Pardoe (supra). When the 1975 agreement was entered into appellant was in possession of the land in pursuance of the 1974 agreement but he had no right title or interest in the land because that agreement was null and void. He was not by virtue of that fact debarred from entering into a lawful agreement. Any such further agreement falls to have its validity determined on its own facts and upon the principles of law which apply to it. The 1975 agreement made no provision for the giving of possession. No payment fell due until 7 days after the consent of the Board has been given. The purchase price was payable in the future and did not, in respect of the balance, fall due until December 31, 1979. A sum of $500, less rent, appears to be a reference to moneys resulting from occupation under the1974 agreement because it says that $500 less rent has been paid. This is a credit and not a deposit paid on signing. Likewise the harvested cane and cane proceeds, obviously the result of occupation under the 1974 agreement, are settled. These are matters which may quite lawfully be agreed on between the parties in respect of earlier occupation even though that occupation may have been given under a former illegal contract. The 1975 agreement was made subject to the consent of the Board and steps were immediately taken to obtain that consent.

Whether the condition as to consent be a condition precedent, or a condition subsequent there was no "dealing with" the land in pursuance of the 1975 agreement. Possession was always by virtue of the 1974 agreement, illegal though it was, and not by virtue of the 1975 agreement. That situation was, in our view, allowed to continue until the condition upon which the 1975 agreement depended for its validity, was fulfilled. The parties had agreed to take proper steps to have the condition fulfilled. Such steps were taken within a reasonable time and the matter was in the hands of the Board which granted consent on April 24. There was some delay in carrying out the necessary procedure because an unlawful condition had been imposed by the Board. In our judgment the proper finding of fact is that the appellant's continued possession of the land was solely referable to the 1974 agreement and that the1975 agreement did not constitute either an alienation of or a dealing with the land before the consent of the Board was granted. For these reasons the plea of illegality must fail and the cross-appeal will be dismissed.

The next question is whether the order for possession ought to be set aside and specific performance be granted. The learned Judge refused specific performance but came to a conclusion that there had been "breaches so considerable as not to entitle (appellant) to the order he seeks". The learned Judge also went on to hold that the 1975 agreement was properly terminated.

Respondent did not plead that the contract was terminated by reason of breach of contract or otherwise. He, throughout the trial, insisted that appellant was a trespasser. The respondent admitted in his pleadings that appellant agreed to purchase the property for $16,000 but denied that any contract had resulted. He further pleaded that appellant agreed that respondent was to retain his property and the proposed Sale (sic) was not to be effected and that the appellant duly agreed with respondent to rescind the proposed arrangement to sell (sic). Respondent has failed to prove these allegations and it has been rightly held, in our opinion, that the 1975 agreement came into full force and effect after the consent had been granted. The true position is that respondent purported to repudiate the 1975 agreement by the letter of October 10, 1975 and thereafter has refused to carry out any part of the 1975 agreement and has prevented the Board from taking the steps usually taken to effect a transaction such as this. The solicitors for appellant replied promptly to the letter of October 10. Their letter in its last paragraph read:

> "We do request that your client without fail have the consented documents handed over to us to have the relevant transfer completed within 14 days from date hereof, failing which our client will be forced to institute proceedings to enforce his rights."

A writ of summons claiming specific performance was issued on December 18, 1975. Respondent never purported to terminate the 1975 agreement for breaches on the part of appellant nor did he plead that he had done so, or that he had the right to do so. The breaches of contract alleged have never been specified nor was appellant called upon by the pleadings to meet any allegation of breach of contract. The finding of the learned Judge that the 1975 agreement was properly terminated cannot stand and must be set aside.

This leaves the question whether or not specific performance ought to be ordered. Appellant pleaded in his Statement of Claim as follows:

> "20. THAT the Plaintiff at all material times has been willing throughout and is now willing to continue with the agreement reached and to pay the purchase price to the Defendant from Sugar cane proceeds from the lease under contract Number 3054 in the Tagi Tagi Sector so as to perform his obligation under the said Contract as had been agreed."

To this respondent pleaded as follows:

> "18. AS to paragraph 20 and 21 of the Statement of Claim the defendant denies that there is any enforceable or valid agreement."

Under Order 18 rule 13(1) any allegation of fact made by a party is deemed to be admitted by the opposite party unless it is traversed by that party. In Baird v. Magripilis (1925) 37 C.L.R. 321 Higgins J. held under a similar rule:

> "Where in an action for specific performance of a contract the defendant has not by his defence denied the readiness and willingness of the plaintiff to perform the contract, there is no issue as to such readiness and willingness, and therefore the fact that the jury has not found that the plaintiff was so ready and willing does not prevent the plaintiff from succeeding in the action."

It was argued on behalf of respondent that he was entitled to raise matters in which he claimed appellant was in default because, so counsel claimed, they were matters on which appellant ought to satisfy the Court on the claim that he was ready and willing to carry out the terms of the contract. Counsel for appellant objected to the course taken. However, it was pursued, and, without deciding how far it was proper to pursue the topic in evidence, it is convenient to examine the position in view of the claim that this Court should grant equitable relief.

The first matter is the payment of a deposit of $400. This was payable 7 days after the consent of the Board was given. It will be seen that, although I have held that this was on April 24, all transactions with the Board were conducted by the solicitors for respondent.

Respondent and his solicitors delayed dealing with the condition imposed by the Board for the period from the end of July until September 15 when the necessary documents were sent to the Board to finalise the question

of the enhanced rent. On September 24 respondent's solicitors sent a telegram to the Board withdrawing the application but appellant was not informed until October 10. This information was given after a letter from the solicitors for appellant was sent on October 3 asking what the present position was because, as it was said, appellant was anxious to have the transaction completed at an early date. It is clear that respondent would not accept any tender, but the fact is appellant neither made tender nor paid the money into Court. Appellant swore that he had the money but said respondent did not come to get it. He does not appear to have been cross-examined on this. So far as concerns any default of appellant it is clear that the conduct of respondent and his advisers were such that they took all steps possible to delay and finally frustrate the gaining of the consent of the Board. Appellant may well be excused if he can now make good the failure to appreciate that he did in fact have a valid consent. Of course, it was the duty of appellant to seek out and pay respondent.

The learned Judge held that appellant made no attempt to produce sugar cane to the extent of the tonnage of the contract. The learned Judge went on to say:

> ".....for although it is not quite impossible for the plaintiff to perform his part of the contract and to pay the deposit of $400 and by a long stretch of imagination produce 400 tons of cane in 1978 and 1979 to put himself in a position to settle by 31st December 1979...."

The hearing was in 1977. This is a finding that appellant will not be able to fulfil future commitments up to December 1979. It appears that respondent has received a sum in the vicinity of $7,000 from sugar can supplied from the property. The 1975 agreement provided that appellant would produce cane equal to at least the basic quota allotted to the land and that he shall do so until December 31, 1979 or until the whole purchase price is paid. The quota was 254 tons per year. In 1975, 280 tons were produced. In 1976 the quantity was only 181 tons and in 1977 the estimate was in the vicinity of 100 tons. There was a question raised about the supply of manure by respondent. It is clear that a substantial question existed between the parties on this point. Appellant said if he had got manure he could have produced 400 to 500 tons of sugar cane.

The learned Judge in coming to his conclusion took no account of the fact that $5,000 worth of cane was produced in the first year of the 1975 contract which was paid to respondent. This payment left a balance of $11,000 payable over the years 1976, 1977, 1978 and 1979. At least a further $2,000 resulted from sugar cane by the date of hearing which was November 1977 so the balance then was $9,000. It is not known how much has been received since then. The parties contemplated that the whole of the purchase price might not be paid until December 1979. The proper inference to be drawn from the evidence is that respondent knew exactly what sugar production

was in each year. He was content to take the proceeds from appellant's work and to continue to do so even in the knowledge that the quota of 400 tons was not attained in 1975, 1976 and 1977. Not only was no question raised respondent has, so far as can be ascertained from the evidence and pleadings, maintained that appellant was a trespasser from whom he could exact the proceeds of his labour in the property. A further substantial question arose on this point. It is clear, in our opinion, that respondent should have pleaded these alleged breaches and that the form of pleading adopted deprived appellant of a full hearing on the question whether or not he was, in the circumstances, and upon the true construction of the 1975 agreement, in default.

The learned Judge relied on the authority of Australian Hardwood Co. v. Railways Comm. (1961) 1 All E.R. 737. Lord Radcliffe in giving the judgement of the Privy Council said at p. 741:

> "Before December 16, however, events had occurred which brought about a fundamental alteration in the position of the parties and of their respective rights and liabilities under the agreement of 1956; for, on November 25, 1957, the respondent had served on the appellant a written notice determining that agreement at the conclusion of three months from the date of notice. The notice of determination was given under the power provided by cl.6 of the agreement on the ground of breaches committed by the appellant, and, when the suit came to trial, it was conceded by the appellant's counsel that the agreement had been effectively determined by this notice so as to

> expire on February 25, 1958, and that the appellant had committed a number of breaches of obligation under the agreement which were listed in the respondent's defence and counterclaim."

That case only highlights the necessity for the alleged breaches to be pleaded and to be made clear so that the matter can be fully put in issue, and, not as in this case, attempt to have them put in issue on the general principle that a plaintiff must show he is ready and willing to perform a contract, the existence of which is denied. The other case cited by the learned Judge was Measures Bros. Ltd. v. Measures (1910) 2 Ch. 248. That was a case of a written contract. Cozens-Hardy M.R. said at p. 254:

> "The consideration which the defendant was to receive for his convenant from the company was (1) the position of a director of the company; (2) the salary of 1000l. a year; and (3) a contingent share of the profits. The plaintiffs have not given, and cannot in future give, the defendant this consideration. The contract on their part has been broken. It is not necessary that the breach should be wilful in the sense of being intentional. It suffices that by an act brought about by the company's own default, namely, the omission to pay debts incurred by the company, the contract has been broken. As Joyce J. said, the plaintiffs are not entitled against this defendant to specific performance - because that is what it amounts to - of clause 5 of the special agreement without performing, and they cannot perform, the clauses which that agreement contains in favour of the defendant. In my opinion it would be inequitable if the plaintiffs could have that relief."

This case is entirely different on its facts.

The conduct of respondent and his solicitors throughout the time during which appellant was in occupation is not unimportant. The first bargain was at a price of $12,000. It was subject to the consent of the Board. Respondent's solicitors also acted for appellant who was allowed into possession with no advice as to the legality of so doing. It is a fair inference that the failure to get the consent was a deliberate act. After appellant worked on the land for a season and the proceeds were apparently collected by respondent, the solicitors, without terminating their obligation to appellant as a client, gave appellant notice to quit on the ground that he was living on the land without paying rent and without colour of right. It was only after the intervention of the panchayat that appellant was rescued from his plight but at the cost of a further sum of $4,000 added to the purchase price. Then, after a further agreement was signed subject to the consent of the Board, respondent and his solicitors again embarked on questionable tactics concerning the obtaining of the consent of the Board. Respondent took advantage of this delay by finally withdrawing the application for consent in the circumstances we have already related and attempted to take advantage of that delay by informing appellant that he no longer wishes to transfer the "Native Land Trust Board land." Respondent was in breach of an implied undertaking to obtain that consent: vide Mulvena v. Kelman (1965) N.Z.L.R. 656.

In our judgment it would be wholly inequitable to refuse the relief sought in the light of the pleadings and the circumstances which we have earlier outlined. Appellant has paid a very substantial part of the purchase price, a price which was put upon him under pressure of saving what he honestly thought was a binding bargain.

A mere return of purchase money or damages would be unfair to him in view of the fact that he is in possession and has worked the property over the years. Respondent has no interest in any alleged breach of contract in the way of loss if his purchase price is paid in full. The provisions which he claims were breached, but no pleaded, were provisions aimed at securing payment of the purchase price. The equities are all on the side of appellant if respondent is assured that the price will be paid. We would grant specific performance but subject to the following conditions, namely:

(1) that a sum of $5,000 be paid into Court within one month;

(2) that, if the parties do not agree upon the balance due for the total price of $16,000, an account be taken to ascertain that amount;

(3) that any amount so found to be owing be paid into Court within a period of one month thereafter;

(4) that such sum as may be found payable to respondent shall be paid from Court upon respondent complying with his obligation to make a good title in accordance with the 1975 agreement;

(5) that leave be reserved to either party to apply further in respect of items 2, 3 and 4 above or as the Court may deem proper in the circumstances;

(6) that no costs be allowed to either party either in this Court or in the Court below.

Accordingly in our judgment, the cross-appeal must be dismissed and the appeal ought to be allowed and the judgments in the Court below set aside with the consequences above set out. The case remitted to the Supreme Court accordingly.

Cross-appeal is dismissed and the appeal is allowed on the above terms.

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL

IN THE FIJI COURT OF APPEAL
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Dr. M.S. Sahu Khan with
S.D. Sahu Khan for the appellant

G.P. Shankar for the respondent

Hearing : 18th July, 1978
Judgment: 28th July, 1978

JUDGMENT OF MARSACK J.A.

I have had the advantage of reading the comprehensive judgment of Sir Trevor Henry and am in substantial agreement with his conclusions and the reasons for them. In my view the vital issue to be determined by the Court is the legal validity of the document signed on March 14th 1975, referred to in my brother Henry's judgment as "the 1975 agreement". For the reasons given in detail in that judgment I am satisfied that this document was a good contract which became binding on both parties to it as soon as the Native Land Trust Board granted its consent to the transaction. Conditional consent was notified on 29th April 1975; later the condition was withdrawn and the Secretary to the Native Land Trust Board,

who gave evidence at the trial in the Supreme Court, confirmed that the consent of the Board to the transfer was unconditional, the only matter remaining necessary to complete the transaction being the presentation to the Board of a formal transfer.

The action of the respondent which resulted in holding up completion indefinitely, was unjustified and constituted a serious breach of good faith.

The position then is that when proceedings were instituted in the Supreme Court there was in existence a binding agreement between the parties and the necessary consent of the Native Land Trust Board still subsisted. No cause was shown by the respondent entitling him to cancel that agreement. It is true that there were some defaults on the part of the appellant and these are set out in Sir Trevor Henry's judgment. None of those defaults was such as to render the agreement viodable at the instance of the respondent. Accordingly in my view the appellant is entitled to a decree of specific performance.

Because of the complicated circumstances surrounding the whole of the dealings it is clear that certain conditions will have to be attached to the decree. In this respect I am in complete agreement with what is proposed in the judgment of my brother Henry.

Accordingly, as all members of the Court are in agreement, the appeal is allowed and a decree of specific performance ordered on the terms set out in the judgment of Sir Trevor Henry. The cross appeal is dismissed.

No order as to costs.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL