IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0011 of 2005S
(High Court Civil Action No. HBC191of 2004L)

BETWEEN:

REX BASIL HOLLOWS

Appellant

AND:

JERALD EDWARD SCOFIELD

Respondent

Coram: Ward, President
Smellie, JA
Penlington, JA

Hearing: Wednesday, 16 November 2005, Suva

Counsel:
Mr V. Mishra] for the Appellant
Ms M. Muir]

Mr I. Roche] for the Respondent
Mr W. Clarke]

Date of Judgment: Friday, 25 November 2005, Suva

JUDGMENT OF THE COURT

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[1] This appeal arises out of an agreement for sale and purchase between the respondent as vendor and the appellant as purchaser. The respondent resides in the United States of America.

Background

Agreement 6 June 2003

[2] Under an agreement in writing between the parties dated 6 June 2003 (the June agreement) the respondent agreed to sell and the appellant agreed to purchase four pieces of land with separate titles, totalling just over 96 acres, which include Naisoso Island near Nadi. The purchase price was F$5 million.

[3] The agreement followed earlier inconclusive dealings between the parties going back a number of years.

[4] Under the June agreement a deposit of F$100,000 was payable within 7 days of the signing of the agreement and the balance, F$4.9 million dollars, was payable "not later than 2 months after the date borne by the notice of his consent to (the contract) by the Minister for Lands."

[5] The agreement was conditional. One condition was the obtaining of the consent of the Minister of Lands. The agreement provided in clause 14(j) that if the Minister had not consented by 30 September 2003 either party had the option of declaring the agreement void and of no effect. This condition was included in the contract because, at the time it was entered into, the parties considered that the consent of the Minister of Lands was necessary. Later as appears below the parties took the view that ministerial consent was not required.

[6] The other condition concerned certain outstanding tax obligations by the respondent to the Commissioner of Inland Revenue. Tax was payable by the respondent as a non resident on profits derived by him from the sale of land. At the time the contract was entered into the amount payable to the Commissioner had not been determined. The Commissioner had secured these obligations by caveats and

charges on the titles. The clause containing the condition as to the respondent's tax obligations was Clause 14(i). It read as follows:

> *"This agreement is conditional upon there being secured to the Commissioner of Inland Revenue by charge 149861 at Settlement Day no more than F$700,000.00 to the discharge of which the Vendor shall pay F$350,000.00 and the Purchaser any balance, but no more than F$350,000.00 but if there is more than F$700,000.00 secured by such charge at such day and the Purchaser chooses not to pay such amount beyond F$700,000.00 as is so secured the Vendor may declare this Agreement void ad of no effect and if so shall refund the deposit to the Purchaser the parties otherwise having neither rights nor duties hereunder."*

Events - 6 June to 3 October 2003

[7] The deposit was paid. The consent of the Minister was sought. It had not however come to hand by 30 September 2003 the date stipulated in the agreement.

[8] On 1 October 2003 in a hand delivered letter to the appellant's then solicitors, Muaror and Co., attention was drawn to the provisions of the clause concerning the ministerial approval and the absence of that approval. The letter concluded

> *"7. Unless you make immediate representations to us as to why our client should not declare void the contract, we will have to inform our client that we have requested from you and you have not given to us any explanation regarding the situation.*
>
> *8. Please contact Bob Smith or Anare Tuilevuka if you wish to discuss this matter further.*
>
> *9. Our client is unhappy with the lack of progress in obtaining the Minister's consent in this matter."*

[9] The Ministerial approval still did not come to hand. On 3 October 2003 the respondent's solicitors gave notice to the appellant's solicitors that the respondent declared the agreement void and of no effect in accordance clause 14 (j) in the

contract because the Minister's consent had not been obtained prior to 30 September 2003.

Events – 3 October to 19 November 2003; the November agreement

[10] The question of whether the Minister's consent was required received further consideration. It was ultimately concluded that the appellant did not require the Minister's consent as he could be properly accepted as a resident of Fiji. Further correspondence then passed between the parties solicitors.

[11] In a letter dated 23 October 2003 from the appellant's solicitors to the respondent's solicitors it was stated that the appellant still intended to proceed with the purchase. Delay in obtaining the Ministerial consent was denied.

[12] In a letter dated 3 November 2003 the appellant's new joint venture partner advised the appellant's solicitors of a fresh proposal (which was passed on to the respondent's solicitors) whereunder if the purchase price remained at F$5 million along with an "acceptable further deposit" a settlement date of 1 February 2004 would be agreeable. The proposal proceeded on the basis that the Minister's consent was not required.

[13] On 19 November 2003 the contract was said to be "restored." The respondent's solicitors sent the appellant's solicitors an e-mail which was in the following terms:

> ***"Babu***
>
> ***We confirm that if the further payment of US$100,000.00 is made to he name account and recorded as a credit in that account by 1700 hrs (Seattle time) on November 28, 2003 the agreement is restored but varied as follows:-***
>
> ***(i) it will be then unconditional with the Purchaser being bound to pay on Settlement Day the balance of the purchase price and half of any tax secured to the Commissioner by Charge 149801 with a maximum liability in respect of the latter of F$350,000.00.***

(ii) Settlement Day will be February 1, 2004

(iii) The US$150,000.00 then having been paid will comprise a deposit forfeitable by the Vendor in the event of default by the Purchaser but will in the event of settlement being completed when due comprise part payment of the purchase price to the extent of the sum in Fiji dollars that US$150,000.00 would buy in Suva at the rate first published by Westpac on Settlement Day.

Regards,

Bob Smith"

[14] Here it is to be noted that the agreement was now unconditional. Settlement was to be on 1 February 2004. A further payment of US$100,000 was to be made by the appellant and the appellant was required to pay half the tax owing by the respondent and secured to the Commissioner with a maximum liability of F$350,000.00 Otherwise the rest of the terms of the June agreement formed part of the new agreement.

Events – 19 November 2003 to 15 March 2004, non completion, notices

[15] Payment of US$100,000 was made by the appellant to the respondent on 26 January 2004. No point was taken by the respondent on this untimely compliance.

[16] On the same day, 26 January 2004, the appellant's solicitors wrote to the respondent's solicitors. The letter stated, inter alia,

(a) that their client had instructed his accountants to negotiate with the tax department for the discharge of the charges and caveats

(b) that the funds would be through a London firm City Financial Associates and were "expected on time"

(c) that they would in the mean time send a transfer.

[17] On the following day, 27 January, transfers were sent by the appellant's solicitors to the respondent's solicitors. The latter thereupon forwarded the document to the respondent in the USA together with a land sales declaration for execution by him. Those documents were returned duly signed and they reached the respondent's solicitors on 11 February 2004. Settlement, however, was not offered or requested by the appellant.

[18] Importantly, by mid February the appellant's solicitors were expressing doubts to the respondent's solicitors as to the availability of the money required for settlement. In an internal memorandum dated 16 February 2004 a solicitor in the respondent's firm of solicitors recorded a discussion with the appellant's solicitor. The latter had not heard from his client since the letter of 26 January, previously referred to. When asked if the monies "had hit his trust account" he replied "between you and me I will believe it when the whole F$5 million hits in one huge amount – but right now my client assures me it is coming but I don't know when." The appellant's solicitors were assured that respondent's solicitors knew how much tax was claimed and owed. The point was made by the respondent's solicitors that time was of the essence and that the respondent would "come down hard on (the appellant) if his promised funds did not materialise soon"

[19] But still nothing happened in regard to settlement. The respondent made good his threatened action. By a notice dated 27 February 2004 (and dispatched by facsimile) the respondent by his solicitors gave notice to the appellant by his solicitors making time of the essence and requiring settlement on or before 5 March 2004. The letter was addressed to the appellant's solicitors. It also purported to be a default notice. It was in the following terms:

> *"FACSIMILE TRANSMISSION*
>
> *TO: FAX No. 670 3330* *MESSAGE NO. 3885*
> *ATTN Mr Babu Singh & Associates* *DATE : 27 February 2004*
> *AT Babu Singh & Associates* *FROM: R A Smith*

RE: Scofield to Hollows – Contract for the sale of Naisoso

NUMBER OF PAGES [INCLUDING THIS PAGE]: 0]

On behalf of Mr Scofield we hereby give notice to the Purchaser under the above contract making time of the essence and requiring settlement on or before Friday March 5, 2004

In the event that the Purchaser fails to settle within that time the vendor will regard the Purchaser as being in default and will, if that default continues for the space of 7 days, rescind the agreement and forfeit as deposit the monies already paid."

[20] There was no response of any kind whatsoever from the appellant or his solicitors.

[21] In particular settlement was neither sought nor tendered.

[22] On 15 March 2004 the respondent's solicitors sent the appellant's solicitors a letter by facsimile. It was in the following terms.

"FACSIMILE TRANSMISSION

TO: FAX NO. 6703330 *MESSAGE NO. 4071*
ATTN: Mr Babu Singh
AT Babu Singh & Associates *DATE: 15 March 2004*

FROM: R.A. Smith

RE: Scofield to Hollows - Contract for the sale of Naisoso

NUMBER OF PAGES [INCLUDING THIS PAGE]: 01

The Purchaser having been in default for more than the space of 17 days, the Vendor hereby rescinds the agreement for sale."

[23] The notices of 27 February and 15 March 2004 were the foundations of the respondent's case that the agreement of 19 November 2003 was at an end. They are central to this appeal.

Events - 15 March 2004 Onwards; Caveats; proceedings commenced

[24] The appellant's first response to the notices of the respondent was to register caveats against the four of titles on 30 March 2004. It so happens that on the same day the Revenue and Customs Authority wrote to the appellant's accountants Price Waterhouse Coopers, setting out the amended tax computation of the tax due by the respondent. As appears below great emphasis was placed by the appellant's counsel on the timing and content of this letter. We shall return to this point later.

[25] On 11 May 2004 the appellant's solicitors submitted to the respondent's solicitors a new draft sale and purchase agreement. This was however rejected.

[26] On 28 May 2004 the respondent's solicitors called on the appellant to remove the caveats. The appellant did not comply and the respondent thereupon applied under s.110 of the Land Transfer Act (Cap.131) for a withdrawal of the caveats. The Registrar gave notice of the step to the appellant's solicitors.

[27] On 29 June 2004 the appellant commenced an action out of the High Court claiming specific performance and damages. On the same day he applied ex-parte for an extension of the caveats until further order of the Court and leave to serve the respondent out of the jurisdiction. This ex-parte application came before Connors J. The Judge made ex-parte orders as moved and listed the motion for inter - partes consideration.

[28] The respondent having not filed a defence to the action, the appellant, on 18 October 2004, filed an application by the way of summons seeking summary judgment for specific performance and damages in default of a defence. By then the respondent had applied to set aside the ex-parte orders on the grounds of material non disclosure. Affidavits were filed by each side in support of and opposition to the various applications before the Court. These applications came on for hearing before Connors J. on 3 November 2004. There was no oral evidence.

Oral argument was presented to the Judge and it was supplemented by written submissions.

The issue for the Judge's consideration and determination:

[29] The issue for the Judge's consideration and determination was: Was the contract validly terminated?

[30] The record of the proceedings before the Judge in the High Court (which was included in the Case on Appeal) specifically recorded the issue in these words. The Judge reserved his decision. In his Judgment delivered on 8 December 2004 he specifically stated the matter in this way:

> ***"the fundamental issue for the determination of the court is whether or not the defendant has validly terminated the agreement for sale and purchase of the subject land."***

[31] In this Court Mr Mishra for the appellant accepted that the argument in the High Court proceeded on the basis that the notices were essential to the valid determination of the agreement. We regard this concession as a matter of importance given one of the appellant's present complaints before us was that the Judge should not have determined the issue summarily, but instead, should have extended the caveats and ordered a full trial.

[32] In the High Court the appellant attacked the validly and effect of the notice of 27 February 2004 making time of the essence and requiring settlement on or before 5 March. The appellant also attacked the validity of the purported notice of recission of 15 March 2004. The Judge rejected these contentions. He held that the June agreement had been brought to an end by the notice of 3 October 2003 and that the agreement for the consideration of the Court was the unconditional one entered into on 19 November 2003 (the November agreement). It consisted of the terms of the

June agreement as varied by the memorandum of 19 November 2003. The Judge held that the notice of 27 February 2004 making time of the essence was a good notice and had been properly served and likewise the notice of recission of 15 March 2004 was a good notice and had been properly served. Accordingly the Judge held that the November agreement had been validly rescinded and that the appellant did not have a caveatable interest in the subject land.

[33] After the appellant appealed to this Court he obtained a stay of proceedings. Accordingly the caveats under challenge remain in place until the further order of the Court.

Grounds of Appeal

[34] We now set out our distillation of the grounds which were actively pursued in this Court.

[35] The appellant contends, contrary to the findings of the Judge:

(a) That by virtue of clause 11 of the agreement, the notice of 27 February 2004 was not a notice where time was of the essence.

(b) That the notice of 27 February 2004 gave an unreasonable amount of time for the appellant to comply and was therefore defective on that account.

(c) That the service of the notice was deficient and that it was therefore defective on that account.

(d) That the respondent was not in a position to give clear title and settle when he gave notice on 27 February 2004 due to:

(i) an unquantified tax liability which was the subject of caveats and charges on the titles

(ii) another encumbrance on each title concerning a judgment debt.

(e) That in default of a defence the Judge ought to have entered summary judgment for specific performance in favour of the appellant.

(f) That alternatively the Judge ought to have ordered a trial of the action.

We now deal with these grounds.

(a) Clause 11

[36] The appellant contended that on a proper interpretation of clause 11 it was clear that neither a notice of default nor a notice for completion were notices where time was of the essence. This was because of the exclusion of clauses 9 and 10. Accordingly, so the appellant contended, the notices were invalid on this ground.

[37] Clause 11 provided:

> ***"Save for the effect of the provisions of clauses 9 and 10 of this agreement time shall be of the essence of this agreement."***

[38] Clause 9 provided:

> ***"If the Purchaser shall make default in payment of any moneys when due or in the performance or observance of any other stipulation of agreement on the Purchaser's part herein contained and if such default shall continue for the space of seven (7) days from the due date then and in any such case the Vendor without prejudice to any other remedies available to the Vendor may at the Vendor's option exercise all or any of the following remedies namely:-***

(a) *enforce this present agreement in which case the whole of the purchase money then unpaid shall become due and at once payable; or*

(b) *rescind this agreement for sale and thereupon all moneys theretafore paid or under the terms of sale applied in reduction of the purchase money shall be forfeited to the Vendor as liquidated damages; or*

(c) *sue for specific performance of this agreement; or*

(d) *sue for special and general damages."*

[39] Clause 10 was a mirror provision relating to the default by the Vendor.

[40] We are unable to accept the appellant's interpretation of clause 11. In our view the respondent's counsel is correct when he submits that clause 11 makes time of the essence notwithstanding the operation of clauses 9 and 10 (which specifically did not make time of the essence by giving 7 days to remedy a breach). We agree with the respondent's counsel that clauses 9 and 10 are merely machinery provisions. It was still possible to make time of the essence in notices under those clauses. We therefore reject the appellant's attack on the notices under this head.

(b) The reasonableness of the notice

[41] The appellant contended that the notice of 27 February 2004 was defective and therefore ineffective because the time given to the appellant for compliance was unreasonable.

[42] This contention must be examined in the light of a number of well established principles to which we now refer.

[43] We first harken back to the difference in attitude of the common law and equity to times stipulations in contracts. This difference is succinctly set out by Mason J., as he then was, in ***Louinder v. Leis*** [1982] 149 CLR 509 HCA at page 519:

> *"A discussion of the topic necessarily demands some mention of the difference in attitude of the common law and equity to time stipulations in contracts. The date for completion is a term of the contract breach of which at common law would entitle the innocent party to determine the contract and recover damages. If, however, the parties did not make time of the essence of the contract, equity would order specific performance, unless to do so would be unjust, and would prevent the innocent party from enforcing his common law rights (Canning v. Temby (1905) 3 CLR 419 especially at 426). By reason of the approach taken by equity a practice developed whereby an innocent party, after default by the other party, gave notice requiring completion of the contract within a reasonable specified time, thereby seeking to establish, if the notice was not complied with, that there had been such delay as to disentitle the party at fault from specific performance and to justify rescission of the contract."*

[44] The time limited by the notice requiring completion becomes, by virtue of the notice, of the essence of the contract. See ***Stickney v. Keeble*** [1915]AC 386 HL at page 418 per Lord Parker of Waddington.

[45] The notice itself must be clear and unequivocal. The requisites of such a notice have been set out by Mason CJ in ***Laurinda v. Capalaba Park*** [1988-9] 166 CLR 623 HCA at page 638:

> *"However, the notice must convey a definite and specific intent to require strict compliance with the terms of the contract within a reasonable time, so that the recipient will be made aware that the party giving the notice may elect to treat the contract as at an end at the conclusion of such reasonable time unless compliance is forthcoming."*

[46] In judging whether the time allowed in the notice was reasonable the court must consider all the circumstances of the case. See ***Stickney v. Keeble*** (Supra) per Lord Parker of Waddington at page 419.

[47] In ***Sindel v. Georgiou*** [1983-4] 154 CLR 661 HCA (in the joint judgment of Mason, Murphy, Wilson, Brennan and Dawson JJ, it was stated at page 670:

"The determination of what is a reasonable time for completion of a contract for the sale of land, judged in the light of the circumstances of the particular case, is very much a matter of impression."

[48] The appellant's Counsel in support of the submission that the time given in the notice of 27 February 2004 was unreasonable pointed to the following matters:

(a) The notice was given on 27 February 2004 which was a Friday with a weekend 28 and 29 February following thereafter.

(b) Only 5 clear business days were left because the notice expired on 5 March 2004 and if the reasoning in ***Rightside Properties v. Gray*** (1974) 2All E 1169 was applied Friday 5 March ought to be excluded in the computation of the actual time available thus leaving only 4 clear business days. If the default period of 7 days was taken into account it gave a total of only 11 or 12 days (which included another weekend) before the respondent could give notice of recission.

(c) The time given was to be compared with the conditional clause in the June agreement concerning the obtaining of the Ministerial consent. Under that clause the appellant, as purchaser, was given 2 calendar months to settle after the Ministerial consent came to hand. This period, so the appellant contended, provided a yardstick for the reasonableness of the notice between these parties even though that conditional provision was no longer operative.

(d) A substantial sum of F$5 million had to be obtained from overseas, this being a fact which was known to the respondent.

(e) The respondent himself could not have settled until 11 February 2004 (the date when the transfer was to hand) which was 10 days after the contractual settlement date.

(f) The respondent at the time when the notice was of 27 February 2004 was given, was unaware of the amount payable to the revenue and he still had to arrange for the discharge of the charges and caveats on the titles. As well the appellant emphasised that at the time of the notice his accountant's were still dealing with the revenue, at his expense, in respect of the respondent's tax liability.

[48] In connection with the matters collected together in (f) above the appellant's Counsel in his oral argument went as far as submitting, without the support of any authority, that the notice of 27 February 2004 should also have contained a statement

(i) that the respondent was in a position to give clear title,

(ii) that the amount due to the revenue was a particular amount; and

(iv) that the caveats and charges on the titles would be removed.

It was argued that the notice was deficient because these matters were not stated.

[49] Although the appellant's Counsel accepted that the Court must look at all the circumstances of the case he relied heavily on the observations of the High Court of Australia in ***Sindel v. Georgiou*** (Supra) at page 661 where it was stated:

> ***"Strong circumstances must be shown to justify the giving of a notice to complete a contract for the sale of land which allows less than fourteen days for completion."***

[50] The appellant's Counsel further contended that the issue of reasonableness could only be resolved after a full hearing at which such witnesses as the appellant's solicitor and his accountants and witnesses from the revenue could have given evidence and been cross-examined.

[51] When pressed by the Court the appellant's Counsel contended for 28 days as the time which would have been reasonable having regard to all the circumstances of this case.

[52] The respondent on the other hand maintained the Judge had correctly found that the time given in the notice of 27 February 2004 was reasonable in all the circumstances of this case. The respondent's Counsel relied on, as he put it, "the factual matrix."

(a) 1 February 2004 was the date for settlement set out in the November agreement. When the notice was given, a further 26 days had elapsed during which time there had been no request by the appellant for settlement.

(b) The 1 February 2004 date for settlement was at the request of the appellant and was part of the proposal to "restore" the June agreement in November 2003 as an unconditional contract. It was put forward on the basis that the price would remain at F$5 million.

(c) By putting forward and agreeing to settlement on 1 February 2004 the appellant would have known that the settlement monies, admittedly substantial, were required by that date.

(d) There had been a history of inconclusive dealings between the parties the last agreement to fall over being the June agreement.

(e) In the respondent's solicitor's letter of 26 January 2004 there was a statement that the funds were "expected on time." Apart from forwarding the transfer on 27 January 2004, however, nothing further happened.

(f) The conversation between the appellant's solicitor and a solicitor in the respondent's firm of solicitors on 16 February 2004 raised doubts as to when the monies for settlement would be to hand. It was then made clear that time was of the essence and that the respondent would "come down hard" on the appellant if his promised funds did not materialise soon. In other words the stance of the respondent as to compliance with the contract was made plain

(g) Even when the notice of 27 February 2004 had been given there was no response.

(h) The respondent for his part was not guilty of any delay.

(i) The respondent's obligations to the revenue and the clearing of the charges and caveats on the titles were not relevant to the content of the notice or the reasonablessness of the time stipulated thereon.

[53] We have carefully considered the competing arguments. We are not persuaded that the Judge erred in finding that the time given to the appellant to complete was reasonable in all the circumstances of this case. It was a conclusion reasonably open to the Judge on the evidence before him. We accept that the appellant was given less time than the 14 days referred to in ***Sindel v. Georgiou*** (Supra) but at the end of the day each case must be decided on its own facts, and here the time given was reasonable having regard to the facts of this case. We do not consider that the Judge needed to hear oral evidence before reaching a conclusion on the reasonablessness of the time in the notice. He had sufficient evidence to reach his conclusion.

[54] We cannot go past the appellant's track record in his dealings with the respondent. The earlier ones had ended inconclusively. The June agreement came to an end when the minister's consent was not obtained timeously and after the respondent

expressed dissatisfaction as to the lack of action on the part of the appellant. The agreement was then "restored." In other words there was a new agreement. We consider that it is a particularly powerful point that the new agreement contained a settlement date of 1 February 2004 which was the appellant's proposed date and which was inserted in consideration of keeping the purchase price at F$5 million. The submission that the time allowed for completion in the June agreement became the yardstick for the new agreement is not a tenable argument in the light of the circumstances under which the settlement date of 1 February 2004 came into being. Likewise we are unable to accept that 28 days would have been a reasonable time for the same reasons.

[55] As the respondent's Counsel correctly submitted there was no delay on the part of the respondent. On the other hand there was unexplained delay on the part of the appellant. On 26 January 2004 there was an assurance that the money would be in hand shortly. But time passed and nothing happened. Even the appellant's solicitor did not hear from his client and he expressed doubts in the conversation on 16 February 2004. That telephone exchange is in our view important evidence. The appellant was put on notice that the time was of the essence and that the respondent would move if "the promised funds did not materialise soon"; and they did not.

[56] The question of whether the respondent's was aware at the time of the notice the amount required to satisfy the revenue is in our view irrelevant to the issue of whether the time stipulated in the notice was reasonable. We are unable to accept the appellant's Counsel's submission that the notice should have also contained a statement concerning

(i) the respondent's ability to give clear title,
(ii) the amount due to the revenue; and
(iii) the removal of the caveats and charges.

That submission was unsupported by authority which did not surprise us. As Mason CJ said in ***Laurinda*** (Supra) the purpose of the notice is to put the receipient on notice in the clearest terms of the requirement of that person to comply with the terms of the contract within the specified time. As we observe later in this judgment the obligations of the party giving the notice when the time comes for settlement are a separate issue and are not related to the content of the notice or the reasonableness of the time given to the receipient for compliance.

[57] It has not escaped our attention that the appellant did not offer any response to the notice. His earlier inaction continued.

[58] For these reasons, we therefore reject the submission that the notice of 27 February 2004 gave an unreasonable amount of time for the appellant to comply. We find that it was clear and unequivocal in its terms. It made it plain to the appellant that the respondent might elect to treat the contract as an end at the conclusion of the time given unless there was compliance.

(c) Service of the Notice

[59] In the High Court the appellant's submitted that there had not been proper and effective service of the notice. The Judge considered this argument and rejected it. The appellant's Counsel now contends that the Judge was wrong. He renews his attack on the service of the notices and he submits that in any event the issue of effective service could only be determined after a full oral hearing.

[60] The starting point is clause 13 of the June agreement which formed part of the November agreement. It provided:

> ***"Except as otherwise stated herein, all notices or other communication hereunder to any party hereto shall be in writing and shall be deemed to be duly given or made when delivered (in the case of personal delivery or***

letters) and when delivered (in the case of facsimile to the party addressed to it) in the case of:-

(a) the Vendor at the offices of –
Munro Leys
3rd Floor, Pacific House,
Butt Street
Suva
G P O Box 149,
Suva.
Facsimile: (679) 3302672

(b) the Purchasers at an address to be advised.

Written notice includes a notice by facsimile.

Any notice of demand or any document delivered on behalf of a party by such party's solicitors shall be deemed to have been given or delivered by that party personally and may be signed by the party giving or by such party's solicitors."

[61] We now refer to some other uncontested facts. First under clause 13 (b) the appellant was to advise the respondent of an address. He did not do so. Secondly, neither clause 13 nor any other provision in the June agreement which found its way into the November agreement required personal service or an affidavit of service. And thirdly, correspondence and other communications during the dealings between the parties were routinely exchanged between the parties' solicitors by way of post, facsimile; and email. Clause 13 expressly provided that "written notice includes a notice by facsimile."

[62] The appellant's Counsel contended that the notices in issue should have been served personally and that there should have been affidavits of service. As we have observed there was no requirement for the personal service or an affidavit of service. We therefore reject these contentions.

[63] The appellant did not supply his address. Whether he did that deliberately or as the result of neglect is immaterial. In the event the respondent's solicitors were left

without an address under clause 13. There had been no objection to the previous form of communication between the parties, and in any event facsimile was specifically authorised by clause 13 on written notice – and that was the method used.

[64] In one of the appellant's affidavits which was before the Judge, he deposed:

> ***"On the 27 February 2004 the Defendant through his Solicitors gave a notice to my Solicitors making time of the essence and requiring settlement before 5 of March, 2004."***

The appellant exhibited a copy of the notice to that affidavit

[65] And as to the service of the notice of the recission the appellant conceded in another affidavit that his solicitor had told him that "Munro Leys (was terminating) the agreement" and then he went on to state that he verily believed "that a notice may have been addressed to him."

[66] As the Judge said, the whole purpose of the service of a document is to ensure that the party is aware of the contents of that document. Here the appellant acknowledged his awareness of both notices. Like the Judge we see no merit in the contention that service was in any way defective. In our view the Judge had sufficient evidence before him to make his findings that service was not defective. There was no need for a full oral hearing on this issue. This grounds therefore fails.

(d) <u>The Respondent's ability to settle</u>

[67] In the High Court, the appellant's Counsel contended that when the respondent gave the notices of 27 February 2004 and 15 March 2004 he was not in a position to give clear title due to (i) an unquantified tax liability which was the subject of charges and caveats on the respondent's titles and (ii) another encumbrance on each title concerning a judgment debt.

[68] The argument appeared to be that the respondent was not entitled to give the notices on this account. The Judge considered this argument and he dealt with it in this way:

> ***"The vendor's obligations under the contract were to give a good title to the purchaser on settlement. There is no evidence before the court that the vendor could not give a good title to the purchaser on settlement.***
>
> ***The arguments that some items appeared to the plaintiff to be outstanding is irrelevant. The plaintiff should have made an appointment to settlement and if the vendor was then unable to settle, these issues would have been relevant.***
>
> ***The issue of the debt to the Fiji Inland Revenue & Customs Authority is again a matter for settlement. The actions of the plaintiff did no more than reduce the amount that the plaintiff had to pay on settlement."***

[69] In this Court the appellant's Counsel contended that the Judge was wrong. He repeated the arguments advanced to the Judge and he further submitted that, in any event, these matters precluded a summary determination and necessitated a full oral hearing.

[70] The respondent's answer was quite simply that the matters raised were the responsibility of the respondent, as vendor, on settlement. They were all "matters of money" which would be resolved at the time of settlement. The respondent did not dispute that he had to give clear title at the time of settlement and if he was unable to complete because any of these matters were not resolved then he would have to bear the consequences of that situation; but that was for the future. Compare ***Ryan v. Hallam*** [1990] 3 NZLR 184 (CA).

[71] The appellant's counsel made much of the fact that it was the appellant, at his own expense, who had negotiated with the revenue and that it was not until the letter of 30 March 2004, referred to earlier, and well after the purported recission, that the amount due to the revenue was known. In our view the Judge correctly dealt with this point. The obtaining of the clearance from the revenue was not a condition of

the November agreement. Any reduction in the amount payable was in the appellant's favour. It was therefore in his interests to seek to bring about this result.

[72] In our view the respondent was not disentitled to give the notices of 27 February 2004 and 15 March 2004 on the account of either the respondent's unquantified tax liability or the other encumbrances on the titles existing at the times those notices were given. We agree with the Judge's findings and reject this ground.

(e) <u>The absence of a defence</u>

[73] The appellant contended that because the respondent had not filed a defence in the action the Judge ought to have entered summary judgment for specific performance under 0.86 r.1. In this Court the appellant's Counsel went so far as submitting that by virtue of 018 r.12, as the respondent had not filed a pleading, the allegations of fact made by the appellant were deemed to have been admitted by the respondent.

[74] The issue of non compliance with the rules requiring the timeous filing of a defence was considered by the Judge. He held:

> ***"The defendant has not filed a defence to the Writ of Summons and the plaintiff seeks judgment. Whilst no defence is filed, the interlocutory applications have all been addressed by the defendant who has filed relevant affidavits. In the circumstances there is no prejudice to the plaintiff and accordingly no merit in this application."***

[75] On the way the proceedings developed before and at the time of the hearing and the common ground between the parties that the issue for the determination was whether the contract had been validly determined, we consider that the Judge properly and correctly determined the issue of non compliance by the respondent. The respondent's defence was fully apparent on the face of the affidavit and exhibited documents which were before the Judge. We therefore reject this ground.

(f) Full trial of the action

[76] The appellant's last complaint and an alternative plea to the previous ground, is that the Judge was wrong in not ordering a full hearing of the action and maintaining the caveats in the meantime.

[77] It is true that this was an interlocutory proceeding, but we come back once again to the essential issue for the Judge's determination: was the contract validly terminated. The appellant's Counsel conceded, in opening the appeal, and in answer to a question from the bench that if the agreement was validly terminated then the substratum of the appellant's case would disappear. There would be no basis for his action for specific performance, as there would be no contract to enforce; and likewise there would be no caveatable interest.

[78] While it is generally inappropriate to determine the rights of the parties in a summary manner, the observations of Fatiaki J. (as he than was) in ***Narain v. Malley*** 34 FLR 118 are in point:

> ***"a caveat being a creature of statute and having been sometimes described as a "blot" on the title cannot be allowed to continue merely because its continued existence would be in some way advantageous to the caveator or because the caveator has not fully disclosed all his evidence in support of the caveatable interest he claims to have."***

[79] The Court will order summary removal:

> ***"... where it is patently clear that there was no valid ground for the lodging of the caveat in the first place... .."***

See ***Peychers Caveat*** 1954 NZLR 285 per Archer J. at page 286.

[80] The onus was upon the appellant to satisfy the Court that there were sufficient grounds in fact and in law for the continuing of the caveats. See ***Eng Mee Yong v. Letchumanan*** 1980 AC 331 PC per Lord Diplock at page 336.

[81] Here, in our view, the Judge was correct in determining the critical issue summarily. On the undisputed evidence before the Judge it was "patently clear" to use the words of Archer J. in ***Peychers Caveat*** (Supra), that the respondent had given a valid notice making the time of the essence and had subsequently validly rescinded the agreement leaving no agreement and no caveatable interest; or put another way the appellant had not been able to establish that there was any ground for continuing the caveats. The sending of a new draft agreement on 11 May 2004 strongly suggests that the appellant himself accepted that the November agreement was at an end.

[82] The last ground of appeal is accordingly rejected.

Result

[83] For the reasons given the appeal fails.

[84] We make the following orders.

(1) The appeal is dismissed.

(2) The judgment of Connors J. of 8 December 2004 is affirmed.

(3) The order for the stay of proceedings is dissolved.

(4) Caveats Numbered 541262, 541261, 541260 and 541278 are to be removed from the certificates of titles 7136, 7138, 7140 and 20489 respectively as from midnight on Thursday 1 December 2005.

(5) The appellant is ordered to pay the costs of this appeal to the respondent in the sum of $2000 together with disbursements as agreed, or failing agreement, as fixed by the Registrar.

Ward, President

Smellie, JA

Penlington, JA

Solicitors:

Messrs. Mishra Prakash and Associates, Suva for the Appellant
Howards, Suva for the Respondent

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