IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

CIVIL ACTION HBC 92 of 2012

BETWEEN : **G.P. REDDY COMPANY LIMITED** a limited liability company having its registered office at Lautoka.

PLAINTIFF

AND : **PAC INVESTMENTS & DEVELOPMENT LIMITED** a limited liability company with its registered office at Lautoka, Fiji.

DEFENDANT

Before	:	Master Tuilevuka
Appearances	:	Mr. V. Mishra for the Applicant/Plaintiff
	:	Mr. V. Naidu for the Respondent/Defendant
Date of Hearing	:	Monday 11 February 2013
Date of Ruling	:	Thursday 14 March 2013

R U L I N G

(My jurisdiction to deal with this matter derives from a directive from the Honorable Chief Justice pursuant to Order 59 Rule 2(1) of the High Court Rules which extends the jurisdiction of this Court to hear all matters coming to the High Court within the powers of a puisne judge with effect from 01 February to 31 March 2013).

BACKGROUND

[1]. Sometime in the late eighties, the Director of Lands (**"DoL"**) gave a Development Lease over some 34-hectares of crown land in Navutu in Lautoka to a company called Land Development Fiji Limited (**"LLDFL"**). The land in question was described as SO 2502 (Lease LD 4/7/3305) and LLDFL was to subdivide and develop it for industrial purposes. Then in January 2012, the Director of Lands gave a Development Lease to Pac Investments & Development Limited (**"PIDL"**) over land which is described as SO 6312 part of Lot 1 SO 2187 LD Ref 4/7/3305-2. This land was also situated in Navutu in Lautoka and was adjacent to the LLDFL-subdivision. The subject-matter of this case revolved around a certain Lot that was thought to be part of the LLDFL Development Lease (i.e. SO 2502) and which LLDFL did in fact commit to a purchaser in a sale and purchase agreement. However, that land turned out to be part of the PIDL Development Lease (i.e. SO 6312). Whether the confusion was due to an error in survey and/or in a misdescription –will all be unraveled at trial.

FACTS

[2]. On 15 July 1992[1], GP Reddy Company Limited (**"GP Reddy"**) entered into an agreement with LLDFL for the sale and purchase of some 5831 square meters of industrial land at the Navutu LLDFL-industrial subdivision. The said agreement

[1] See paragraph 9 of Ganpati Reddy's Affidavit. Paragraph 1 of Statement of Claim states "15th day of July 1993"c.f. Deed of Settlement between GP Reddy and Brian Murphy & FDB in HBC 418 of 1996L states at Clause 5 that GP Reddy entered into a Sale & Purchase Agreement for Lot 5 on 11 September 1992.

was duly stamped and consented to by the director of lands on **19 July 1992**. GP Reddy went into possession in 1994[2] and immediately built some warehouses on the land. GP Reddy apparently made a part payment of $51, 950-00 pursuant to the sale and purchase agreement[3]. Clause 6 of the agreement makes the contract subject to the consent of the Director of Lands.

[3]. As this was, then, a new industrial sub-division, new lot titles were to be created for purchasers such as GP Reddy. However, before that was done, the Fiji Development Bank (**"FDB"**) - which had a mortgage debenture granted by LLDFL - did appoint a receiver manager of LLDFL in May 1995. This happened at a time when LLDFL was already committed by agreement with various purchasers (including GP Reddy) for the sale and purchase of specific industrial lots. Also, at the time of the appointment of a receiver-manager, LLDFL was yet to complete certain infrastructural works – nor – as stated - obtained separate titles over the lots. LLDFL's Receiver was to later complete these unfinished business.

[4]. GP Reddy's case theory, as presented, is that - like every other purchaser, it was expecting a formal lease title over the same land that it had contracted for (i.e. 5831 square meters). But it was given title (Crown Lease 13851) over 2574 square meters of land only. That means that some 3257 square meters of land (**"balance land"**) that was part of the land described in its sale and purchase agreement with LLDFL - is still due and owing to it. In fact, two of GP Reddy's warehouses actually sit on this land.

[5]. According to an affidavit[4] filed for and on behalf of PIDL, GP Reddy acquired Crown Lease 13851 (over 2574 square meters of land) pursuant to a Deed of Settlement it signed on 11 April 2007 with LLDFL's Receiver. This happened after GP Reddy had paid the Receiver the sum of $82,000 in accordance with the Deed of Settlement. That Deed was made to settle a High Court claim that GP Reddy had mounted against the Receiver, the FDB and the Attorney-General of Fiji (HBC 418 of 1996L - seeking, mainly, a declaration that it is the lessee and, accordingly, that it is entitled to a lease over Lot 5). Notably, because the Fiji Court of Appeal had conclusively determined in another case[5] that the Director of Lands could not be liable, GP Reddy had withdrawn its claim against the Director of Lands before the Deed of Settlement.

[6]. Evidence exhibited in the affidavits filed for PIDL show that the "balance land" in question is actually part of PIDL's development lease. Hence, that was why it was

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[2] Paragraph 7 of the Statement of Claim alleges that possession was given to GP Reddy in 1994 c.f. paragraph 15 of the same which states that PF has been in occupation since 1993.

[3] Under clause 3 of the sale and purchase agreement, the deposit of $20,000 was paid and thereafter $10,000 and thereafter $5,000 per month as stated in the agreement. The Deed of Settlement (see footnote 1 above) acknowledges that GP Reddy had in fact paid $ 51,950-00.

[4] of Vijay Rajnesh Prasad.

[5] **Manubhai Industries Ltd v Lautoka Land Development** (Fiji) Ltd [2002] FJCA 21; ABU0043U.98S (31 May 2002).

left out of the Deed of Settlement. Meanwhile, PIDL has in fact completed all subdivision work on its development lease and has entered into an agreement with some purchasers for the sale of its lots, including the balance land which is now described as Lot 5 on SO 2502 Stages 2 and 3 comprising 3257 square meters (**"Lot 5"**).

[7]. However, to this very day, GP Reddy continues to occupy Lot 5. It maintains the position that Lot 5 is the "balance of area" due and owing to it. An Affidavit filed for and on behalf of GP Reddy[6] exhibits certain correspondence from the Director of Lands Office. These give the impression that the Director of Lands itself is baffled by the confusion surrounding Lot 5 and is carrying out an investigation.

[8]. Meanwhile, the tussle over Lot 5 continues between GP Reddy and PIDL. GP Reddy, by virtue of its sale and purchase agreement with LLDFL, and the fact that it has been in occupation and possession of Lot 5 since 1994 – is asserting a prior equitable interest over Lot 5. On the other hand, PIDL – banks on its registered legal proprietorship over the same land which it says was acquired without any notice of GP Reddy's claim - if assuming such a claim really exists. By summons dated 14 May 2012, GP Reddy seeks orders to restrain PIDL from interfering with its possession of Lot 5. The summons is opposed. The only issues are whether or not there is a serious question to be tried and where the balance of convenience lies. PIDL does not question the adequacy of GP Reddy's undertaking as to damages.

THE LAW

[9]. In an interlocutory injunction application, the issues, according to the **American Cyanamid** case are[7]:

(i) whether or not there is a serious issue to be tried?
(ii) the balance of convenience.
(iii) undertaking as to damages.

[10]. I caution myself that I need not assess where the preponderance of evidence might lie from the affidavits before me, if there is a clash of evidence[8]. All I need do is look at the whole case and have regard to the relative strength of the claim as well as the defence before deciding what is best done[9].

[11]. While the above general principles (see paragraph [9] & [10]) are helpful, the Courts must not brush over lightly the importance of the **American Cyanamid**

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[6] Affidavit of Ganpati Reddy.

[7] Certain aspects of the principles of the **American Cyanamid Ltd v Ethicon Ltd [1975] AC 396** are currently before the Supreme Court of Fiji for review. I say no more on that. For now, following the Fiji Court of Appeal's ruling in **Strategic Nominees Ltd (In Receivership) v Gulf Investments (Fiji) Limited, Civil Appeal No.ABU 0039**.

[8] as per Lord Diplock at 406-7 of **American Cyanamid**.

[9] as per Lord Denning in **Hubbard & Another v Vesper & Another [1972] EWCA Civ 9; (1972) 2 WLR 389** cited in **Vivrass Development Ltd v Fiji National Provident Fund [2001] FJHC 303; [2001] 1 FLR 260 (10 August 2001)**), Lord Denning at page 396.

principles – in particular - whether or not there is a serious issue to be tried (see New Zealand Court of Appeal in **Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd**[10]). As registered proprietor of Lot 5, PIDL is in a very strong position. In the absence of fraud or other exception to indefeasibility, PIDL will take priority over all other prior interests. However, its interest will be subject to any equitable interest on the land of which if it has had notice prior to taking title. The immediate questions to ask are, firstly, whether GP Reddy has an arguable equitable claim over Lot 5 and, secondly, whether or not PIDL, arguably, did have notice of that equitable claim prior to acquiring title to Lot 5?

Serious Issue To Be Tried

[12]. A prior equitable claim may defeat a subsequent legal interest if the latter was acquired with notice of the former. Also – under the Land Transfer Act, any instrument of Title issued in error – or fraudulently or wrongfully obtained[11] may be corrected. From where I sit, these set the tone for the issues that arise in this case.

[13]. Generally, a purchaser cannot have an equitable interest deriving from his or her sale and purchase agreement unless he or she is entitled to specific performance of the said agreement. As a starting point, specific performance will only be available if the contract is binding[12].

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[10] [1985] 2 NZLR 110, 128 (NZCA).

[11] Section 166 to 168 of Land Transfer Act

166. If it appears to the Registrar that any grant, certificate of title or other instrument of title has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any such instrument, or that any such instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that any such instrument is fraudulently or wrongfully retained, he may summon the person to whom such instrument has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected as the case may require, and, in case such person refuses or neglects to comply with such summons or cannot be found, the Registrar may apply to the court to issue a summons for such person to appear before the court and show cause why such instrument should not be delivered to be so cancelled or corrected, and, if such person when served with such summons neglects or refuses to attend before the court at the time therein appointed, it shall be lawful for the court to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.

Power of court in case of refusal to deliver up instrument of title

167. Upon the appearance before the court of any person summoned or brought up by virtue of a warrant issued under the provisions of section **166**, the court may examine such person upon oath and may order such person to deliver up such grant, certificate of title or other instrument of title, and, upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to prison for any period not exceeding six months unless such instrument shall be sooner delivered up, and in such case, or in case such person has absconded so that the summons cannot be served upon him as hereinbefore provided, the court may direct the Registrar to cancel or correct any such instrument of title or any entry or memorial in the register or of any endorsement relating to the land, estate or interest therein contained, and to substitute and issue such other instrument of title or make such entry or endorsement as the circumstances of the case may require, and the Registrar shall give effect of such order.

Power of court to direct Registrar

168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court

[12] A contract will not be binding if, for example, it does not comply with the statute of frauds provisions (i.e. section 59(d) of the Indemnity, Guarantee and Bailment Act (Cap 232) of Fiji), or is enforceable under the doctrine of part performance). If any requisite Ministerial approval has not been first had and obtained, specific performance will be refused.

In other words, a purchaser's equitable interest in a piece of land is usually commensurate with his ability to obtain specific performance. In **Legione v Hateley [1983] HCA 11; (1993) 152 CLR 406** for example, Mason and Dean JJ in their joint judgment stated at page 446 thus:

[14]. In this case, Mr. Naidu attacks the basis for the equitable claim by emphasizing that Lot 5 is a protected crown lease and therefore, the prior consent of the Director of Lands was required before GP Reddy could entertain any equitable claim on Lot 5. The logic in Mr. Naidu's reasoning is supported by such cases as **Re CM Group Pty Ltd's Caveat [1986] 1 Qd R 381** where it was held that property did not pass in equity until the required municipal council approval was obtained and **Brown v Heffer (1967) 110 CLR 344** where an interest in equity did not pass because the required consent of the Minister had not been obtained[13]. However, clause 6 of the agreement states categorically that the agreement in question shall come into effect upon the granting of the consent. There is some case law authority that the statutory protective scheme of section 13 only forbids performance and/or implementation of a contract before consent. In other words, section 13 does not forbid contracting before consent[14]. It appears that GP Reddy only constructed the warehouses on Lot 5 after consent was given, although this needs to be clarified at trial.

[15]. In any event, apart from the alleged equitable claim, it is possible that the confusion over Lot 5 all stems from a misdescription of the Development Lease issued to PIDL. As stated, this, if made out, is in itself, a valid ground to defeat LLDFL's claim based on indefeasibility of title.

[16]. Mr. Naidu then argues that PIDL was not privy to the agreement between GP Reddy and LLDFL. While that is true, it has no bearing on the issue of whether or not LLDFL did take title to Lot 5 with prior notice of GP Reddy's (purported) equitable interest thereon. Suffice it to say that, at the time when PIDL acquired Lot 5 in 2012, GP Reddy's warehouse had been in existence on that land for some 20 years or so. Surely, there is an arguable case of constructive notice.

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*In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (**Brown v Heffer (1967) [1967] HCA 40; 116 CLR 344, at p.349**).*

It is important to note also that a purchaser who has breached an essential condition is normally not entitled to specific performance. But a delay in pursuing specific performance may be a bar to that right (see **Narayan v Shah [1975] FJCA 5; [1975] 21 FLR 139 (26 November 1975)** citing **Stonham's Vendor and Purchaser at p. 778**; **Dillon v. MacDonald** 21 N.Z.L.R. 45).

[13] In **Chand v Prakash [2011] FJHC 640; HBC169.2010 (7 October 2011)**, Mr. Justice Calanchini, after rejecting a claim on promissory and/or proprietary estoppels (which are equity-based remedies) by a party who was asserting those rights in the alternative based on an agreement to occupy a protected crown lease for which the director of lands' consent had not been first had and obtained:

> However, there is a principle that the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has enacted is to be invalid. (**Halsburys Laws of England** supra at paragraph 1515). As Gates J (as then was) noted in **Indar Prasad** (supra) at page 171:
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> ***"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."***

And later

> However, in my judgment the classification of the leases as protected leases and hence bringing into play section 13 of the State Lands Act is decisive. The mandatory requirement of section 13 and the legal consequences that flow from non-compliance overcome and sufficiently dispose of any interest claimed by the Defendant under section 172 of the Land Transfer Act.

[14] There is authority that section 13 merely precludes the enforcement and/or the implementation and/or the performance of a contract but is not necessarily infringed when two parties contract subject to the Director of Lands' consent (see Fiji Supreme Court decision in **Guiseppe Reggiero – v - Nabuyoski Kashiwa Civil Appeal No. CBV0005 of 1997S**).

[17]. Mr. Naidu also argues that any claim for an equitable interest that GP Reddy may pursue will be time barred. As stated above, time is indeed important because it may be a factor that will bar the availability of specific performance to GP Reddy.

[18]. Obviously, the remedy of specific performance is not available against LLDFL which is now completely wound-up. True, a party who had a valid contract for the purchase of land against a wound-up company may obtain a Court Order for specific performance and compel the Liquidator or Receiver to transfer title to the land to them, upon tender of the purchase price (see **Re Coregrange Ltd [1984] BCLC 453**) - but in this case, specific performance is clearly no longer an option against the Receiver either, firstly, because Lot 5 is already registered to LLDFL anyway and , secondly, because of serious potential limitation issues.

[19]. The argument by Mr. Naidu that the Deed of Settlement (see above), creates an estoppel against GP Reddy from pursuing any further claim pertaining to Lot 5 is best left for trial.

[20]. The serious issues to be tried, in my view are:

(i) whether or not GP Reddy does have an equitable claim in Lot 5?

(ii) whether or not the confusion regarding Lot 5 stems from a misdescription?

(iii) in any event, whether or not that alleged equitable interest of GP Reddy was destroyed once Lot 5 was acquired by PIDL – which – will then turn on the question as to whether or not PIDL was a bona fide purchaser for value without notice.

Balance Of Convenience

[21]. Once a Plaintiff satisfies that there are serious issues to be tried, the Court must next consider the balance of convenience by assessing whether there is adequate compensation in damages for the plaintiff if the **injunction** is refused or whether the Defendant will be adequately compensated in damages if the **injunction** is granted[15]. In my view, the balance of convenience favours GP Reddy based on these factors: firstly, considering that GP Reddy has been in possession for some twenty one years or so and has erected warehouses on the land which it currently uses in its business. It would be inconvenient for GP Reddy to have to vacate now. In contrast, PIDL only acquired title to the same property just a little over a year ago and has never been in occupation. I suspect

[15] As Lord Diplock stated in **American Cyanamid** at page 400:

"If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appear to be at that stage. If on the other hand, damages would not provide an adequate remedy for the Plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the Defendants were to succeed at the trial in establishing his right to do that which was sought to be enjoyed, he would be adequately compensated under the Plaintiff's undertaking for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an understanding would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction."

that it may have given a mortgage over the property to a financier – but this was not put before me at the hearing.

CONCLUSION

[22]. I grant Order in Terms of the application. The interim injunction shall be in place until further Orders of the Court. The case is adjourned to **26 March 2013** for mention only. Costs in the cause.

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Master Tuilevuka

At Lautoka
14 March 2013.