

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 157 OF 2016

BETWEEN : **MUNESH RAJ** and **VANILA DEO RAJ** of 12366 91 Avenue,
Surrey B V3V 6J9, Canada.

PLAINTIFFS

A N D : **MANDA YOLANDE IHAKA** of 6 Lakeba Crescent, Nasoso, Nadi.

DEFENDANT

Appearances : Mr R. Singh for the plaintiffs
No appearance for the defendant

Date of Hearing : 24 July 2019

Date of Judgment : 24 July 2019

J U D G M E N T

Introduction

[01] This is a summons to enter a default judgment against the defendant.

[02] By their summons to enter default judgment filed 14 October 2016 (*the application*), the plaintiffs seek the following orders:

- a) *That the defendant within seven (7) days of an Order being made prepare and lodge an application for consent in the required form, within the iTaukei Land Trust Board to transfer the land comprised in Agreement for Lease iTLTB No. 50039125 comprising land known as Taukovukuca in the Tikina of Nadi Ba containing an area of 822 sq meters to the plaintiffs.*
- b) *That the defendant be ordered to complete the dwelling house being constructed on the land comprised in Agreement for Lease iTLTB No. 50039125 comprising land known as Taukovukuca in the Tikina of Nadi, Ba containing an area of 822 sq meters in accordance with the approved plans and specification within twenty one (21) days.*

- c) Damages for breach of Agreement/contract in lieu of or in addition to specific performance to be assessed.
- d) In the alternative, the defendant refund the sum of \$326,900.00 (THREE HUNDRED TWENTY SIX THOUSAND AND NINE HUNDRED DOLLARS) with interest at the rate of 13.5% to the plaintiffs.
- e) Costs on solicitor/client indemnity basis to be assessed.
- f) Any other relief this honourable court seems just.

[03] However, the plaintiffs confined their relief to that of specific performance, damages in addition to specific performance and costs.

[04] The application is made under Order 19 of the High Court Rules 1988, as amended ('HCR') and under the inherent jurisdiction of the court.

[05] At the hearing I had be benefit of oral submissions from Mr Singh as well as his written submissions. His submissions and position statement have been of considerable assistance.

Background

[06] The brief background facts of the case are as follows.

- 6.1 Munesh Raj and his wife Vanila Deo Raj, the plaintiffs and Manda Yolande Ihaka, the defendant entered into a Sale and Purchase Agreement for the land comprised in iTaukei Lease No. 32284 containing an area of 823m² formerly known as Agreement for Lease iTLTB Number 50039125 containing an area of 822 sq. meters ('the land') in the sum of \$80,000.00 ('the agreement').
- 6.2 It was agreed that the defendant would construct a dwelling house in accordance with the approved plan in the sum of \$258,000.00 on the said land.
- 6.3 The total consideration sum under the agreement for the purchase of the said land and the construction of the dwelling house was \$338,800.00.

- 6.4 The plaintiffs had paid a sum of \$326,900.00 with a balance of \$11,900.00, which they retain.
- 6.5 Under the Agreement the defendant were to construct the dwelling house within 12 months from the date of execution of the same.
- 6.6 The plaintiffs allege that in breach of the agreement the defendant failed to construct the dwelling house in a proper and timely manner, and thereby failed to perform the agreement.
- 6.7 The plaintiffs brought this action to compel the defendant to perform the agreement and to seek damages in addition to specific performance and costs to be assessed. The defendant's solicitors filed an acknowledgement of service on 23 September 2016. The defendant however did not file his statement of defence to date. The plaintiff applies for specific performance of the agreement, damages in addition to specific performance and costs, which are to be assessed.

The legal framework

- [07] The plaintiff's claim appears to be a mixed claim. The HCR, O 19, R 6, deals with default of defence in respect of mixed claims. Rule 6 provides as follows:

'Default of defence: mixed claims (O 19, R.6)

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in Rules 2 to 5, and no other claim, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter against that defendant such judgment in respect of any such claim as he or she would be entitled to enter under those Rules if that were the only claim made, and proceed with the action against the other defendants, if any.'

The principles on specific performance

- [08] An order for specific performance requires the performance of the obligation of a party to a contract. It is an equitable remedy and is not available as of right. An order for specific performance is an equitable remedy awarded at the court's discretion where a legal remedy would be inadequate.

- [09] Specific performance is asked for most often in claims for enforcement of agreements relating to land.
- [10] The claimant must show that he is ready, willing and able to perform his part of the obligation or contract.
- [11] In the ordinary run of cases where damages may be said to be an adequate remedy, specific performance will not be awarded. In many contracts for sale of goods, it is possible to purchase substitute goods in the market, and therefore damages, to cover the cost of obtaining substitute performance, will be adequate remedy (*Societe des Industries Matallurgiques SA vThe Bronx Engineering Co. Ltd* [1975] 1Lloyd's Rep 465).

The evidence

- [12] The plaintiffs have filed an affidavit in support, and have also filed a supplemental affidavit. The summary of what they state in their supplemental affidavit is as follows:
- a) *We entered into a Sale and Purchase Agreement (Agreement) for the land in dispute in the sum of \$80,000.00 ('Ex/B').*
 - b) *It was agreed that the defendant would construct a dwelling house in accordance with the approved plan in the sum of \$258,000.00 ('Ex/C').*
 - c) *The total consideration sum for the purchase of the land and the construction of the dwelling house was \$338,800.00.*
 - d) *We have paid the defendant, \$326,900.00 with a balance of \$11,900.00, which we retain.*
 - e) *As we reside in Canada, we entrusted the defendant to complete the dwelling home in accordance with the plans and specifications. He had to complete the house within 12 months of the agreement.*
 - f) *We trusted the defendant would do everything properly and timely manner, but he has failed to construct the dwelling house in a proper and timely manner. He has ignored the notice of default sent to him (Exhibit E).*

- g) *The defendant's solicitors had initially agreed to transfer the land to us (Exhibit F).*
- h) *On the 25 April 2017, our solicitor informed the defendants of the costs of completion and rectification of defective construction work would be around \$67,000.00 (Exhibit G).*
- i) *Since the defendant had abandoned construction, we attended to work on the dwelling house ourselves and completed the dwelling house.*
- j) *The defendant has executed a transfer of the land on 5 February 2018, and we have paid the required stamp duty in the sum of \$16,905.00 on 13 March 2018 having obtained consent from the iTaukei Land Trust Board (Exhibit I and Exhibit J).*
- k) *Thereafter, the defendant has not attended to any formalities with the assessment of the CGT. The land cannot be transferred to us without the CGT Certificate.*
- l) *We also seek compensation for the costs of completion and cost of rectification of the dwelling house.*

Discussion

- [13] The plaintiffs apply to this court for specific performance of the agreement with damages in addition to specific performance and costs of these proceedings. This application is made on the basis that there is no defence to their claim.
- [14] As I said, the defendant did not file a defence to the claim after filing an acknowledgement of service on 23 September 2016. Thereafter, it appears, particularly after the plaintiff had filed the application for default judgment the defendant through his solicitors had been obtaining dates on the pretext of negotiating settlement. His solicitors have now filed a summons to withdraw as counsel.
- [15] The plaintiffs' claim appears to be a mixed claim. Therefore, they are entitled to make an application under the HCR, O19, and R6 for default judgment. In the case of a mixed claim, according to R6, if the defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under the HCR for service of the defence, enter against that defendant such judgment in respect of any such claim as he or she would be entitled to enter under the HCR.

[16] In the claim, the plaintiffs claim among other things for specific performance, damages in addition to specific performance and for costs. Since the defendant has failed to serve a defence on the plaintiffs, the plaintiffs are entitled to enter default judgment in respect of the relief they seek in their claim.

Specific performance

[17] An order for specific performance is an equitable remedy awarded at the court's discretion where a legal remedy would be inadequate.

[18] I have gone through statement of claim, the application to enter default judgment, the supporting affidavit, the supplemental affidavit and the exhibits annexed to the affidavits and have heard submissions advanced on behalf of the plaintiff.

[19] The defendant neither filed a defence to the claim nor an opposition to the application to enter default judgment, although it was served on the defendant's solicitors.

[20] The plaintiffs had completed their obligation under the agreement. They had paid the whole consideration sum except \$11,900.00, which they had retained, and had taken over possession of the property. The defendant had completed almost all the paper work to transfer the land to the plaintiffs. However, he has failed to apply for assessment of Capital Gains Tax (CGT) and to obtain CGT Certificate in order to complete the transfer.

[21] There is uncontested evidence before the court that the defendant is unnecessarily refusing the performance of the agreement without any reason, after agreeing to transfer the property to the plaintiffs.

[22] There is no evidence before the court that the plaintiffs had breached any terms of the agreement. On the contrary, they have proved that they are ready, willing and able to perform their part of the obligation under the agreement.

[23] The plaintiffs wish to enforce the contract for the sale of land. As a matter of law all land is unique, so that specific performance is available upon breach of a contract for the sale of land. The land is particularly unique to the plaintiffs because a modest house has been constructed on the land according to the

plaintiffs' plans and specifications. In the circumstances, the sole means of protecting the plaintiffs' expectation is by compelling performance. In my opinion, a substitute performance is unavailable to the plaintiffs under the circumstances of the case. I would, therefore, order for specific performance of the agreement against the defendant. In that the defendant will do all things necessary to complete the transfer of the property within 30 days.

Damages in addition to specific performance

[24] The plaintiffs also ask for damages in addition to specific performance. I have been referred to the case authority of *Grant v Dawkins* [1973] 3 All ER 897.

[25] I then turn to the question whether the plaintiffs are entitled to damages in addition to the specific performance.

[26] In *Grant* (above), the defendant agreed to sell, and the plaintiff to buy, a house. The contract was for a sale free from encumbrances. The property was subject to first mortgage in favour of the second defendant and a second mortgage in favour the third defendant. The cost of redeeming those mortgages exceeded the purchase money under the contract. The first defendant failed to complete the sale in accordance with the contract and the plaintiff brought an action for specific performance. In default of appearance by the first defendant the plaintiff sought order in two parts, the first requiring the first defendant to redeem the mortgages so as to give a good title and for completion on that footing, the second, in the event of the first defendant failing to redeem, was drawn on the footing that the plaintiff should take the property subject to subject to the mortgages, redeem them himself and have the purchase price abated, and if necessary damages also, so as to recoup the full amount of the moneys needed to redeem the mortgages, it was held-

"In default of the first defendant conveying the property free from the mortgages the plaintiff was entitled to have the property conveyed to him subject to the mortgages, to the extinguishment of the purchase price by way of compensation for liability to the mortgages and, by virtue of s 2^a of the Chancery Amendment Act 1858, to damages in respect of the amount by which that liability exceeded the purchase price. For the purpose of assessing damages however the property was to be valued as at the date set for completion of the sale rather than the date of breach, thus giving the

plaintiff the benefit of any appreciation in value of the property between those dates. An order would be made accordingly... Wroth v Tyler [1973] 1 All ER 897 applied."

- [27] In *Phelps v Prothero* (1855) 7 De GM & G 722, Turner LJ was of the view that:
- "Not only could a court of equity give damages in addition to specific performance but a plaintiff ought not to seek relief in equity by way of specific performance and damages at law in the common law courts."*
- [28] Woff J in *Grant's case* decided that where there is a contract to sell free from mortgages and the vendor fails to pay them off, the plaintiff may, on discharging them himself, recoup his position by compensation out of the purchase price so far as it will extend and, over and above that, by damages limited to the excess at the relevant time of the value of the property over the purchase price.
- [29] It appears that the court may grant damages in addition to specific performance in exceptional circumstances, limited to the extent that the value of the property exceeds the purchase price.
- [30] In the matter at hand, it was not only a sale of the land but also the defendant was to build a house in accordance with the agreed plan. The purchase price included the construction of the house. The plaintiffs had paid almost the full purchase price of \$326,900.00 minus \$11,900.00. They have to pay the balance price money of \$11,900.00 upon transfer of the land to them with the house.
- [31] The unchallenged evidence before the court is that the defendant failed to construct the dwelling house in a proper and timely manner in accordance with the agreement.
- [32] The plaintiffs have to complete the house from the stage the defendant left spending more money, which may exceed the purchase price. There is no evidence before the court how much money the plaintiff would need to complete the house except the letter sent by the plaintiffs' solicitors where their solicitors informs the defendant that the cost of completion and rectification of the defective construction work would cost around \$67,000.00.
- [33] I accept the plaintiffs' evidence that the defendant had failed to complete the house in accordance with the agreement.

[34] The purchase price in this case was for the land and for the construction of the house. The house was not constructed in accordance with the agreement. There is some work still to be done to the house. In other words, the house is incomplete. The defendant is not available to complete the job. Since the purchase price includes the construction of the house, taking the incomplete house would mean that the plaintiffs had paid more than the value of the property. I find it an exceptional circumstance where the court could grant damages in addition to the specific performance. Therefore, I find that the defendant is liable to pay damages (minus retention sum of \$11,900.00) to the plaintiffs in addition to the specific performance. I find that the defendant is liable to pay costs of these proceedings to the plaintiffs. The damages and costs will be assessed before the Master upon application by the plaintiffs.

The outcome

1. There shall be an order for the specific performance of the sale and purchase agreement made between the plaintiffs and the defendant on 12 March 2014.
2. The defendant shall do everything necessary to complete the transfer of the property in favour of the plaintiffs within 30 days.
3. The defendant is liable to pay compensation for the incomplete construction of the house and to pay costs of these proceedings to the plaintiffs.
4. The damages and costs are to be assessed before the Master on application by the plaintiffs.

M.H. Mohamed Ajmeer
B.4/7/19
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M.H. Mohamed Ajmeer
JUDGE



At Lautoka
24 July 2019

Solicitors: Patel & Sharma, Barristers and Solicitors for the plaintiffs