

IN THE HIGH COURT OF FIJI
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 105 of 2014L

BETWEEN : **IAN WILLIAM SMITH** of Lot 21, Baravi Road, Newtown Beach, Nadi,
PLAINTIFF

AND : **ROSELINE SHAREEN LATA DUTT** formerly of Lot 21, Baravi Road,
Newtown Beach, Nadi,
DEFENDANT

Appearances : (Ms) Vasantika Patel for the plaintiff
: The defendant is absent and unrepresented

Hearing : Friday, 10th May, 2019
Judgment : Friday, 23rd August, 2019

JUDGMENT

[A] INTRODUCTION

- (1) The plaintiff seeks specific performance of the contract for the sale of the defendant's one undivided half interest in the property comprised in Certificate of Title No. 18439 known as "Cawa" (part of) situated in Nadi having an area of one rood one perch and five tenths of a perch (1r.1.5p).
- (2) The defendant neither entered an appearance to the Writ nor filed a defence to the claim.
- (3) The plaintiff's claim was heard by way of formal proof.

[B] THE FACTUAL BACKGROUND

- (1) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

- (1) *That the Plaintiff is the registered proprietor of one-undivided half share of all that freehold property comprised in Certificate of Title No. 18439 known as "Cawa" (part of) and situated in Nadi having an area of 1 rood 1.5 perch.*
- (2) *That the Defendant is the registered proprietor of one-undivided half share of all that freehold property comprised in Certificate of Title No. 18439 known as "Cawa" (part of) and situated in Nadi having an area of 1 rod 1.5 perch.*
- (3) *That by an agreement in writing dated the 2nd day of February, 2012 and made between the Plaintiff and the Defendant (hereinafter called "the Agreement") it was agreed that the Defendant should sell and the Plaintiff should purchase for the sum of NZ\$25,000.00 [TWENTY-FIVE THOUSAND NEW ZEALAND DOLLARS] the Defendant's one undivided half share of the said property comprised in Certificate of Title No. 18439.*
- (4) *It was provided in the said agreement that a sum of NZ\$2,000.00 had been paid to the Defendant on the 20th of January, 2012 and that a further sum of NZ\$8,000.00 be paid by the Plaintiff upon execution of the said agreement and that the balance of NZ\$15,000.00 be paid on such date(s) as agreed between the parties.*
- (5) *The Plaintiff in accordance with their agreement, paid a total of NZ\$16,717.04 to the Defendant on account of the said purchase price. The balance sum was to be paid to the Defendant at settlement.*
- (6) *In breach of the agreement the Defendant failed to provide the Plaintiff with a duly executed Transfer to enable settlement to be effected.*
- (7) *On or about the 26th day of October, 2012 the Plaintiff sent an email to the Defendant informing her that he would have the transfer documents delivered to her for execution by her. The Defendant responded that she should sign the documents when she returned to Fiji. Notwithstanding requests by the Plaintiff, the Defendant has neglected and refused and continues to neglect and refuse to take any steps towards completion of the said Agreement.*
- (8) *The Plaintiff has at all material times been and is ready and willing to fulfill all his obligations under the said Agreement and has been at all material times and is ready and willing to pay the balance sum of NZ\$8,282.96 to the Defendant.*
- (9) *That the Defendant is in breach of the said Agreement to sell and transfer her one undivided half interest in Certificate of Title No. 18439 to the Plaintiff.*
- (10) *That the Plaintiff claims interest on damages pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap.27 at such rate and for such period as the Court thinks fit.*

- (2) The plaintiff claims from the defendant;
- (a) Specific Performance of the Agreement.
 - (b) an Order that the Deputy Registrar, Lautoka High Court do execute all requisite documents on behalf of the Defendant in order to transfer the Defendant's one-undivided half interest in Certificate of Title No. 18439 in favour of the Plaintiff.
 - (c) General Damages.
 - (d) Interest under the provisions of Section 3 of the Law Reform (Miscellaneous Provisions) (Death & Interest Act) Cap. 27.
 - (e) Such further or other relief as this Honourable Court deems just.
 - (f) Costs on a solicitor/client indemnity basis.

[C] ORAL EVIDENCE

Plaintiff's case

- Mr Ian William Smith (the plaintiff)
- Mr Jaynandan Naicker, Senior Conveyancing Clerk

[D] DOCUMENTARY EVIDENCE

<u>Exhibit No.</u>	<u>Document</u>
1	—————> Certified True Copy of CT No. 18439.
2	—————> Stamped copy of Sale and Purchase Agreement.
3	—————> Westpac Online Banking Statements.
4	—————> Email dated 12.9.12 from Rams Law.
5	—————> Email dated 26.10.12 Smith/Shareen.
6	—————> ANZ Statement & RBF form.

[E] **THE SUMMARY OF EVIDENCE**

Mr Ian William Smith (the plaintiff)

He (Smith) had been residing at Lot 21, Baravi Road, Nadi since 2002. The defendant (Shareen) is his de-facto wife. He is the registered proprietor of one-undivided half share of all that freehold property comprised in Certificate of Title No. 18439 (exhibit -1) known as "Cawa" (part of) and situated in Nadi having an area of 1 rood 1.5 perch. He had purchased the said property with his friend John Alfred Edward in 2002. They each had one undivided half interest in the property. Smith has lived on the property since he first purchased it on 07/11/2002.

Subsequently, Smith decided to buy Edward's one undivided half share from him for \$210,000.00. As Smith was not a Fiji Citizen, he could not borrow the money locally to purchase Edward's half-interest in the property. As Shareen (the defendant) was a Fiji Citizen, she applied for a bank loan in her name and the bank approved the loan. Thus, Edward's one undivided half-interest in C.T.18439 was transferred into Shareen's name on 12/06/2008 and the mortgage to ANZ Bank was registered. Smith made the payments under the mortgage to ANZ Bank.

Shareen parted and went to New Zealand in 2011 and in January 2012 she offered to sell her interest in the house at Lot 21, Baravi Road, Newtown Beach, Nadi to Smith and they agreed on a price of NZ\$25,000.00. Smith instructed Solicitor Mr Hari Ram of Rams Law to draw up the papers.

Smith and Shareen entered into an agreement whereby it was agreed that Shareen would sell and Smith would purchase Shareen's one-undivided half share of the said property comprised in Certificate of Title No. 18439 for the sum of NZ\$25,000.00.

The Sale and Purchase Agreement (exhibit-2) was executed by the Vendor (Shareen) before a Solicitor in Auckland, New Zealand on 23/02/2012. It was executed by Smith as Purchaser before Mr Hari Ram of Ram's Law in Nadi. The actual date of the execution of the agreement by Smith in Fiji is not clear as he cannot recall the date.

The purchase price for Shareen's interest in C.T. 18439 was NZ\$25,000.00. Smith was to pay NZ\$10,000.00 initially and the balance of NZ\$15,000.00 on settlement. The settlement was to be effected on or before 30/06/2012 or such other date as may be mutually agreed to in writing between the parties.

Smith paid Shareen NZ\$2,000.00 on 20/1/2012. About a week or so later she rang Smith and asked for "the rest of the \$10,000.00." Smith sent her NZ\$4,000.00 on 8/2/2012 but told her that she would not be getting any more until she signed the Sale and Purchase agreement [**Exhibit 2**]

Smith collected the documents from Mr Ram upon being notified by him that the documents were ready to be picked up. Smith rang Shareen and told her that he had the

documents. He flew to Auckland and met her at Auckland Airport. The documents were given to her and they went together to get the documents signed by her. He waited in the car downstairs whilst she went inside the building. She returned and gave him the envelope which was sealed. He did not open it. He paid her another \$4,000.00 on the same day. This was on the 23rd February, 2012. **[Exhibit 3]**

Settlement could not be done on or before 30th June, 2012 as the Instrument of Transfer document was missing from the documents given to Smith by Shareen. This was discovered by PW2 Janardhan Naicker who was the Senior Conveyance Clerk with Rams Law when Smith took the documents to Rams Law. The documents were not taken to the Solicitors in Fiji by Smith immediately upon his return from New Zealand but quite some time later.

The reason Smith did not hand over the documents to Rams Law directly upon his return from Auckland was because communication between Smith and Shareen was very friendly. He thought that there was a possibility of reconciliation between the two of them and that they would resume their relationship.

After leaving the Solicitors' office Smith skyped Shareen and told her that the Solicitor had told him not to pay any more money to her until the transfer document was signed by her. This is confirmed by the fact that no payments were made by Smith to her in the months of May and June. **[Exhibit 3]**

Smith subsequently did make a number of payments on account of the purchase price to Shareen. These payments were again made at her request. He paid for her air-tickets on 4th July, 2012. One ticket was for her to travel to Fiji around September when she was supposed to come and sign the Transfer document. She failed to travel to Fiji and Smith was told by a friend who was an ATS employee that Shareen was a "no show" although her name was on the passenger list.

Mr Ram wrote to Shareen on 12th September, 2012 and copied the email to Smith. In that email the Solicitor Mr Ram clearly stated to Shareen, inter alia, that she had not provided the duly executed Instrument of Transfer nor the relevant documents for the purposes of assessment of capital gains tax to effect settlement, that Smith has the monies ready and available for payment but that they had advised him that the balance of the monies is only payable on settlement and not before. In that email she was asked to collect these documents from his office when she was next expected in Fiji in October, 2012. It was also pointed out to her that her name under the Certificate of Title differed from her name under the Tax Identification No. Certificate she had provided to Smith. It went on to say "*Once we have all the relevant documents we would arrange for settlement which is when the balance of the purchase price would be paid to you.*" **[Exhibit 4]**

Between 20/01/2012 and 17/09/2012, Smith paid Shareen or paid on her account, a total of NZ\$16,717.04. All these payments were made to her or on her behalf at her request. Smith made the payments in July, August and September, 2012 to Shareen because as he

stated in his evidence, Shareen kept ringing and skyping him saying that she was coming back and that she would sign the documents and could she have some more money.

On 26/10/2012 Smith sent an email to Shareen saying that he had given the [Instrument of Transfer] documents to his friend Len to deliver to her. It reads:

“I have given the papers to Len to bring over how do u want them delivered? He flus sat and get in late so he can deliver next week were would u like them. There is a self addressed envelope with some money inside to pay for the stamp you need to get a notary public to sign for the witness... ..if you don't feel like signing just bring them back with u and do it here but it would be nice to get it over and done with.....”

Her response was trite: *“Ian told you I will do it when I come there....I dnt want people carrying xtra luggage. take it back pliz.”* [Exhibit 5]

Shareen has not executed the Instrument of Transfer document to date. She did not provide an executed Instrument of Transfer or Capital Gains Tax documents to either Smith or to Rams Law to enable them to proceed further with the conveyance. As stated by PW2 in his evidence, *“Subject to receipt of all the documents, the settlement could have been done by 30th of June. Unfortunately the transfer wasn't there.”*

[F] DISCUSSION

- (01) Counsel for the plaintiff has tendered extensive written submissions in support of her case. I am grateful to Counsel for those lucid and relevant submissions.
- (02) The remedy of specific performance is discretionary. Equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so¹. The discretion is, however, not an arbitrary discretion, but one to be governed as far as possible by fixed rules and principles².
- (03) In considering whether specific performance is applicable one of the rules is that there must have been a valid contract. For any agreement to have a binding effect both parties must sign it. The contract (exhibit-02) is in writing and signed by both parties in front of different Solicitors. I find that the agreement is in compliance with requirements of Section 59 of the Indemnity, Guarantee and Bailment Act. Here it is clear from the evidence and my findings of fact that there was a valid contract for the sale of the defendant's one undivided half-interest in the property which is comprised in Certificate of Title No. 18439.
- (04) **Clause (01) of the agreement provides;**

¹ Stickney v Keeble (1915) AC 386, 419

² Lamare v Dixon (1873) L.R. 6 H. L. 414, 423

Covenant to sell & purchase

1.1 *The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the half share of the property for the consideration of Twenty Five Thousand New Zealand Dollars (\$NZ25,000.00).*

(05) Clause (02) of the agreement provides;

2. Price & Deposit

2.1 *The said sum of Twenty Five Thousand New Zealand Dollars (\$NZ25,000.00) shall be paid by the Purchaser to the Vendor in the following manner.*

(a) *a sum of Two Thousand New Zealand Dollars (\$NZ2,000.00) has been paid on the 20th day of January, 2012 and the Vendor.*

(b) *a further sum of Eight Thousand New Zealand Dollars (\$NZ8,000.00) shall be paid upon execution hereof.*

(c) *The balance of sum of Fifteen Thousand New Zealand Dollars (\$NZ15,000.00) to be paid on such date(s) as agreed between the parties.*

(06) Shareen signed the agreement in Auckland on 23/02/2012. Smith paid Shareen NZ\$2,000.00 on 20/01/2012. Smith sent her NZ\$4,000.00 on 08/02/2012. On 23/02/2012, Smith paid another NZ\$4,000.00 in Auckland making up the NZ\$8,000.00 to be paid to Shareen under clause 2(b) upon execution of the agreement.

(07) Clause (03) of the agreement provides;

3. Settlement

3.1 *The settlement shall be effected on or before 30th June, 2012 or such other date as may be mutually agreed to in writing between the parties. At settlement the Vendor will hand over the stamped registrable transfer of the Property in favour of the Purchaser free of encumbrances whatsoever in exchange of the settlement cheque.*

(08) Clause (08) of the agreement provides;

8. Default by Vendor

8.1 *If the Vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor's part herein contained and if such default shall continue for the space of thirty (30) days from the due date then and in any such case the Purchaser without prejudice to any other remedies available to him may at his option exercise all or any of the following remedies namely:-*

- (a) *May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the Purchaser without deduction.*
- (b) *May sue for specific performance of this Agreement.*
- (c) *May sue for Special and General Damages.*

(09) Clause (09) of the agreement provides;

9. *Default by Purchaser*

9.1 *If the Purchaser shall fail or neglect to observe or comply with any covenant, stipulation or agreement on their part in this agreement contained and to be performed or observed by her (the times for such payment performance or observance fixed by this agreement being strictly of the essence of this contract) and if the Vendor shall give the Purchaser notice in writing specifying the default and requiring the default to be remedied within the period of thirty (30) days after the date of giving of such notice and if the Purchaser fail within such period to remedy the default then in any such case the Vendor without prejudice to the other remedies of the Vendor hereunder may at the option of the Vendor exercise any of the following remedies namely:*

- (a) *May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of purchase money shall be forfeited to the Vendor as liquidated damages;*
- (b) *May re-enter upon and take possession of the said Land without the necessity of giving any notice or making any formal demand.*
- (c) *May enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and once payable;*
- (d) *May sue for specific performance of this Agreement;*
- (e) *May sue for Special and General Damages.*

(10) The purchase price for Shareen's interest in C.T. No. 18439 was NZ\$25,000.00. Smith was to pay NZ\$10,000.00 initially and the balance of NZ\$15,000.00 on settlement. Smith has in fact paid Shareen NZ\$16,717.04. The balance to be paid to her in respect of the purchase price is NZ\$8,282.96.

(11) The date of settlement was on or before 30/06/2012 or "*such other date as may be mutually agreed to in writing between the parties*". In short, by agreement in writing the parties could postpone the date of settlement. However, that was not done. The settlement could not be done on or before 30/06/2012 as the instrument of transfer

document was missing from the documents given to Smith by Shareen. On the evidence, I am satisfied that Smith was ready, willing and able to perform his part of the obligation of the agreement. The delay was due to Shareen's default in failure to provide the duly executed instrument of transfer and the relevant documents for the purposes of assessment of capital gains tax to effect settlement. The agreement does not contain time is of the essence clause. The purpose of a time of the clause is to make it clear that failure to uphold a contractual deadline will amount to a material breach of the contract. In the absence of an express clause, a post contractual notice will have to be given making time of the essence in the event a party wishes to terminate for an unmet deadline. This has not been done. For illustration, in an agreement for sale of land, time will not be of the essence unless the agreement expressly so provides, even if a date is specified for completion. If there is no time of the essence clause, then the parties will have a reasonable time to complete the transaction after the completion date has passed. This approach allows for flexibility in the parties dealings. However, it may also result in too much uncertainty, since what constitutes a 'reasonable time' will ultimately fall to be determined by the Court. On the other hand, if a valid time of the essence clause is included in the agreement for sale, then failure to complete by specified time, even by a few minutes, will amount to a breach of the contract allowing the aggrieved party to terminate the agreement, claim for any damages suffered, and/or, if the agreement allows, forfeit a deposit paid.

In *Union Eagle Ltd v Golden Achievement Ltd*,³ a deposit of Hong Kong \$420,000.00 was forfeited because the purchaser was ten minutes late for settlement. The Privy Council concluded that requirements of certainty in commercial transactions dictated that in the absence of a waiver or estoppel Courts would hold parties to their bargains.

Similar views were expressed by Sir R. Malins V.C. in *Webb v Hughes*⁴ as follows:

"But if time be made the essence of the contract, that may be waived by the conduct of the purchaser, and if time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract."

- (12) In the instant case, there is no time of the essence clause in the agreement. In an agreement for sale of land, time will not be of the essence unless the agreement expressly so provides, even if a date is specified for completion. The completion date has passed due to Shareen's default in failure to provide the duly executed instrument of transfer and the relevant documents for the purposes of assessment of capital gains tax to effect settlement. At all times, Smith was ready, willing and able to settle and the Conveyance Solicitors were advised of this.

The acts outlined below indicate that Smith had given a reasonable time to Shareen to fulfill her obligations and to complete the transaction even after the completion date has passed.

³ (1997) 2 All ER 215

⁴ LR 10 Eq. 281 at 287

(*) Smith subsequently did make a number of payments on account of the purchase price to Shareen. These payments were again made at her request. He paid for her air-tickets on 4th July, 2012. One ticket was for her to travel to Fiji around September when she was supposed to come and sign the Transfer document. She failed to travel to Fiji and Smith was told by a friend who was an ATS employee that Shareen was a “no show’ although her name was on the passenger list.

(*) Mr Ram wrote to Shareen on 12th September, 2012 and copied the email to Smith. In that email the Solicitor Mr Ram clearly stated to Shareen, inter alia, that she had not provided the duly executed Instrument of Transfer nor the relevant documents for the purposes of assessment of capital gains tax to effect settlement, that Smith has the monies ready and available for payment but that they had advised him that the balance of the monies is only payable on settlement and not before. In that email she was asked to collect these documents from his office when she was next expected in Fiji in October, 2012. It was also pointed out to her that her name under the Certificate of Title differed from her name under the Tax Identification No. Certificate she had provided to Smith. It went on to say “*Once we have all the relevant documents we would arrange for settlement which is when the balance of the purchase price would be paid to you.*” [Exhibit 4]

(*) On 26/10/2012 Smith sent an email to Shareen saying that he had given the [Instrument of Transfer] documents to his friend Len to deliver to her. It reads:

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Her response was trite: “*Ian told you I will do it when I come there....I dnt want people carrying xtra luggage. take it back pliz.*” [Exhibit 5]

(*) Shareen has not executed the Instrument of Transfer document to date. She did not provide an executed Instrument of Transfer or Capital Gains Tax documents to either Smith or to Rams Law to enable them to proceed further with the conveyance. As stated by PW2 in his evidence, “Subject to receipt of all the documents, the settlement could have been done by 30th of June. Unfortunately the transfer wasn't there.” [page 23 of Transcript]

(13) Shareen has failed to provide the duly executed instrument of transfer and the relevant documents for the purposes of assessment of capital gains tax to effect settlement to date. She did not complete the Settlement. She had failed to perform her obligations under the terms of the agreement. This will amount to breach of contract. Smith needs not wait indefinitely. Notwithstanding Smith's requests, Shareen has neglected and refused and continues to neglect and refuse to take steps towards completion of the agreement.


Shareen is in breach of the agreement to sell and transfer her one- undivided half share of the said property comprised in Certificate of Title no – 18439.

- (14) Smith has acquired equitable interest by paying a total of NZ\$16,717.04 and became the owner of the property in equity.
- (15) The facts of this case warrant specific performance and Smith had shown he is ready with the balance payment of NZ\$8,282.96. Smith had established that he was continuously taking steps to purchase the property and kept the contract on foot.
- (16) Accordingly, I determine that Smith is entitled for the specific performance of the Sale and Purchase Agreement by making the balance payment of NZ\$8,282.96.

ORDERS

1. Judgment for the plaintiff.
2. Specific performance of the agreement dated 02-02-2012 in the writ in this action.
3. The plaintiff to pay the balance of the purchase price, namely, the equivalent of NZ\$8,282.96 to Lautoka, High Court Judicial Trust Account for the credit of the defendant.
4. The Deputy Registrar of Lautoka High Court to execute all requisite documents on behalf of the defendant in order to transfer the defendant's one un-divided half- interest in Certificate of Title No- 18439 in favor of the plaintiff.
5. The defendant to pay costs of 2,000.00 (summarily assessed) to the plaintiff within 14 days from the date of this judgment.




..... 23/08/2019.
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 23rd August, 2019