

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBC 174 of 2017**

**BETWEEN** : **HIN MAN NGAI** of Flat B, 8/F, Wah Tat Building, Hoi Pa Street,  
Tsuen Wan, N.T Hong Kong, Businessman

**PLAINTIFF**

**A N D** : **FANNENG SOUTH PACIFIC HOLDINGS LIMITED** a limited  
liability company having its registered office C/- Mamlakah  
Lawyers, Barristers & Solicitors, 46 Gordon Street, Suva.

**DEFENDANT**

Appearances: A. K. Lawyers for the Plaintiff  
Patel & Sharma for the Defendant

Hearing: 21<sup>st</sup> June 2019

Date of Ruling: 30 August 2019

## **RULING**

### **INTRODUCTION**

1. On 03 August 2018, I did grant an order for specific performance pursuant to the plaintiff's application under Order 86 Rule 1, 3 and 6 of the High Court Rules 1988. The property in question has since been transferred.
2. What remains is the plaintiff's application for damages. Both counsel submit that I should first determine whether or not damages may be

awarded in addition to specific performance and if I do so determine, to then refer the matter to the Learned Master for assessment.

3. The plaintiff and the defendant had agreed to a consideration of FJD\$2.1 million dollars for the purchase and sale of the said property.
4. Their sale and purchase agreement provided that defendant (as vendor, and as the law requires) would pay 10% Capital Gains Tax on the agreed sale and purchase price of FJD\$2.1 million.
5. It appears that the defendant had hoped that the transaction would attract Capital Gains Tax. However, as it turned out, the Fiji Revenue Customs Service would assess 20% income tax on the transaction instead of 10% CGT which the defendant had hoped.
6. Moreover, the 20% income tax was not assessed on the agreed sale and purchase price of FJD\$2.1 million. Rather, it was levied on the figure of FJD\$3.25 million which was the value of the property according to a valuation carried out by FRCS.
7. Because of the huge losses it would suffer if the transaction went ahead, the defendant tried to resile on the deal. It was then that the plaintiff applied for and was granted the Order for specific performance.

#### **CAN DAMAGES BE AWARDED IN ADDITION TO SPECIFIC PERFORMANCE?**

8. Both counsel agree that damages can be awarded in addition to an order for specific performance.

9. Mr. Singh submits that damages are awarded in addition to specific performance only in exceptional cases where it is just and equitable to do so. He argues that the Court's assessment in such cases will be based on principles which are different from those applicable in assessing *damages in lieu of specific performance*. He relies on Grant v Dawkins & Ors [1973] 3 ALL ER 897, in particular the following passage which he read as authority for the proposition that whilst damages in lieu of specific performance is assessed at the date of breach, damages in addition to specific performance is assessed after the order of specific performance is made.

*The present case is different, being one of specific performance and damages in addition, so that the Plaintiff will get the benefit of any appreciation in value, but if damages are not assessed on the Wroth v Tyler<sup>2</sup> principle he will get his specific performance subject to some liability in respect of the mortgages which he ought not to have to bear under an open contract.....*

*.....I think the test in Wroth v Tyler<sup>2</sup> applies and that the damages should be assessed, not at the date of the breach but as at the date when they fall to be assessed. For practical purposes it seems to me that, that is the date referred to in the minutes of order as the second completion date. The order provides for a first completion date on the footing that the vendor will pay off the mortgages. In default it then directs accounts and enquiries, and orders completion on a second completion date when the Plaintiff is to recover compensation on a second completion date when the Plaintiff is to recover compensation and is to be awarded damages. That seems therefore to be the relevant date.*

10. In Grant v Dawkins (supra), the defendant/seller could not complete the sale of the property because the mortgage debt on the property exceeded the sale price. The plaintiff/buyer was able to obtain an Order for specific performance. However, he also incurred extra costs in having to discharge the mortgage in question. The Court held that the plaintiff/buyer was entitled to damages for these extra costs. The headnotes reads as follows:

*The first Defendant agreed to sell, and the Plaintiff to buy, a house. The contract was for a sale free from incumbrances. The property was subject to a first mortgage in favour of the second Defendant and a second mortgage in favour of 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 an order in two parts, the first requiring the first Defendant to redeem the mortgage so as to have a good title and for completion on that footing, the second, in the event of the first Defendant failing to redeem, was withdrawn on the footing that the Plaintiff should take the property 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.*

***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 the liability to the mortgagees and, by virtue of s 2<sup>a</sup> 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 (see p. 899 and e, p 900 f and p 901 c d and e to g, post).*

*Wroth v Tyler [1973] 1 All ER 891 applied.*

11. Mr. Narayan relies on the case of **Jones v Gardiner** (1902) 1 Ch 191. In this case, settlement was delayed because of a charge on the defendant/vendor's title. This caused the plaintiffs/purchasers to institute an action for specific performance. An award of twenty-five pounds was granted. Byrne J posed the following question:

*The next question is whether or not damages can be recovered for delay in completing a contract for sale of real estate, where the delay has been caused by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having cared, or troubled, or taken reasonable pains to perform his contract.*

12. Having posed the question, Byrne J then answered it as follows:

*I am of opinion that a very considerable part of the delay which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor – default, that is, in doing what he could reasonably and fairly have done had he been duly careful to fulfil his contract.....*

*The case of Bain v. Fothergill (1) established what is now familiar law, namely, that a vendor of real estate, acting in good faith, is not liable to the purchaser in damages for loss of bargain, where he is unable to perform his contract owing to defect of title.....*

*On the other hand, Engell v. Fitch (2), which was considered in Bain v. Fothergill (1), so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law.....*

*.....I think that the Plaintiffs are also entitled to reasonable damages, having regard to the measure as laid down in Jaques v. Miller (1), for the delay, and for not having vacant possession.*

### **CONSEQUENTIAL LOSSES ALLEGED**

13. Mr. Narayan highlighted that the original settlement date in this case was 12 May 2017 but this case was actually settled on 11 January 2019 following the Order for specific performance. This was a delay of 1 year and 8 months.
14. It appears to me from the facts of this case that the defendants were committed to settling the transaction with the plaintiff. However, it was startled and thrown off course by the exorbitant tax assessment by FRCS which caused it to begin to resile. Not only was it assessed on 20% income tax rather than the anticipated 10% CGT, it was assessed on a valuation

sum which was FJD\$1.15 million dollars higher than the agreed sale and purchase price.

10% of \$2.10 million	\$210,000 (this is the anticipated tax based on 10% CGT)
20% \$3.25 million	\$650,000 (this is the tax actually assessed based on 20% income tax)
Difference	\$440,000

15. I have difficulty classifying the \$440,000 as the amount “lost” by the defendant if that is the amount that is payable anyway.
16. The defendant/vendor’s problem may have been caused by its having “pitched” the sale price too low, probably because of a negligent valuation, and/or, because the defendant/vendor forgot to negotiate to pass the burden of paying any taxes payable on the transaction to the plaintiff/buyer by contract.
17. However, it is hard to ignore the fact that the plaintiff/purchaser has indeed obtained a substantial windfall out of the transaction in having a property which has considerable more value than what it had bargained for.
18. The defendant’s counsel submits that this should be taken into account in any claim of damages, if damages is at all to be assessed by this Court.

19. He plaintiff's counsel submits that FRCS's valuation of the property is different from that which the market is actually prepared to pay for the property.
20. Since FRCS assesses taxes payable on all types of property transactions, one would think that it (FRCS) would be in the best position to determine the value of the property in question based on recent comparable sales.
21. I am prepared to accept that FRCS' valuation of the property in question represents a fair market value of the property. Accordingly, I am prepared to accept that the plaintiff has indeed benefitted with a considerable windfall from the transaction.
22. Whilst damages is awarded generally for breach of contract and assessed to compensate for loss of bargain, an order for specific performance reinforces and restores the bargain, which means that any damages awarded in addition to an order for specific performance must be based on different principles.

## CONCLUSION

23. Damages in addition to specific performance can be awarded where the party seeking specific performance has suffered pecuniary losses, and where these pecuniary losses will not adequately be compensated for by the order of specific performance.
24. I accept the argument that lost rental income for the period by which completion was delayed falls into the above category and is therefore recoverable.

25. I make the following awards for consequential losses:

Amount Claimed by Plaintiff		Details	Award
(i)	FJD\$2.5 million	Including VAT, stamp duties and fees)	I do not see how the plaintiff should be compensated for these as these are incidental to the transaction. <u>No award.</u>
(ii)	FJD\$200,000	Property had been rented out at \$10,000 per month	This needs to be adjusted as there is no evidence that the property was immediately rentable in any event, on the original stipulated completion date. Master to consider further.
(iii)	Extra costs to be assessed	Additional attendances following the Order for specific performance, which the plaintiff would not have incurred had the sale and purchase agreement been settled as stipulated in the agreement.	To be assessed by Master subject to proof.
(iv)	Extra costs to be assessed	Maintenance to bring the property up to state of repair after it had been left lying idle for 1 year and eight months.	To be assessed subject to proof. Basis of assessment to be determined by the Master.
(v)	Legal costs on a solicitor-client basis.		To be assessed subject to proof. Basis of assessment to be determined by the Master.



26. The parties are encouraged to try and settle this amicably between themselves.
27. This case is adjourned to the Learned Master. NOAH to be sent.



Anare Tuilevuka

JUDGE

Lautoka