



5. On 03 July 2019, All Fastners (Fiji) Pte Limited (“**AFPL**”) and Vijayanti Mala Naidu (“**Naidu**”) entered into a sale and purchase agreement. The subject matter of their agreement is a piece of land which is owned by Naidu which is all comprised in *i*-Taukei Lease No. 12547.
6. After the parties executed the agreement, AFPL then applied for consent from *i*-TLTB.
7. *i*-TLTB actually obtained consent on 13 September 2019. AFPL then proceeded to pay the levied stamp duty of \$4,500.
8. The consent from *i*-TLTB was valid for three months. It expired on 12 December 2019. The transfer instrument was actually stamped on 26 September 2019.
9. After the stamping of the transfer instrument, it was incumbent upon Naidu to then obtain the necessary CGT Certificate before the expiry of the *i*-TLTB consent.
10. On 10 March 2020, Naidu wrote the following letter to FIRCA:

The Chief Executive Officer  
Fiji Revenue and Customs Services  
Private Mail Bag  
SUVA

Dear Sir/Madam

**Re: UNDERTAKING – VIJANTIMALA aka VIJATIMALA NAIDU aka VIJAYANTI MALA NAIDU (TIN 22-15263-0-7) Lease No. 12547**

We refer to the above-mentioned client and advise that we act for her as Solicitors in the sale and purchase of the above-mentioned lease.

We hereby on behalf of our client advise your good office that settlement in this matter is still pending.

Please contact the undersigned for any further clarification.

Yours faithfully.

Anishni Chand Lawyers

11. One of the main points of contention between the parties in this case is whether or not Naidu did obtain the CGT Certificate and if she did, whether or not she did serve the said Certificate on AFPL.
12. At the time the above letter was written, the *i*-TLTB consent had already lapsed. Ms. Ravai invites the Court to infer from the above letter that Naidu only attempted to obtain CGT clearance after the consent had lapsed.
13. Ms. Chand objected to the drawing of that inference, but conceded that she does not know when Naidu actually applied for CGT clearance. The affidavit sworn by her client does not

have information as to when the application for CGT Certificate was lodged with FRCA – however, Ms. Chand advises the Court from the bar table that her office had assisted in the application and they had lodged the said application “*sometime in November 2020*”.

14. One gets the feeling that Ms. Chand is not comfortable about disclosing the date of lodgment, but I will give her the benefit of the doubt on that for now. What I am not prepared to accept just yet is that the said application was actually lodged in November 2020. This must remain part of the issues to be determined at trial.
15. The Agreement provides at clause 3.2 that vacant possession of the property shall be given by the Vendor to the Purchaser upon signing of the Agreement. However, AFPL actually went into occupation sometime in October 2020. Notably, at the time AFPL went into occupation, the *i*-TLTB consent had already lapsed. In the peculiar circumstances of this case,
16. It would appear that AFPL’s solicitors never ever wrote a letter to Naidu at any point to say that AFPL was ready to settle. Neither did Naidu. It appears also that neither party has taken any step to either rescind or terminate the agreement. On the contrary, well after

#### **DEPOSIT**

17. Most sale and purchase agreements would require a deposit to be paid at or around the time of execution with the balance to be paid at settlement. The sale and purchase agreement between AFPL and Naidu does not require a deposit to be paid initially. Rather, it stipulates at clause 2.1 that the full-purchase price to be paid at settlement.

#### **ISSUE**

18. The main issue of contention between the parties is whether or not Naidu did obtain CGT clearance before the expiry of the *i*-TLTB consent and if she did, whether she did serve this on AFPL’s solicitors.
19. The other point of contention is whether or not AFPL was always ready, willing and able to pay the settlement sum.
20. To be entitled to an interim injunction, AFPL must satisfy the requirements in the American Cyanamid case, namely, that there is a serious issue to be tried, that the balance of convenience favors an injunction and that damages would not be an adequate remedy.

#### **SERIOUS ISSUE TO BE TRIED**

21. *Prima facie*, it would appear that AFPL has an equitable interest in the property in having carried out all that it is required to do to take the Agreement in question to settlement.
22. However, whether or not APFL really has an equitable interest in the property in question must remain postponed as an issue for trial.

23. 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:
34. 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 of the contract (Brown v. Heffer [1967] HCA 40; (1967) 116 CLR 344, at p 349).
24. This, in turn, depends on whether or not she has performed her part of the bargain. A purchaser who has breached an essential condition is normally not entitled to specific performance.
25. Notably also, 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).
26. Also, whether AFPL has always been ready willing and able to settle this transaction and whether Naidu had breached the agreement by deliberately delaying the obtaining of the CGT Certificate so as to sabotage completion – are matters which I must postpone for trial.

#### WHETHER DAMAGES WOULD BE AN ADEQUATE REMEDY?

27. As I have said, it does appear from the material that is before me so far that AFPL has performed all it is required to do under the sale and purchase agreement and is ready willing and able to settle the full consideration price at settlement. However, the final determination of this point remains a question for trial.
28. For now, the question is whether damages would be an adequate remedy. If damages would be an adequate remedy, then there is no need to continue the injunction.
29. In a case of breach of the sale and purchase agreement in lieu of specific performance, damages at common law would be assessed based on the need to protect the purchaser's (AFPL's) expectation interest and to give it the benefit of the bargain. Generally, this is achieved by placing the purchaser (AFPL), so far as money can do so, in the same position as if Naidu had performed her end of the bargain. In other words, the market value of the land, even if the market value of the land is higher than the contracted price.
30. However, almost invariably, the first preferred remedy for a purchaser who has acquired an equitable interest in any real property which is the subject matter of a sale and purchase agreement is always specific performance. This is because of the thinking in law that each piece of land is unique. As such, a purchaser who loses a piece of land which he or she has bargained for, though may be compensated in damages, does not quite recover the "uniqueness" of the land he or she has lost.
31. Having said that, and considering that AFPL, prima facie, does appear to have an equitable interest in the property, there is no compelling reason in this case as to why damages might be an adequate remedy.

### BALANCE OF CONVENIENCE

32. As I have said, Ms. Chand highlights that AFPL has not attempted to send a settlement notice to her client at the relevant time. Instead, AFPL is now bringing this matter to court some twelve months or so after settlement was to have taken place.
33. I observe, although this is a matter of final conclusion after trial, that both parties conducted themselves in 2020 as if the sale and purchase agreement was still on foot. For example, Naidu was still chasing up FIRCA for the CGT Certificate and neither party had sent to the other a notice of rescission or termination.
34. I am of the view that the balance of convenience favours the continuation of the injunction until the final determination of the issues.

### CONCLUSION

35. In the final, I am of the view that the injunction should continue until final determination of the matter. Parties are to bear their own costs. Case adjourned to Monday 10 January 2022 at 10.30a.m. for mention.
36. Defendant to file and serve Statement of Defence in twenty-one (21) days.



Anare Tuilevuka  
**JUDGE**  
Lautoka

**13 December 2021**