

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 372 of 2013

BETWEEN: **SEAGRAM GROUP LIMITED**

PLAINTIFF

AND: **PACIFIC BEACH INVESTMENTS LIMITED**

DEFENDANT

Before: Honourable Chief Justice, Mr. Kamal Kumar

Solicitors: Ms. S. Devan for the Plaintiff
 Ms. P. Narayan for the Defendant

Date of Hearing: 10, 11 July 2018

Date of Judgment: 27 July 2022

JUDGMENT

Introduction

1. On 31 December 2013, Plaintiff caused Writ to be issued with Statement of Claim for injunction, specific performance and damages arising out of Sale and Purchase Agreement dated 26 April 2013.
2. On the same day, the Plaintiff filed Ex-parte Application for Interlocutory Injunction which Application was converted to Inter-Parte (**“the Injunction Application”**).
3. This proceeding was adjourned to 7 February 2014, to enable the Plaintiff to serve the Defendant and obtain Director of Lands consent.
4. The Injunction Application was called on 28 January, 2014, and adjourned to 7 February, 2014.
5. On 7 February 2014, parties were directed to file Affidavits and the Injunction Application was adjourned to 9 April 2014.
6. The Injunction Application was adjourned on various occasions to enable the Plaintiff to obtain Director of Lands consent.
7. On 28 October 2014, the Defendant filed Statement of Defense.
8. On 31 October 2014, the Defendant filed Affidavit in Opposition.
9. The Injunction Application was called on 14 November 2014, when Counsel for the Plaintiff informed the Court that Director of Lands consent has been obtained and the Plaintiff was directed to file Affidavit in Reply, both parties were directed to file Submissions with the Injunction Application adjourned to 3 February 2015, for hearing.
10. On 4 December 2014, the Plaintiff filed Reply to Statement of Defence.
11. On 12 December 2014, the Plaintiff filed Affidavit in Reply.
12. On 3 February 2015, the following orders were granted by consent:-
 - 1.) **THAT** the Defendant is restrained whether by itself and / or by its servants or agents from selling, transferring and / or disposing of the property comprised in Lease No. 357644 being Lot 1 on S.511 (Site for Cable Test House) with an area of 137 sqm until final determination of this action.

- 2.) Notice to be issued for this matter to be called before the Master for parties to finalize pre-trial matters.
13. On 6 February 2015, the Plaintiff filed Summons for Directions.
14. On 13 August 2014, the Defendant and the Plaintiff filed their Affidavit Verifying List of Documents respectively.
15. On 8 February 2016, Defendant filed Application seeking removal of the Plaintiffs Solicitor on record which Application was dismissed and struck out on 16 February 2017.
16. On 11 September 2015, the Plaintiff filed Minutes of Pre-Trial Conference.
17. On 16 February 2017, the Defendant filed fresh Application for Declaration to Remove Plaintiff's Solicitors which application was dismissed for non-compliance with court order.
18. On 14 September 2017, the Plaintiff filed Copy Pleadings and Summons to Enter Action for Trial which was returnable on 21 November 2017.
19. On 21 November 2017, Order in Terms of Summons was made and this matter was referred to a Judge.
20. This matter was called in this Court on 23 February 2018, and adjourned to 10, 11 and 12 July 2018, for trial.
21. Trial concluded on 11 July 2018, when parties were directed to file submissions.
22. Both parties failed to file submission as directed by this Court on 11 July 2018, and as such this matter was called on 16 August 2018.
23. On 16 August 2018, the Plaintiff's counsel informed Court that the Plaintiff has filed Application to Intervene in a proceeding between the Plaintiff and Fiji Revenue and Customs Services (FRCS) which Application was to be called before Justice Alfred on 22 August 2018, and as such this matter was adjourned to 24 August 2018, for review.
24. On 24 August 2018, the Plaintiff's Counsel informed the Court that the Intervener Application has been adjourned to 12 October 2018, for hearing when this matter was adjourned to 2 November 2018, for review.
25. On 2 November 2018, the Defendant's Counsel informed that the Intervener Application had been dismissed and Counsel for the Plaintiff informed this Court that the Plaintiff is in process of appealing that dismissal.

26. This matter was next called on 22 February 2019, and adjourned to 26 April 2019 for review.
27. On 26 April 2019, both parties were directed to file submission by 10 May 2019, and Reply to submission by 24 May 2019, with Judgment to be delivered thereafter.
28. Both parties failed to file submission as directed by this Court on 11 July 2018, and 26 April 2019.

Plaintiffs Case

29. The Plaintiff called following witnesses
 - (i) Peter John Watt of 11c 196 Hobson Street, Auckland, New Zealand, Director (**PW1**).
 - (ii) Avinesh Reddy of 2 Evelyn Place, Nasese, Suva, Legal Practitioner (PW 2).
30. PW1 during examination in chief gave evidence that:
 - (i) He is a director of the Plaintiff Company which is involved in the business of buying properties and construction works.
 - (ii) In April 2013, he came to look at a waterfront property at 1 Elizabeth Drive Suva about which he heard from Sunil Mishra.
 - (iii) Through Sunil Mishra, he arranged to meet the owner, Janen Singh at the subject property.
 - (iv) The subject property had a restaurant and bar which was not in operation and the owner informed him that he wanted to sell the property and venture into a business at Dolphins.
 - (v) The owner wanted a quick sale and he offered \$350,000.00 as for the property.
 - (vi) He then went to the office of Reddy and Nandan Solicitor with Sunil Mishra and Janen Singh where they met lawyer Avinesh Reddy and Siddharth Nandan.
 - (vii) After the meeting Avinesh Reddy drafted Sale and Purchase Agreement which was dated 26 April 2013 ("**the Agreement**") which was signed by him on behalf of the Plaintiff and Janen Singh signed it for the Defendant (**Exhibit P2**).
 - (viii) The purchase price was \$350,000.00 and in terms of the Agreement the Plaintiff paid \$30,000.00 deposit into the Trust Account of Reddy and Nandan Lawyers.

- (ix) The property is subject to Lease No. 357644 which comprised of a restaurant which was not in operation and a bar which had little patronage.
- (x) Agreed that since the Plaintiff Company was New Zealand based, he had to apply for Foreign Investment Certificate (FIC), Ministerial and Director of Lands consent.
- (xi) The Plaintiff did not obtain FIC (**Exhibit P3**) and the Plaintiff's intention was to build a pier / marina to continue with restaurant and bar business.
- (xii) Reddy and Nandan Lawyers applied for Ministerial and Director of Lands Consent.
- (xiii) Application for Dealing dated 12 July 2013, was signed by Avinesh Reddy as Solicitor for the Vendor, and him for the Plaintiff (**Exhibit P5**).
- (xiv) Application for Consent to Transfer (DOC) was signed by him under the Plaintiff's common seal (**Exhibit P6**).
- (xv) On 2 September 2014, Ministry of Lands and Mineral Resources wrote to Neel Shivam Lawyers stating that no consent was required from them (**Exhibit P7**).
- (xvi) The Plaintiff paid consent fee vide Revenue Receipt No. 66234 dated 1 October 2014 (**Exhibit P8**).
- (xvii) He signed the Transfer dated 12 July 2013, and Janen Singh signed with another person for the Defendant (**Exhibit P9**).
- (xviii) He could not recall if Janen Singh was present at Reddy and Nandan Lawyers when he signed the Transfer.
- (xix) Under the Agreement, the Plaintiff was buying the property with few chattels but not the business.
- (xx) The property was not transferred to the Plaintiff because Janen Singh had passed away.
- (xxi) After Janen Singh's death, his ex-wife did not want to sell the property and the Plaintiff received letter to that effect from the Defendant's Solicitor (**Exhibit P10**).
- (xxii) He thinks that Avinesh Reddy responded to the said letter.
- (xxiii) The Plaintiff, then engaged Neel Shivam Lawyers who responded to the letter from Defendant's solicitors on 6 November 2013 (**Exhibit P11**).
- (xxiv) The Plaintiff still intends to purchase the property and the deposit is now held in Neel Shivam Lawyers Trust Account (**Exhibit P12**).
- (xxv) On 18 April 2014, the Plaintiff paid \$2,154.71 as outstanding ground rent (**Exhibit P13**).
- (xxvi) The Plaintiffs Solicitors conducted company search on the Defendant and from Annual Return dated 19 May 2009, it appears that Janen Singh held majority shares with Alvina J. D. Nair holding 1 share.
- (xxvii) Particulars of Directors dated 4 March 2014, lists directors of the Defendant company.

31. During cross – examination PW1.

- (i) Agreed that Reddy and Nandan Lawyers prepared the Agreement and acted for both parties with their consent.
- (ii) Agreed that pursuant to clause 2 of the Agreement, sale was subject to foreshore lease being obtained and directed to Marjorie Lavaki.
- (iii) When asked if foreshore lease was obtained he stated that he was not sure and left everything to his lawyer.
- (iv) Agreed that the Approval Notice for Foreshore Lease attached to the Agreement did not belong to the Defendant.
- (v) Stated that he followed up with Reddy and Nandan Lawyers on how that condition could be completed and they would have written to Levaci or her Estate.
- (vi) Agreed that pursuant to clause 2.2 of the Agreement sale was subject to Ministerial Consent which the Plaintiffs lawyers' applied for **(Exhibit P5 and P7)**.
- (vii) Could not recall if the Plaintiff provided documents required by Ministry of Lands in its letter dated 2 September 2014 **(Exhibit P7)**, and stated that he gave everything to the lawyer.
- (viii) Could not recall receiving any letter from Ministry of Lands after 2 September 2014 letter.
- (ix) Agreed that the Ministry of Lands letter dated 2 September 2014 is almost ten (10) months from the date of the Defendants Solicitors letter to Reddy and Nandan Lawyers **(Exhibit P10)**.
- (x) Agreed that date of consent on top of the Agreement is well after 26 March 2013.
- (xi) Agreed that the Agreement was not stamped.
- (xii) In reference to clause 2.3 of the Agreement where it is stated that the "sale is an ongoing basis" when it was put to him that the Plaintiff was buying everything from the Defendant he stated that the Property had monthly tenant.
- (xiii) When asked if the Plaintiff was buying the Property with the tenant he stated that the Plaintiff wanted vacant possession.
- (xiv) When it was put to him that clause 2.4 of the Agreement states that no VAT is payable he stated that they are zero rated and there is no VAT payable.
- (xv) He did not know that the Defendant owed lot of tax and he was not shown any letter from Fiji Revenue and Custom Services **(FRCS)** to show that the Defendant owed them more than \$300,000.00.

- (xvi) Agreed that after this proceedings commenced FRCS lodged charge against the property.
- (xvii) Stated that he did not know what was owed on Fiji Development Mortgage No. 923026 when the Agreement was entered into and his Solicitors did not provide any detail on what was owing to FDB.
- (xviii) In reference to FDB's Statement he agreed that it shows debt of \$264,880.89 as at 31 March 2013.
- (xix) Stated that the Plaintiff was not to take over the Defendant's debt and he did not know about the debt until the trial date.
- (xx) When it was put to him that given the debt to FDB and FRCS settlement could not be completed he stated that it was his understanding that the Defendant had other properties.
- (xxi) In reference to the Tenancy Agreement for the Property for three (3) years from 1 August 2012, he stated that he met someone but did not know who it was.
- (xxii) When it was put to him that the tenancy was not monthly he stated that he was told that the tenant defaulted in rent and notice was given to the Tenant.
- (xxiii) Stated that he has not seen any notice to the Tenant.
- (xxiv) When it was put to him that the Defendant agreed to pay the Tenant \$100,000.00 if the Defendant sold the property he stated that the restaurant was closed and tenancy was terminated.
- (xxv) Stated that the Defendant did not give him copy of the Tenancy Agreement.
- (xxvi) Did not agree when it was put to him that in addition to \$350,000.00 (sale price) he agreed to give Janen extra monies in kind and permit him to live in Plaintiffs apartment in Auckland.
- (xxvii) Denied that he gave any IOU document to Janen Singh.
- (xxviii) Agreed in October 2013, he had meeting with Josephine Singh (Janen's wife) and Avinesh Reddy.
- (xxix) Denied that at that meeting Josephine Singh told him that he gave IOU to Janen Singh.
- (xxx) Agreed that at the meeting Josephine Singh told him that \$350,000.00 was not enough as she had to look after three (3) children and he offered to give another \$50,000.00.
- (xxxi) Could not recall Josephine Singh asking for \$100,000.00 but stated that she could have asked.
- (xxxii) Could not recall if the Agreement was signed by both parties on the same day.
- (xxxiii) Stated that directors of the Defendant did not sign Transfer document with him.

- (xxxiv) When it was put to him that Josephine Singh said that the Transfer was signed on the stair case of Reddy and Nandan lawyers he stated that he knows nothing about it.
- (xxxv) Stated that he identified the chattels listed in Schedule B of the Agreement with Janen Singh.
- (xxxvi) Stated that Janen Singh did not provide him with any evidence that the said chattels belonged to the Defendant.
- (xxxvii) Agreed that those chattels could belong to anybody.

32. During re-examination PW1:

- (i) Stated that he understands the fundamentals of a foreshore lease, it was his intention to apply for it and he does not know if foreshore lease was granted.
- (ii) Stated that it was his understanding that he would apply for foreshore lease after he bought the property.
- (iii) Stated the main part of the Agreement was the Crown Lease and the foreshore lease was additional.
- (iv) In reference to months delay in obtaining Director of Lands consent he stated that the Plaintiff had no objection to any time frame.
- (v) Stated that when consent was not obtained, no default notice was given to the Plaintiff.
- (vi) Agreed that only letter he received was on 1 November 2013, and FRCS charge was lodged almost a year after the Agreement.
- (vii) Stated that there was nothing in the Agreement for him to enquire about tax liability of the Defendant.
- (viii) When asked if the Plaintiff was purchasing the Property with tenant he stated "vacant possession".
- (ix) Stated that at the meeting he offered Josephine Singh extra \$10,000.00, then \$20,000.00 and then \$50,000.00.
- (x) This meeting was held in a room between him and Josephine and after that they went to see the lawyer.
- (xi) Stated that the reason he offered \$50,000.00 was because he was sorry and wanted the deal to proceed.
- (xii) Stated that Josephine Singh initially agreed to take \$50,000.00 but next day changed her mind.

33. PW2 during examination in chief gave evidence that:

- (i) He has been a partner in the law firm of Reddy and Nandan Lawyers for a period of eleven (11) years.

- (ii) He acted for the Plaintiff in few matters including the sale and purchase of Lot 1 in Nasese known as the lighthouse which property the Plaintiff was buying from Janen Singh.
- (iii) On receipt of instructions from the Plaintiff he went and drew up list of chattels in the presence of his brother Alvin Karan (employed by his firm) and Janen Singh.
- (iv) The list of chattels was written by him and signed by Peter Watt for the Plaintiff and Janen Singh for the Defendant which appears as Schedule B to the Agreement (**Exhibit P2**).
- (v) The Plaintiff signed the Sale and Purchase Agreement before him but he was not sure if the Defendant signed the Agreement in his presence.
- (vi) The Plaintiff paid the deposit of \$30,000.00 out of which lease rental arrears was paid out.
- (vii) In reference to clause 2 of the Agreement (**Exhibit P2**) no application for foreshore lease was made by the Plaintiff and in his opinion it was something that would not stop the Plaintiff from buying the property being Lease No. 357644.
- (viii) Could not recall if his firm applied for Ministerial consent but would have done so.
- (ix) Agreed that, Exhibit P5 (letter dated 26/7/12 and Exhibit P6 (Application for Consent to Transfer) was generated from his office.
- (x) Application for Consent to Transfer (**Exhibit P6**) was signed by Peter Watt for Transferee in his presence.
- (xi) He knows Janen Singh signed the Application but could not recall who else signed or whether it was signed in his presence.
- (xii) He could not recall if consent was granted but stated that it could have been.
- (xiii) Agreed that DOL's consent was endorsed on the Agreement on 1 October 2014, and Ministerial consent was not required due to land area being less than one acre.
- (xiv) He could not recall if the Transfer (**Exhibit P9**) was signed in his office.
- (xv) Parties could not proceed to settlement due to the death of Janen Singh.
- (xvi) After Janen Singh's death his wife Josephine Singh became the Trustee of his Estate and decided not to sell the property because she felt the sale price was too low.
- (xvii) He then talked to Peter Watt to give Josephine Singh some incentive as all her properties were stuck.
- (xviii) Peter Watt offered to pay extra \$50,000.00.
- (xix) He then asked Peter to give \$100,000.00 in addition to the sale price which she did not accept and handed the matter to her lawyer.
- (xx) He was not aware if the sale was ongoing basis and there was no formal agreement for sale and purchase of business.

34. During cross examination PW2:
- (i) Stated that he could not recall preparing Tenancy Agreement between the Defendant and Adi Vika.
 - (ii) Stated that he did some work for Janen Singh and he may have prepared the Tenancy Agreement.
 - (iii) When shown the Tenancy Agreement he stated that his firm may have prepared and saw that Mr. Nandan was dealing with that.
 - (iv) Stated that he provided Trust Account Statement.
 - (v) Agreed that fees owed by the Defendant were deducted from Trust Account if the Defendant failed to pay their fee.
 - (vi) Agreed that he signed Application for Consent to Dealing (**Exhibit P5**) as Solicitor for the Vendor (**the Defendant**).
 - (vii) Stated that he could not receive any response to the Application for Dealing or Application for Transfer when file was handed to Neel Shivam Lawyers.
 - (viii) Agreed that Peter Watt authorized him to pay lease rental arrears.
 - (ix) When asked if he paid the lease rental when he applied for consent he stated that he thought so otherwise consent would not be granted.
 - (x) When it was put to him that he did not but Neel Shivam Lawyers did he stated that he cannot remember.
 - (xi) Stated that he could not remember when Application for Consent to Transfer (**Exhibit P6**) was given to the Defendant (Transferee) or they were told that directors will have to sign but they do tell companies that directors have to sign.
 - (xii) Stated that he could not recall the date of meeting between himself, Peter Watt and Josephine Singh but confirmed that meeting took place but was unsuccessful.
35. During re-examination PW2 in reference to clause 2 of the Agreement stated that Peter waived that condition and did not rely on it and it was the Defendant's job to get it and it was the Defendant's obligation to get the Foreshore Lease.
36. Defendant's Case
- Defendant called following witnesses:
- i. Josephine Singh, 106 Manilevu Road Nadera, Secretary (**DW1**).
 - ii. Vasemaca Vukialau, Lot 12 Tabua Estate, Cunningham Stage III, Suva Bank Officer (**DW2**)
 - iii. Semesa Bainimua of Tacirua East, Suva, Tax Officer (**DW3**).
37. DW1 during examination in chief gave that:

- (i) She became director of the Defendant in September 2013, after her husband Janen Singh passed away and is currently a director with Anital Badal.
- (ii) Prior to her husband's death he was the director of the Defendant company with one Mahendra Prasad or Mahendra Narayan.
- (iii) The subject property (**L 357644**) is located at Lot 1 Queen Elizabeth Drive, Nasese and is mortgaged to Fiji Development Bank which is owed around \$300,000.00.
- (iv) She became aware about tax owed to FRCS in May or June 2013, when her husband who was not well received Statement from FRCS.
- (v) She was asked by her husband to respond to FRCS's letter dated 30 May 2013, which she did and informed FRCS about her husband's health condition and that they will engage an Accountant once he gets out of hospital.
- (vi) There was no further correspondence from FRCS after her letter and she could not recall what happened after her letter.
- (vii) The Transfer (**Exhibit P9**) has her signature with her husband's signature and at that time she was not director of the Defendant (**Transferor**).
- (viii) Transfer (**Exhibit P9**) was signed at Raojibhai Patel Street, Suva downstairs when clerk from the lawyers firm brought the document downstairs because her husband could not climb the stairs to get to the lawyers office (**upstairs**) due to him being very sick.
- (ix) FRCS lodged charge against Lease No. 357644 over which she had no control and according to the charge lodged the Defendant owed FRCS \$316,853.76 as at 21 February 2014 (**exhibit D2**).
- (x) The property was physically occupied by Adi Vika Naitoni who was the tenant at the time her husband passed away under a Lease Agreement dated 13 September 2012 (**Exhibit D4**).
- (xi) She obtained copy of the Tenancy Agreement from the Tenant and is not aware about the whereabouts of the original.
- (xii) She communicated with the tenant sometimes later after her husband passed away.
- (xiii) She is aware about her Solicitor Prem Narayan writing to Neel Shivam Lawyers on 8 April 2014, about change of directorship and shareholders in respect to the Defendant (**Exhibit D5**).
- (xiv) After Janen Singh passed away Avinesh Reddy called her to say that Peter Watt wanted to have a meeting about the Defendant company.
- (xv) She went to attend the meeting when Peter Watt came with one other person and Avinesh Reddy was present.
- (xvi) After they were introduced to each other she went into one office with Peter Watt whilst the other person and Avinesh Reddy were in different office.

- (xvii) At the meeting between her and Peter Watt:-
 - a) She mentioned that her understanding was that debt owed by the Defendant was more than \$350,000.00.
 - b) She asked for increase in purchase price when Peter Watt offered her \$50,000.00 extra.
 - c) She mentioned to Peter Watt that her husband had informed her that he was making a deal with a particular party for \$750, 00.00 and that Peter Watt signed an IOU in her husband's favor.
 - d) She mentioned to Peter, that another person being Mahendra Narayan also told her about the IOU.
- (xviii) According to Avinesh Reddy and Peter Watt there was no IOU and the arrangement was that her husband will be provided with an apartment and car whenever he travelled to New Zealand.
- (xix) When she went back to her office, Avinesh Reddy called and said that he managed to strike a deal with Peter for \$100, 000.00 and for her to get back to Peter and say whether she agreed to accept \$100,000.00 extra.
- (xx) She did not go back to Peter as she started liaising with her Solicitor, was sorting out FRCS issues and other things for the Defendant company.
- (xxi) In reference to clause 2 of the Agreement her husband was liaising with Majorie Lavaki about sale of property and she is not aware about what.
- (xxii) She does not understand what Foreshore Lease is.
- (xxiii) Debt owed to FDB and FRCS would not be satisfied with \$350,000.00.
- (xxiv) The Defendant will not be able to sell the Property in compliance with the Agreement.

38. During cross-examination DW1:

- (i) Agreed that her husband was majority shareholder and director of the Defendant and she became director of the Defendant on 3 September 2013.
- (ii) Agreed that amount stated in Exhibit D3 comprises of tax owed by the Defendant, VAT owed and penalties for the period before the year 2014.
- (iii) Could not confirm the amount of tax owed when Agreement was signed would have been much lesser than in 2014.
- (iv) Could not recall if she instigated FRCS to lodge charge on Property on 8 April 2014, and stated that she may have or may not have.
- (v) Subsequently stated that she would not confirm that she told FRCS to lodge the charge.
- (vi) Transfer (**Exhibit P9**) was signed by her with Janen Singh at Raojibhai Patel Street (downstairs).

- (vii) Stated that she did not read the Transfer before signing for the reason that Janen Singh was very sick when he was called by the lawyer to sign and they came in a hurry.
- (viii) When it was put to her that she could have refused to sign, she stated Janen Singh was totally stressed and she did not want to give him more stress.
- (ix) Stated that Transfer was brought down by someone from Reddy and Nandan Lawyers and Janen asked her to sign.
- (x) Stated that she did not go upstairs to see the Solicitor because she could not leave her husband alone.
- (xi) Stated that she asked the person who brought the Transfer document if she could sign and he said it is okay for her to sign.
- (xii) Stated that she did not inform any of the Solicitors that she should not have signed the document.
- (xiii) Agreed that letter from Prem Narayan dated 1 November 2013, terminating the Agreement did not say anything about tax being owed or her signing the Transfer or FDB debt with only one reason being consent not being obtained.
- (xiv) Agreed that letter dated 8 April 2014, from Prem Narayan to Neel Shivam Lawyers is the only letter after a lapse of almost one year after the date of the agreement.
- (xv) Agreed that FDB Statement (**Exhibit D6**) shows debt at \$272,507.58.
- (xvi) Stated that the Defendant is not making repayment to FDB because the Defendant's business "Crystal Palace" has been shut down.
- (xvii) Stated that the Tenant is not paying rent due to some land issues.
- (xviii) Agreed that last loan repayment to FDB was made on 24 June 2014.
- (xix) Denied that she is deliberately not paying the debt and stated that Crystal Palace was paying debt until the Lands Department raised consent issues.
- (xx) Stated that the Defendant has no other property and no other source of income.
- (xxi) Agreed that if parties would have settled prior to FRCS charge being lodged, FDB's debt would have been paid off.
- (xxii) Stated that IOU is something about which she heard from another person with whom her husband liaised with and mentioned about it.
- (xxiii) Stated that she did not get anything in writing about benefit which Peter said that he was going to give to her husband and that was part of their verbal discussion.
- (xxiv) When it was put to her that no such benefit was given to her husband she stated that she could not confirm and would only confirm what she was told during verbal discussion between herself and Peter.
- (xxv) Stated that Mahendra Narayan being the person she heard from about IOU is not here to give evidence as she does not have his contact.

- (xxvi) When it was put to her that there was no such agreement to give Defendant \$750,000.00 she stated that she cannot confirm.
- (xxvii) When it was put to her that the fact that the Defendant owes FDB and FRCS does not necessarily stop the sale, she stated that it does as the amount owed is more than \$350,000.00.
- (xxviii) When it was out to her that if the Plaintiff decided to pay off FDB and FRCS debt, sale could go ahead, she stated that it could be possible but also could not be possible.

39. DW2 during examination in chief gave evidence that:-

- (i) Current amount outstanding on the FDB Mortgage over Lease No: 357644 is \$297,117.23 which appears in Statement for the period 4 June 2009 to 26 August 2014 (**Exhibit D6**).
- (ii) Agreed that if not for Court Order, FDB would have exercised its rights under the mortgage.
- (iii) FDB approved the Defendant loan to pay FRCS debt but was withdrawn because Department of Lands did not give consent to FDB's mortgage.

40. During cross-examination DW2:

- (i) Stated that amount owing as at 31 December 2014, under the Mortgage was \$271,366.61.
- (ii) Stated that if the Defendant chose to pay FRCS, FDB would not pay because the loan has been withdrawn.
- (iii) When asked if fresh application for loan is lodged, then how likely is the loan will be approved she stated that she cannot say.
- (iv) Stated that she could not recall how long before further loan was applied for and was way back in 2016.

41. DW 3 during examination in chief gave evidence that:-

- (i) He works at Debt Collection and Management Office at FRCS.
- (ii) After FRCS issues Tax Assessment notice to tax payer, they then negotiate with tax payer but if no response is received from tax payer within 30 days of notice that matter is referred to his department.
- (iii) For the Defendant audit was carried out in 2009 and 2012, with assessment done in 2013 and 2016.
- (iv) For the Defendant Tax Assessment was issued in June 2013, and prior to June 2013, there may have been communication between the Defendant and FRCS which would be in audit file.
- (v) On 25 June, 2013, the Audit Section wrote to the Defendant about the need to audit the Defendants account (**Exhibit D7**).

- (vi) In reference to Exhibit D2 and D3 the date should be 13 February 2014, instead of 13 February 2012, for the reason the date shown should be date FRCS registered charge.
- (vii) The sum of \$316,853.76 stated in the charge was subsequently reduced to \$304,000.00 after negotiation.
- (viii) Current amount owing by the Defendant to FRCS is \$304,535.86.
- (ix) He had latest Statement of Account dated 11 July 2018, for the Defendant (**Exhibit D8**).
- (x) From the records it can be said that Defendant attempted to pay the tax through FDB loan which could not proceed due to FDB not being able to obtain Director of Lands consent to its mortgage.
- (xi) FRCS would call the Defendant to pay the tax and Defendant would pay \$400.00 or \$500.00.
- (xii) FRCS issued notice dated 12 June 2018, to the Defendant that it will sell the Property (Exhibit D9).

42. During cross-examination DW3:

- (i) Agreed that the integrated amount in Exhibit D7 is taxed owed by Yajpal Singh.
- (ii) Stated that he was with Debt Collection Unit when charge was lodged.
- (iii) Stated that he cannot confirm if something similar to what was sent on 8 April 2014, to the Defendant was sent to the Defendant before that date.
- (iv) Denied that the charge was put on the Property at request of Josephine Singh or her solicitor and stated that it was put as required by their section head.

43. From the pleadings filed and evidence led, this Court finds the following facts to be undisputed;

- (i) On 26 April 2013; the Plaintiff as the Purchaser and the Defendant as Vendor entered into a Sale and Purchase Agreement (“**the Agreement**”) for sale and purchase of properties described in the Agreement.
- (ii) The arrangement for the sale and purchase of properties subject to the Agreement was between Peter Watt for the Plaintiff and Janen Singh for the Defendant.
- (iii) Avinesh Reddy of Reddy and Nandan Lawyers acted as Solicitor for both the parties to the Agreement with their consent.
- (iv) At the date of signing of the Agreement, the property subject to Schedule A of the Agreement was subject to Mortgage in favour of FDB and the Defendant owed FDB approximately \$267,844.66
- (v) At the time of signing of the Agreement the Defendant also owed taxes to FRCS.

44. The issues for determination are:-

- (i) What properties were subject to sale in terms of the Agreement?
- (ii) Whether the sale of properties were subject to the condition stated in Clause 2 and 2.2 of the Agreement?
- (iii) Whether sale was on ongoing basis?
- (iv) Whether sale transaction subject to the Agreement was void?
- (v) Whether the Plaintiff agreed to pay the Defendant additional money to what is stated in the Agreement or provide any benefits to the Defendant or its majority shareholder outside of the Agreement?
- (vi) Whether the sale price was genuine price for property subject to schedule A or was a set up to defraud the Defendant's creditors and the public?
- (vii) Whether the Plaintiff is entitled to any relief sought in the Statement of Claim?

What properties were subject to sale in term of the Agreement]

45. The Plaintiffs main contention is that the Plaintiff's intention was to purchase property known as Lot 1 Plain No. So 511 Cable Test House Site, Veiuto, Province of Rewa, District of Suva containing 137 m² comprised and described in Lease No. 357644 (**hereinafter referred as "the State Lease"**) being subject to Schedule A of the Agreement for \$350, 000.00.
46. This Court with all due respect cannot accept the Plaintiff's contention stated in the preceding paragraph for reasons that follow.
47. The Preamble A, Clause 1.1 and 1.2 of the Agreement provide as follows:-
- A. The Vendor is the owner of all the **land** and **chattels** as described in Schedule A and **Schedule C** hereto ("**the said property**")

COVENANT TO SELL & PRUCHASE

- 1.1 The Vendor will sell and the Purchaser will purchase **the said property** on the basis that the said property will stand on the Date of Settlement, and for the price, and upon and subject to the terms and conditions hereafter appearing, provided that the Vendor will do nothing between the date hereof and the Date of Settlement to depreciate the value of the said property.

PRICE AND DEPOSIT

1.2 The Vendor will sell to the Purchaser who will purchase all that estate and interest of the Vendor in **the said property** described in the Schedule A & C hereto at or for the price of **\$350,000.00 (THREE HUNDRED FIFTY THOUSAND DOLLARS)**.

(Emphasis added)

48. Even though at Preamble it is stated “land and **chattels** as described in Schedule A, there is **no chattels** described in Schedule A.
49. PW2 in his evidence stated that he verified the chattels being purchased by the Plaintiff and wrote it down in his own handwriting as appears in Schedule B to the Agreement.
50. It must be noted that properties subject Schedule A, B and C of the Agreement is collectively referred as “**the said property**”
51. At clause 1.2 of the Agreement the sale price for “the said property is settled at \$350,000.00.
52. It is the Plaintiff’s contention which is supported by PW1 and PW2’s evidence that \$350,000.00 was to be paid for the property subject to Schedule “A” of the Agreement.
53. If, the Plaintiff’s contentions is true, then one may ask what was the value and agreed price for the chattels (**Schedule B**) and property subject to **Schedule “C”**.
54. The only written evidence this Court has on the purchase price for the properties subject to Schedule A, B and C is clause 1.2 of the Agreement which clearly states that the purchase price for all the said property is \$350,000.00.
55. However, the Transfer document (**Exhibit “P9”**) states the consideration sum for transfer of property subject to Schedule “A” at \$350,000.000.
56. The question then arises as that what did the Plaintiff agree to pay for the chattels(Schedule “B”) and property subject to Schedule “C”
57. In view of which has been said at the preceding paragraphs this Court has no hesitation in making a finding that the Agreement was drawn hap hazardously.
58. As for the purchase price the correct approach should have been to state the purchase price for specific properties in Schedule A, Schedule B and Schedule C of the Agreement.

59. It is also noted with great concern that the Defendant entered into an Agreement to sell the property subject to Schedule C when it was not the owner/ lessee of the property subject to Schedule C of the Agreement.
60. This Court fails to understand as to why the common Solicitor did not check on the ownership of the property subject to Schedule C before preparing the Agreement and getting parties to enter into the Agreement.
61. This Court has no hesitation in setting aside the Agreement due to the ambiguities noted in the preceding paragraphs.
62. However, this Court will deal with other issues before coming to a firm conclusion.

Whether the sale of properties were subject to the conditions stated in Clause 2 and 2.2 of the Agreement?

63. This Court will look at each clause 2 to 2.3 of the Agreement (**Exhibit P2**).
64. Clause 2 of the Agreement provides as follows:-
 - “2. The sale is subject to foreshore lease being obtained as outlined in LD Ref 4/16/8146 Approval Notice of Lease (**Schedule C**) directed to Marjorie Gai Thomas Lavaki former lease holder of Crown Lease No – 357644”.
65. No evidence has been led to establish that this condition has been met and that foreshore lease has been obtained over land subject to File No. 4/16/8146.
66. This Court does not accept PW2’s evidence in re-examination that this condition was waived by Peter Watt. It appears to be an afterthought after giving evidence during examination in chief and cross examination.
67. Conflicting evidence has been given by PW1 and PW2 regarding the foreshore lease in that:
 - i. PW1 in his evidence stated that it was his understanding that the foreshore lease was to be obtained by him after the settlement as appears at paragraph 32 (ii) of this Judgment.
 - ii. However, the common Solicitor’s (PW2) evidence was that it was the Defendant’s job to get the foreshore lease.

68. This Court accepts PW2's evidence in this respect which evidence is support by the fact that the Defendant agreed to sell the foreshore lease (Preamble A of the Agreement) and sale was subject to the condition that the foreshore lease be issued.
69. Clause 2.2 of the Agreement provides that "The sale is further subject to Ministerial consent".
70. Section 6(1) of Land Sales Act provides as follows: -
- 1. No non-resident or any person acting as his or her agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land, provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.**
71. It is undisputed that, in this instance Ministerial consent was not required on the ground that the land subject to sale is less than one (1) acre in total.

Whether sale was on ongoing basis

72. Clause 2.3 of the Agreement provides that "The sale is on ongoing basis".
73. Determination of this issue will determine if Value Added Tax is payable on the transaction and if payable then whose responsibility was to pay it.
74. Since, payment of Value Added Tax is not an issue between the parties and not relevant to this proceedings it is not justified to makes a final determination on this issue.

75. **Whether sale transaction subject to the Agreement was void?**

Section 13 (i) of States Land Act 1974 provides as follows:-

"Whenever in any lease under this Act there has been inserted the following clause—

"This lease is a protected lease under the provisions of the State Lands Act 1945"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, without the written consent of the Director of Lands.

Any sale, transfer, sublease, assignment, or other alienation or dealing effected without such consent shall be null and void”

76. Pursuant to Clause 1.3 of the Agreement the balance purchase price of \$320,000.00 was to be paid on **24 October 2013**.
77. It is undisputed, that Director of Lands consent was not obtained until 1 October 2014 which is:-
 - a. 11 months after the Defendant’s Solicitors issued letter of termination; and
 - b. 9 months after this proceeding was instituted.
78. It is noted that the Plaintiff’s then Solicitors did not pay the consent fee when it submitted the Application on or about 26 July 2013.
79. Director of Lands consent fee was only paid on 1 October 2014, as appears from Exhibit P8.
80. This Court also takes note of the fact that the Plaintiff’s current Solicitors obtained Director of Lands consent when Director of Lands refused to grant consent for this proceedings on the ground that no consent was obtained for sale of the property subject to Scheduled “A”.
81. This Court has no hesitation in holding that the transaction subject to the Agreement and in relation to property described in Scheduled A is void for want of Director of Lands consent prior to 24 October 2013 (date of settlement) or prior to termination of the Agreement by the Defendant or prior to the institution of this proceedings.

Whether the Plaintiff agreed to pay Defendant additional money to what is stated in the Agreement or provide any benefits to the Defendant outside of the Agreement?

82. DW1 throughout her evidence maintained that the Plaintiff was to pay additional sum in addition to \$350,000.00 and or provide certain benefit to the Defendant and or its majority shareholder/director.

83. DW1 also maintained that her husband Janen Singh prior to him passing away and the former director Mahendra Narayan told her that the Plaintiff signed on IOU in favour of the Defendant.
84. The Plaintiff's witnesses denied that the Plaintiff signed an IOU or agreed to provide any additional benefit to the Defendants majority shareholder.
85. No evidence of any IOU was provided in Court.
86. However, this Court cannot negate DW1's evidence that the Plaintiff agreed to pay the Defendant additional sum or provide benefits to the Defendant and or its majority shareholder outside of the Agreement for the reasons aforesaid which is repeated here as follows:-
- i. The Plaintiff agreed to purchase and Defendant agreed to sell land (**Schedule A**), chattels (**Schedule B**) and foreshore lease (**Schedule C**) as is stated in the Agreement.
 - ii. The purchase price for the properties subject to Schedule A, B and C is \$350,000.00 in total.
 - iii. Transfer of Lease No. 357664 (**Exhibit P9**), which is the property subject to Schedule A shows consideration sum as \$350,000.00 which is total purchase price in the Agreement.
 - iv. In answering the question that if \$350,000.00 was paid for property subject to Schedule A, then what was to be paid for properties subject to Schedule B and C, it is evidently clear that the Plaintiff would have agreed to pay or provide benefit to the Defendant and/ or its majority shareholders outside of the Agreement.
87. This Court therefore finds that the Plaintiff had agreed to pay the Defendant and/ or its majority shareholder Janen Singh additional sum to that stated in the Agreement or provide certain benefits to the Defendant and/ or its majority shareholder Janen Singh.

Whether the sale price was genuine price for property subject to schedule A or was a set up to defraud the Defendant's creditors and the public?

88. No valuation report has been provided by either side to establish true value of the property subject to Schedule "A".

89. This Court takes note of the following details at the signing of the Agreement:-
- i. Debt owed to FDB : \$ 264,885.59
 - ii. Debt owed to FRCS: \$ 193,187.19
90. It was DW2's and DW3's evidence that FBD had agreed to pay the Defendant's tax liability to FRCS but could not do so because Director of Lands refused to grant consent to FBD's mortgage.
91. It is obvious, that if not for consent issue FDB would have cleared the Defendant's tax liability to FRCS.
92. If FDB did do so, then at the date of signing the Agreement FDB debt would have been in excess of \$350,000.00.
93. DW1's evidence which was not challenged is that the Defendant has only one real estate property which is subject Schedule A of the Agreement and mortgaged to FDB.
94. It is common knowledge that Banks would in very exceptional circumstances lend more than the value of the property.
95. Based on what is stated at paragraph 87 to 94 this Court has doubt about the genuinences of price for property subject to Schedule A of the Agreement.
96. The fact that the Plaintiff agreed to pay extra \$100,000.00 as was the evidence of PW2 which evidence this court accepts over PW1's evidence that he offered to pay extra \$50,000.00 gives strength to the doubt expressed by this court.
97. Even though this Court doubts about the genuinences of the price for property subject to Schedule A, this Court finds that no evidence was led to establish that the purchase price agreed between the Plaintiff and the Defendant was to defraud anyone.
98. This Court makes following finding:-
- i. The Agreement is to be set aside for being ambiguous for reasons provided at paragraphs 44 to 58 of this Judgment.
 - ii. The sale transaction for property comprised and described in Lease No. 357644 is void.

Whether Plaintiff is entitled any relief?

- 99. Since the Agreement is set aside the Plaintiff is entitled to refund of monies held in the Trust Account of Neel Shivam Lawyers.
- 100. The Plaintiff or its Solicitors will need to liaise with Neel Shivam Lawyers for release of the balance deposit held in their Trust Account.
- 101. The Plaintiff is entitled to refund of \$2554.78, the Lease rental paid on behalf of the Defendant together with interest thereon.

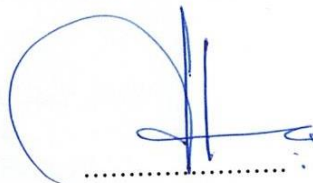
Costs

- 102. Both parties failed to comply with Courts direction to file submission.
- 103. It is only appropriate that no costs be awarded to either party.

Order

- 104. This Court makes following orders;
 - (i) The Plaintiff's claim for specific performance of Sale and Purchase Agreement dated 26 April 2013 and damages is dismissed and struck out.
 - (ii) Defendant do pay the Plaintiff a sum of \$2554.78 plus interest thereon at the rate at 10% per annum from 28 April 2014, to the date of this Judgment.
 - (iii) Interlocutory Injunction granted on 3 February 2018, in respect to property known as Lot 1 Plain No. So 511 Cable Test House Site, Veiuto, Province of Rewa, District of Suva comprised and described in Lease no. 357644 containing 137m² is dissolved.
 - (iv) Each party bear their own cost of this action.




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Kamal Kumar
CHIEF JUSTICE

Solicitors

Neel Shivam Lawyers, Suva
Prem Narayan, Suva