

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 310 of 2018

BETWEEN : NAVIN KUMAR

PLAINTIFF

AND : BAL KRISHNA

1ST DEFENDANT

AND : DIRECTOR OF LANDS

2ND DEFENDANT

AND : ATTORNEY GENERAL'S OFFICE

3RD DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Chand for the plaintiff
: Mr. R. A. Dayal for the first defendant
: Mr. S. Chand with Ms. B. Sharma for the second and third
defendants

Date of Hearing : 20 August 2020

Date of Judgment : 28 October 2022

JUDGMENT

SPECIFIC PERFORMANCE Protected lease – Sale and purchase agreement – Whether the Consent of director of lands is necessary to enter into a sale and purchase agreement – State Lands Act 1945 – Order 86 of the High Court Rules 1988

The following cases are referred to in this judgment:

- a) *Arjun v Devi* [2010] FJHC 38; HBC 113.2009 (9 February 2010)
 - b) *Hunter v Apgar* [1989] 35 F.L.R 180
 - c) *Veronica Tuigasiale v Director of Lands and Another* [2017] FJCA 45; ABU 0027.2016 (12 May 2017)
 - d) *Rasul v Jeet Singh and Hazara Singh* [1964] 10 Fiji LR 16
 - e) *Vijendra Kumar v Honey Dew Farms Ltd and Another* [2018] FJHC 65; HBC 53.2016 (12 February 2018)
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1. This is an application for summary judgment seeking specific performance of a contract between the plaintiff and the first defendant for the transfer of a lease protected under the State Lands Act 1945.
2. Prior to filing a summons for specific performance, the plaintiff filed a writ action against the defendants on 15 October 2018 concerning a sale and purchase agreement that he entered into with the first defendant on 20 May 2014 for the purchase of a property for the sum of \$150,000.00. In his statement of claim, the plaintiff sought specific performance of the agreement between him and the first defendant, an injunction restraining the defendant (relief B of the statement of claim does not specify which defendant is to be restrained, but it is presumed that the reference is to the first defendant) from dealing with the land. Alternatively, he sought damages for breach of contract. No relief was sought against the other defendants. The second and third defendants filed their statement of defence on 31 October 2018. The plaintiff filed its reply to the statement of defence on 24 July 2019. The record does not show an acknowledgement of service or statement of defence on behalf of the first defendant.
3. In terms of the agreement, the plaintiff paid the second defendant a sum of \$6,555.00, in settlement of the first defendant's arrears of ground rental. Settlement

of the transaction was scheduled 90 days from the date of consent by the director of lands, the second defendant. The plaintiff complained that the first defendant did not comply with the agreement and that notwithstanding numerous requests, the second defendant failed to grant consent for the transfer of the property.

4. The property is described as State Lease No. 855785, lot 1 on DP No.9219. The plaintiff pleaded that he filed a caveat in respect of the property on 18 May 2018 and that he received an email from the second defendant saying that consent to transfer the property to a third party by the name of "Plus Packaging" was granted. Although a clarification was sought from the department of lands, the plaintiff says he did not receive a response.
5. On the same date the writ was filed, the plaintiff filed a notice of motion seeking leave to file a second caveat in respect of the property to protect his interest until the determination of the action and an order restraining the defendants from disposing off the property in the interim.
6. In his affidavit in support, the plaintiff restated most averments in his statement of claim. He averred that the second defendant wrote to him on 10 September 2018 saying that the first defendant had applied to remove the caveat, and that it would be cancelled 21 days after the notice. He averred that unless a second caveat was filed he stood to lose his interest in the property.
7. The first defendant opposed the plaintiff's application to file a second caveat. In his affidavit in opposition filed on 24 October 2018, the first defendant said that he was the registered proprietor of the subject land. He admitted entering into the agreement for the sale of the property and taking a deposit of \$6,555.00 towards the purchase price. His position is that the director of lands did not give consent to the sale, and that the 90 day period for settlement of the transaction lapsed on 20 August 2014. He stated that as the time for settlement had lapsed, the plaintiff did not have a proprietary or equitable interest in the property to justify the filing of a caveat. The second and third defendants did not file affidavits opposing the plaintiff's application.

8. By judgment dated 17 April 2019, the acting master allowed the plaintiff to lodge a second caveat to ensure his rights under the purchase agreement are protected until finalisation of the substantive matter. That judgment was not appealed.
9. On 31 October 2019, the plaintiff filed a summons for summary judgment supported by an affidavit. The application was made under Order 86 of the High Court Rules 1988 seeking specific performance of the written agreement between the plaintiff and the first defendant. In the alternative, the plaintiff sought damages for breach of contract. Costs on an indemnity basis were also sought. The acting master directed the matter to be listed before a Judge.
10. In his affidavit in support filed on 31 October 2019, the plaintiff reiterated the matters set out in his statement of claim and in the affidavit supporting his motion for a second caveat. He averred that the first defendant had acted in breach of their contract by attempting to sell the property to another party, although he was obliged in terms of the contract to transfer the property to him. He stated that the first defendant had failed to file a notice of intention to defend the writ action and also did not file a statement of defence, and asked that orders sought in the summons be granted.
11. The first defendant filed an affidavit in opposition on 2 December 2019. He stated that the plaintiff did not have a caveatable interest in the property. He also said that the plaintiff objected to his filing of the statement of defence out of time after having agreed to allow him to file it. The second and third defendants did not file affidavits in opposition.
12. When the plaintiff's summons for summary judgment came up for hearing, all parties were represented. The plaintiff and the defendants filed written submissions. The plaintiff submitted that the first defendant has not shown a defence or raised an issue that needs to be tried in order to deny him the orders he has asked in his summons.
13. In written submissions filed on 19 August 2020, the first defendant submitted that the parties could not have had a dealing in the property – being a protected lease – as the sale and purchase agreement was entered into without the prior consent of

the director of lands. That being so, it was submitted, the contract to sell the land was unenforceable. In support of this argument, the case of *Arjun v Devi*¹ and *Hunter v Apgar*², were cited.

14. The first defendant also made submissions concerning the plaintiff's application for filing of the second caveat. However, this matter was already dealt with by the acting master, and the matter is not in issue in the present summons before court. His written submissions did not deal with the merits of the plaintiff's application for specific performance.
15. Section 3 of the State Lands Act provides that a state land cannot be alienated except in accordance with the provisions of the Act. There is no dispute between the parties that the subject land is state land, and a protected lease. The term "dealing" in respect of land is not defined in the State Lands Act. However, section 2 of the Land Transfer Act 1971 defines dealing to mean any transaction of whatsoever nature by which land or any estate or interest therein is affected under the provisions of the Act. In their submissions, the second and third defendants referred to the decisions in *Veronica Tuigasiale v Director of Lands and Another*³, *Rasul v Jeet Singh and Hazara Singh*⁴ and *Vijendra Kumar v Honey Dew Farms Ltd and Another*⁵. It was held in these cases that entering into a sale and purchase agreement did not amount to a dealing under the State Lands Act. The second and the third defendants submitted that the consent of the second defendant is required before a protected lease is dealt with. The cases referred to by the second and third defendants show that the first defendant's contention in stating that the sale and purchase agreement is invalid for want of consent of the director of lands is misconceived. In *Arjun v Devi*, cited by the first defendant, the court took into consideration the fact that the defendant in that case had taken possession of the property and that the contract was partly performed. In this case, the transfer of the property and settlement was to take place subject to the land director's consent.

¹ [2010] FJHC 38; HBC 113.2009 (9 February, 2010)

² [1989] 35 F.L.R 180

³ [2017] FJCA 45; ABU 0027.2016 (12 May 2017)

⁴ [1964] 10 Fiji LR 16

⁵ [2018] FJHC 65; HBC 53.2016 (12 February 2018)

16. On behalf of the second and third defendants, Janice Reuben, the Divisional Land Manager (central Eastern), Department of Lands filed an affidavit on 2 September 2020, along with the written submissions of these two defendants. At the hearing the second and the third defendants were directed to inform court as to when the first defendant applied for consent to transfer the property. The affidavit filed by the second and third defendants was pursuant to this direction. Their affidavit shed light on the present controversy, and the particulars disclosed by the second and the third defendants should have been brought to the court's notice prior to the hearing.
17. The deponent averred that the first defendant had on 26 February 2018 applied through his solicitors seeking the consent of the second defendant to transfer the state lease to Plus Packaging Limited. A letter from Singh & Singh Lawyers was enclosed to the affidavit. The solicitors' letter referred to a sale and purchase agreement duly executed by both parties. The officer averred that the second defendant consented to the transfer of the state lease between the first defendant and Plus Packaging Limited and endorsed the transfer instrument on 26 April 2018. The transfer instrument showed a consideration of \$650,000.00. Thereafter, the first defendant through its solicitors applied for consent to transfer the state lease to Topik Furniture & Joinery Limited as settlement had not proceeded for transfer of the lease to Plus Packaging Limited. Consent was sought on behalf of the first defendant by letter dated 18 October 2018 sent by his solicitors, Bale Law. The transfer instrument to Topik Furniture & Joinery Limited shows a consideration of \$680,000.00.
18. Order 86 Rules 1 and 3 of the High Court Rules state:
 - "1 (1) In any action begun by writ indorsed with a claim –
 - (a) For specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant of assignment of a lease of any property, with or without an alternative claim for damages, or
 - (b) For rescission of such an agreement, or

(c) For the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment”.

“3 Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action”

19. The first defendant’s affidavit in opposition filed on 2 December 2019 does not disclose a reason to deny the relief sought by the plaintiff. The first defendant merely speaks of the plaintiff’s lack of interest in the subject land in order to file a second caveat; this was a matter that was already dealt with by the master’s judgment dated 17 April 2019. The first defendant does not say that he applied for the second defendant’s consent to sell the land. The first defendant’s omission to make an application for consent to transfer the property is clear from the affidavit filed on behalf of the second and the third defendants. The omission has not been explained. He has received a small part of the purchase consideration. The settlement date is stated as 90 days of obtaining consent of the director of lands, and not upon the expiry of 90 days after signing the contract. Upon receiving the second defendant’s consent, the plaintiff is entitled to go through with the transaction in accordance with the terms of the contract.
20. There is a valid and enforceable contract between the plaintiff and the first defendant for the sale and purchase of land in place. Each party has obligations to be performed in terms of the contract. Instead of obtaining the necessary consent from the second defendant, the first defendant attempted to sell the subject land to two other potential purchasers. These attempts to sell was disclosed by the affidavit filed by the second and third defendants. The first defendant made no mention of this in his affidavits. The affidavits filed by the second and third defendants show that the director of lands gave consent for transfer of the protected lease to Plus Packaging Limited and subsequently to Topik Furniture & Joinery Limited. There is no evidence that these transfers were carried out and registered with the registrar of titles. Presumably, those registrations were

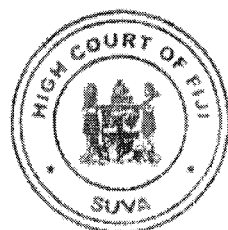
thwarted by the acting master's order for registration of a second caveat in respect of the subject property. In the affidavit in opposition that he filed and in his written submissions, the first defendant did not show cause as to why an order for specific performance should not be issued in terms of Order 86 of the High Court Rules. The circumstances render this case fit to order specific performance of the sale and purchase contract. Any dealing that is carried out in respect of the property in terms of the contract must necessarily have the consent of the director of lands.

21. The first defendant's defence for not performing the sale and purchase contract is without any merit whatsoever, and the positions taken by the first defendant are untenable. Costs summarily assessed in a sum of \$2,000.00 is appropriate in the circumstance.

ORDERS

- A. An order for specific performance is issued directing the first defendant to comply with and perform the obligations of the sale and purchase contract executed between the plaintiff and the first defendant on 20 May 2014 for sale of the property comprised in state lease number 855785 described as lot 1 on DP No.9219.
- B. The first defendant is directed to lodge the application to obtain the consent of the director of lands to transfer the subject property within 21 days of this judgment.
- C. The first defendant is to pay the plaintiff costs summarily assessed in a sum of \$2,000.00 within 21 days of this judgment.

Delivered at Suva on this 28th day of October, 2022



A handwritten signature in black ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge