

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 113 of 2015

BETWEEN : ORIX HOLDINGS LIMITED

PLAINTIFF

AND : DINESH CHAND MAHARAJ and PRAVINESH CHAND
MAHARAJ

DEFENDANTS

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. R. A Singh for the Plaintiff
: Mr. S. Kumar for the Defendant

Date of Hearing : 8 April 2022

Date of Judgment : 28 July 2023

DECISION

SPECIFIC PERFORMANCE Writ of summons – Sale & purchase agreement – Refusal of consent by director of lands for commercial lease – Plaintiff's claim for assignment of lease – Plaintiff's summons for specific performance – Defendants' summons seeking resolution of questions of law – Order 33 rules 4(2) & 5 and order 86 High Court Rules 1988 – Section 13 State Lands Act 1945

1. After the plaintiff initiated action by writ of summons, each party filed a summons supported by affidavit. The plaintiff's summons was for specific performance of a contract for the sale of a land, while the defendants' summons sought the determination of certain questions of law concerning the performance of the contract in the absence of consent of the director of lands.
2. The plaintiff's statement of claim had sought *inter alia* specific performance of a sale and purchase agreement for the sale of a crown property in the Wainibuku subdivision of Suva. The land – identified as crown lease No.1778 – is an acre in extent. The defendants denied the plaintiff's claim and stated that the contract was frustrated by the refusal of the director of lands to grant consent for the transaction under section 13 of the State Lands Act 1945. Subsequently, the defendants filed an amended statement of defence.
3. The plaintiff replied stating *inter alia* that the defendants failed to take any steps towards applying for the consent of the director of lands and that they cannot rely on their own breach as a defence to the plaintiff's claim.
4. After pre-trial steps were taken, solicitors for the plaintiff filed summons on 11 June 2019 to enter the action for trial. Thereafter, the plaintiff filed a summons on 29 October 2019 under Order 86 of the High Court Rules. The defendants filed their summons on 15 November 2019 under Order 33 of the rules.
5. This decision concerns the matters raised by the parties by their respective summons.

The plaintiff's summons

6. By its summons, the plaintiff sought the following orders:
- a. "For specific performance of the sale and purchase agreement between the plaintiff and the defendants by the defendants.
 - b. A declaration that the sale and purchase agreement and any variation thereto annexed to the affidavit in support of Parveen Prakash herein ought to be specifically performed and carried into execution.
 - c. The defendants do all things necessary, including payment of any lease premium imposed by the Director of Lands, to process a new lease to be issued to the plaintiff by the Director of Lands
 - d. The defendants to take all necessary steps to obtain consent of the Director of Lands for the assignment of the lease.
 - e. That the defendants execute an instrument of transfer for the property comprised in crown lease No. 1778 and any other documents necessary to convey title to the said property to the plaintiff.
 - f. That the defendants deliver to the plaintiff the original crown lease No. 1778 and a certificate as required under Section 20 of the Capital Gains Decree.
 - g. That the defendants provide to the plaintiff evidence of payment of all outgoing in relation to the property up to the date of delivery of the documents mentioned in order "E".
 - h. Subject to orders "C" to "G", that plaintiff pay the defendant the sum of \$600,000.00.
 - i. That the defendants pay the plaintiff's costs of this action on an indemnity basis.
 - j. That the parties be at liberty to apply generally.
 - k. Any other Order this Honourable Court deems just and expedient in the circumstances".
7. A supporting affidavit was given by Parveen Prakash in support of the plaintiff's summons. He is a director of the plaintiff. He stated that after numerous discussions and negotiations, the plaintiff was made an offer to purchase the

property at the price of \$600,000.00. The offer was recorded in a document titled "offer to purchase" which was signed by the parties on 10 April 2013. Thereafter, the parties executed the sale and purchase agreement on 10 September 2013.

8. The plaintiff states that the sale and purchase agreement stipulated that the vendors were to apply to the director of lands for the issuance of a new lease directly to the plaintiff. In the event that application was refused, the vendors were to apply for the director of land's consent to assign or transfer the lease to the plaintiff.
9. The affidavit stated that from time to time inquiries were made from the defendants regarding the state of the application to the director of lands for a fresh lease. Mr. Prakash states that at a point the plaintiff was advised that it was unlikely that a new lease would be issued to the plaintiff directly, and the defendants suggested that the transaction could be effected by way of an assignment rather than the issuance of a fresh lease.
10. Mr. Prakash stated that a meeting between the parties on 6 October 2014, it was resolved that an application would be made to the director of lands for renewal of the lease to the defendants, and for its subsequent assignment to the plaintiff. If the lease could not be renewed, an assignment of the existing lease was to be effected in favour of the plaintiff. He stated that the defendants were to apply for the director of land's consent for the assignment. Several emails were annexed to the affidavit to show the plaintiff's inquiries from the defendant's solicitor concerning the progress of the application to the director of land for consent to assign the lease.
11. Mr. Prakash stated that on 12 December 2014, the plaintiff's solicitor requested an update on the status of dealings with the director of lands. On 16 December 2014, the defendant's solicitor advised the plaintiff's solicitor by email that the defendants no longer wish to proceed with the transaction. On the same day, the plaintiff's solicitor responded stating that the defendants cannot unilaterally withdraw from the transaction, and that the plaintiff is waiting for the defendants to progress matters with the director of lands. The affidavit stated

that the plaintiff has always been ready and willing to perform the agreement, and that the defendants have no defence to the reliefs sought by the summons.

12. An affidavit in opposition was filed by Dinesh Chand Maharaj on behalf of the defendants. He stated that he was unaware of the meetings and discussions mentioned in Mr. Prakash's affidavit. He was unaware of the email correspondence referred to in the plaintiff's affidavit. He denied generally the material averments in the plaintiff's affidavit. He stated that the director of lands has refused consent, and, therefore, any dealing of the land is unlawful. He stated that the sale and purchase agreement is tainted with illegality for want of the director of land's consent. The plaintiff replied the affidavit in opposition. Mr. Maharaj also filed a supplementary affidavit on 5 December 2019, in which he states that the orders sought by the plaintiff in its summons are not stated in the writ of summons or in the statement of claim.

Are there grounds upon which to enforce the sale and purchase contract?

13. The subject lease is a protected lease. As such it is governed by section 13 (1) of the State Lands Act 1945. Section 13 (1) states:

“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 Lands.

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

14. The statutory proposition is also stated in the lease instrument. A condition of the instrument is that the lessee shall not transfer, sublet, assign or part with the possession of the demised land or any part thereof without the written consent of the lessor first had and obtained.
15. This is recognized by clause 21 of the sale and purchase agreement, which provides that the agreement is subject to the consent by the director of lands.

Clause 10 of the sale and purchase agreement sets out the nature of the lease and its term to be procured from the director of lands. The clause states:

“The sale is subject to a special condition that the vendors shall procure a commercial lease for 99 years from the Director of Lands which lease to the name of Purchaser and this shall be registered with the Registrar of Titles Office on the date of settlement upon payment of the balance purchase price”.

16. The director of lands refused to give consent for the grant of a commercial lease to the plaintiff.
17. The plaintiff states that the initial application to the director of lands was in respect of a new lease in the plaintiff's name. When this did not eventuate, according to the plaintiff, the parties agreed to assign the lease held by the defendants to the plaintiff. The plaintiff has annexed several emails in support of its contention that the parties or their representatives met and took decisions to proceed by way of an assignment of the lease in favour of the plaintiff and to apply for the director of land's consent on that basis. These communications also refer to a memorandum of variation prepared by the plaintiff's solicitors. The memorandum does not appear to have been executed.
18. The plaintiff's contention is that there is a valid and enforceable contract in place and that it is entitled to an order for specific performance among other reliefs.
19. The defendants take the position that the sale and purchase contract is frustrated. They do not concede that fresh terms were agreed upon for the assignment of their lease with the consent of the director of lands.
20. The plaintiff's claim concerning the assignment of the lease is not clearly evident by the sale and purchase agreement. If clause 10 is to be properly construed, the parties may have to bring forth evidence to explain the true meaning of the clause in the light of their negotiations. In these circumstances, court is of the view that the grant of remedies in terms of Order 86 of the High Court Rules would not be appropriate without the hearing of evidence. The plaintiff has already filed summons on 11 June 2019 to set the action down for trial. Evidence

must be led and tested at the trial so that court may determine the issues. The plaintiff's summons is, therefore, declined.

The defendants' summons

21. The defendants filed a summons on 15 November 2019 under Order 33 rule 4(2) and Order 33 rule 5 of the High Court Rules seeking an order for the following questions of law to be determined first before the action proceeds further.
- i) "Is the purported sale and purchase agreement described in the statement of claim null and void because of section 13 of the Crown now State Lands Act.
 - ii) Can specific performance and or damages be granted on the sale and purchase agreement which is not consented to by the Director of Lands?"
22. Court is of the opinion that these questions are best answered after the taking of evidence at the trial.
23. The case will be set down for early trial as the action was filed in 2015.

ORDER

- A. The plaintiff's summons dated 29 October 2019 is struck off.
- B. The defendant's summons dated 15 November 2019 is struck off.
- C. Parties will bear their respective costs.

Delivered at Suva on this 28th day of July, 2023.



M. Javed Mansoor
Judge