IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 247 of 2020

BETWEEN	:	**ASHOK TRANSPORT PTE LTD** a limited liability company duly incorporated in Fiji and having its registered office at Lot 5, Jai Abamma, Vatuwaqa, Suva, Fiji.
		PLAINTIFF
AND	:	**THE TRUSTESS OF ARYA PRATINIDHI SABHA OF FIJI** a religious body registered under the Religious Bodies Registration Act Cap. 68 having its head office in Suva.
		FIRST DEFENDANT
AND	:	**THE DIRECTOR OF LANDS**
		SECOND DEFENDANT

Coram	:	**Banuve, J**
Counsels	:	**Neil Shivam, Barristers & Solicitors for the Plaintiff** **Vijay Maharaj Lawyers for the First Defendant** **Attorney-General's Chambers for the Second Defendant**
Date of Hearing	:	**5th and 6th March 2024**
Date of Judgment	:	**20th January 2025**

JUDGEMENT

A. INTRODUCTION

1. A Writ of Summons was filed by the Plaintiff with a Statement of Claim indorsed on 19th August 2020.

2. The Plaintiff seeks an order for specific performance for a Sale and Purchase Agreement it entered into on 4th March 2014, whereby the First Defendant had agreed to sell and the Plaintiff agreed to buy all that piece or parcel of land known as Crown Foreshore Land, Suva City, District of Suva, Province of Rewa, comprising an area of 2.9630 hectares (Lot 1 Adjacent to Lot 3 DP 3482-Part of) present covered by an Approval Notice of Lease held and applied for by the First Defendant.

3. The brief particulars of the Agreement were laid out in paragraph 5 of the Statement of Claim;

(a) Clause 2.1-the Vendor will sell and the Purchaser will purchase the said property on the basis as 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.

(b) Clause 3.1-the full purchase price for the said property shall be $2,000,000.00 plus VAT…The said sum shall be paid and satisfied by the Purchaser to the Vendor as follows:

1. A sum of $20,000.00 (Twenty Thousand Dollars) shall be paid by the Purchaser into the Trust Account of Messrs MC Lawyers on the date of the execution of this Agreement;
2. The balance sum of $1,980,000.00 (One Million Nine Hundred and Eighty Thousand Dollars) shall be paid by the Purchaser to the Vendor within 60 days from the grant of consent to transfer by the Director of Lands.

(c) Clause 4.1-The Date of Settlement shall be 60 days from the grant of consent to transfer by the Director of Lands or any other date as may be mutually agreed in writing between the parties hereto;

(d) Clause 13-Purchaser's Default;

(e) Clause 14-Vendor's Default;

(f) Clause 21-Variation

(g) Clause 25-This Agreement is subject to the consent being obtained from the Director of Lands.

4. A Special Condition was attached to the Agreement that the Vendor shall make necessary applications to the relevant authorities for change of the current approval notice for lease zoned to general industrial lease.

5. In accordance with particulars laid out the deposit prescribed under clause 3.1(a) was paid on 4th March 2014, however the date of settlement was varied by letter to 4th March 2016.

6. The Plaintiff and the First Defendant had discussions in relation to the application for rezoning and the regulatory requirements whereby the First Defendant indicated that the associated costs for the requirements would cost an additional $200,000 (Two Hundred Thousand Dollars). The Plaintiff plead that was at all time ready to pay the additional sum provided the First Defendant had forwarded a breakdown of the associated costs, which it failed to do

7. On 5th May 2020, the First Defendant issued a letter notifying the Plaintiff of its intention to terminate the Agreement, which it affirmed on 26th June 2020.

8. The Plaintiff allege breach of Agreement by the Defendant for which it had suffered loss and damage and by for reasons it itemizes in the Statement of Claim claims;

(a) An Order for Specific Performance of the sale and Purchase Agreement dated 4th March 2014.

(b) An Order restraining the First Defendant by itself and/or by its servants or agents from selling, leasing and/or subleasing , transferring, assigning and/or in any manner or form howsoever from dealing or disposing of all that piece or parcel of vacant known as Crown Foreshore Land, Suva City, District of Suva, Province of Rewa comprising an area of 2.9630 hectares (Lot 1 Adjacent to Lot 3 DP 3482-Part Of)

(c) Upon Approval of Lease being granted to the First Defendant, an Order restraining the Second Defendant from granting consent to sell, lease and/or sublease, transfer, assigning to any other persons and/or third party, all that

piece or parcel of vacant land known as Crown Foreshore Land, Suva City, District of Suva, Province of Rewa comprising an area of 2.9630 hectares (Lot 1 Adjacent to Lot 3 DP 3482-Part Of)("the land")

(d) Further or in the alternative an Order for damages against the First Defendant for breach and/or refusal to complete its contractual obligations under the Sale and Purchase Agreement dated 4th March 2014 , particulars of such loss to be quantified and made available prior to trial;

(e) Costs of the proceedings on a full indemnity basis.

(f) Such other order and/or relief as this Honorable Court may deem just and expedient.

9. The First Defendant its Statement of Defence on 10th September 2020 and the Second Defendant filed its Defence on 16th December 2021.

10. In its Defence, the First Defendant refutes the allegation of breach of contractual obligations under the Sale and Purchase Agreement dated 4th March 2014 and raise 2 issues in response;

1. It does not admit that the Plaintiff was ready and willing at all material times to pay the additional sum of $200,000.00. The Plaintiff failed and/or neglected to sign a Variation to the Original Agreement within the time specified by the Defendant. The Plaintiff had further requested for a meeting with the representatives of the Defendant to discuss the variation but failed to attend any of the meetings with the Defendant as scheduled.

2. The Defendant avers that the Agreement entered between the Plaintiff and the Defendant was subject to the grant of consent by the Director of Lands. No such consent was applied for nor granted and the Agreement is therefore unenforceable null and void.

11. The Plaintiff and the 2 Defendants called a witness each. The Plaintiff filed its closing submissions on 24th April 2024 with the First Defendant filing its closing submissions on 21st May 2024.

B. THE PLAINTIFF'S CASE

12. The Court has, at the outset, laid out the broad parameter of the Plaintiff's case because of the following;

(a) To comprehend the scope of the case pleaded which the Defendants had to respond to;

(b) To evaluate whether the Plaintiff's evidence adduced at trial, substantiated the case pleaded against the Defendants , to warrant the grant of the remedy it seeks;

(c) Who has to seek the consent of the Director pursuant to clause 25.1 of the Agreement ?

The Court relies on Part E of the Plaintiff's Closing Submissions, entitled 'Analysis of Witness Evidence' as succinctly setting out the case it presented, at trial.

The Plaintiff's Submissions

13. The Plaintiff prefaces its case with the submission that the determination of the central issues hinges on the evidence adduced at the trial, on the nature and type of evidence adduced; the demeanor and the credibility of the witnesses and in the context of the supporting documentary evidence as existed or produced at trial. It then set out its analysis;

(15) There is no dispute that parties entered into a sale and purchase agreement.

(16) There was unequivocal evidence by the Plaintiff's witness that the Plaintiff had completed its obligations under the said agreement.

(17) SCC had stipulated that the First Defendant needs to comply with 7 conditions for re-zoning application to be considered.

(18) It became evident though the Defendant's witness in his evidence and the documentary evidence adduced by the Plaintiff that the Defendant failed to comply with further attendances it was required to attend to, including;

a. Verify the status of Lots 1 and 3 as stated in the letter of DTCP;

b. **Roading of 16m.**
c. **EIA Requirement-The Defendant was to lodge an application;**
d. **The Defendant was to engage professionals to do a geotech assessment;**
e. **Revisit the 3m landscaping reserve and the 6m on the creek bank with DTCP to ascertain what would be applicable;**
f. **The Defendant to work with SCC on the advertisement and gazetting issues.**

(19) The Defendant's witness clearly gave evidence to the effect that by legal right it was the Sabha's responsibility to meet the above conditions but there was an understanding that the Plaintiff would help.

(20) The Defendant's witness stated that there was pressure on the Sabha to meet the above requirement because of the lease getting expired. Whilst the parties agreed that any expenses borne for the above will be borne by the Plaintiff, the Plaintiff never attended to the checklist and never provided a breakdown of these costs.

(21) There was no genuine intention to complete the checklist and proceed towards settlement.

14. The Court deems the position laid out in these paragraphs sufficiently set out the Plaintiff's case.

The Plaintiff's Evidence

15. The Plaintiff's case seems straight forward, as outlined, that there was a sale and purchase agreement that was entered into, that it had completed its obligations under the said agreement, and rather it was the First Defendant that had not completed further attendances and comply with 7 conditions required for a rezoning application to be considered.

16. The Court has considered the evidence provided by the Plaintiff through its witness, Ashish Deepak Kumar, to elicit whether the evidence he provides affirms, the case pleaded in the Statement of Claim, as the Court will determine in this ruling.

What were the terms of the Sale and Purchase Agreement?

a. A Sale and Purchase Agreement was entered into between the Plaintiff and the First Defendant on 4th March 2014[1], for the sale and purchase of all that piece and parcel of vacant land described in Approval Notice of Lease, being land known as Crown Foreshore land, Suva City, District of Suva, Province of Rewa, containing an area of 2.9640 hectares (LD Ref: 60/127).

b. The purchase price of the said property was $2,000,000.00 (Two Million Dollars),[2] with an amount of $20,000.00, (Twenty Thousand Dollars),[3] payable on the execution of the said Agreement,[4] and the Date of Settlement being sixty (60) days from the grant of consent to transfer by the Director of Lands, or any other date, as may be mutually agreed, in writing, between the parties hereto.[5]

c. The Agreement was extended by letter from 4th March 2014[6] to 4th March 2016, from 4 March 2016 to 3rd March 2019 and then to 4th March 2023[7].

d. The purpose behind the extension in Agreement was to allow for rezoning of the subject land from Residential C to Industrial, as required by the Plaintiff[8], which was approved by the Department of Town and Country Planning, on 25th September 2019,[9] subject to the Suva City Council ensuring that the developer comply with certain conditions before the Agreement was submitted to the Director of Lands, for his consent.

e. The consent of the Director of Lands has not been sought, despite the approval for the change in zoning being obtained, because the developers have not complied with the rezoning conditions, prescribed by the Suva City Council.

17. The major issue of contention between the parties was the rezoning of the subject land to Industrial; who was to be responsible for complying with the rezoning

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[1] **Exhibit P1**
[2] Clause 3.1
[3] Clause 3.1(a)
[4] The deposit was paid by cheque to the Trust Account of MC Lawyers dated 4th March 2014-**Exhibit P3**
[5] Clause 4.1
[6] **Exhibit P3**
[7] **Exhibit P5**
[8] Transcript of Evidence of Mr Kumar, **p 11 of 96**
[9] **Exhibit 1 "D2"**

conditions required by the Suva City Council, and bear the cost of complying with these conditions. The Plaintiff, in its Statement of Claim, pleads that the responsibility of obtaining the rezoning approval and complying with any condition, the rezoning was subject to, were that of the First Defendant.

Did the terms of the Agreement of 4th March 2014, capture all matters agreed to by the parties?

a. In a letter dated 15th January 2020[10], the First Defendant pointed out to the Plaintiff that since the execution of the agreement, it has had to carry out various works which cost an additional $200,000 (Two Hundred Thousand Dollars), which the Plaintiff had agreed to pay in order to defray the additional burden of the First Defendant, increasing the purchase price of $2 million dollars to $2.2 million dollars.

b. The First Defendant, in the same letter, also pointed out to the Plaintiff that the Ministry of Local Government's Department of Town and Country Planning had stipulated that the Suva City Council impose certain conditions for the re-zoning of the subject land from Residential C, to Industrial, which the parties in a series of meetings held subsequent to 4th March 2014, agreed would be discharged also by the Plaintiff, these being;

1. Verify the status of Lots 1 and 3 as stated in the letter of DTCP.
2. Roading of 16m.
3. EIA Requirement-The Defendant was to lodge an application.
4. The Defendant was to engage professionals to do a Geo-Tech assessment.
5. Revisit the 3m landscaping reserve and the 6m on the creek bank with DTCP to ascertain what would be applicable.
6. The Defendant to work with SCC on the advertisement and gazetting issues.
7. Revisit the 3m landscaping reserve and the 6m on the creek bank with DTCP to ascertain what would be applicable.
8. The Plaintiff to work with the Suva City Council on advertisement issues to be gazette.
9. If the Director of Lands was not agreeable to the grant of lease to the Plaintiff, then the First Defendant to obtain the lease in its own name then transfer it to the Plaintiff.

[10] **Exhibit P6**

c. It was affirmed in the said letter that the parties had agreed that all expenditure to meet the above conditions, (but not limited to), with effect from 18th November, 2019, shall be met by the Plaintiff, on a without prejudice basis, with a clear understanding that in the event the Director of Lands refused to grant consent, the amount incurred by the Plaintiff shall be forfeited to the First Defendant.

d. An invitation was issued in the said letter for the original agreement of 4th March 2014 to be revisited, amended and varied by the Plaintiff, in a Draft Amended Agreement, and forwarded to the First Defendant for its consideration. There was no response to this request from the Plaintiff and the initial Agreement entered into by the parties on 3rd March 2014, remained un-amended.

e. In an email dated 20th April 2020[11], the First Defendant's solicitors wrote to the Plaintiff's solicitors, referring to the letter of 15th January 2020, indicating that if the Plaintiff was unable to respond to the said letter within 7 working days, then the First Defendant would assume that the Plaintiff was no longer interested in the subject property and had repudiated the agreement, as the Plaintiff's Director had not attended a meeting scheduled on 30th January 2020, to discuss this issue, nor had a response been received to the earlier letter of 15th January 2020.

f. The Plaintiff's Director denies ever receiving the letter sent by the First Defendant's solicitors to its solicitors dated 15th January 2020 or the mail dated 20th April 2020.[12]

g. The Agreement was terminated by the First Defendant on 5th May 2020,[13]due to a lack of response from the Plaintiff as set out in the email from the First Defendant's solicitors of 20th April 2020.[14].

[11] Exhibit **1 D3**
[12] The meeting sought by the Plaintiff's Director was scheduled for 30th January 2020 but had to be aborted because his solicitors stated that the Director could not be located, something which the Director disputes was brought to his attention. This is an issue that could be raised by the Plaintiff's Director against his solicitors under the *Legal Practitioners* Decree 2008 and the Rules of Professional Conduct and Practice .
[13] Annexure **P8**
[14] Ibid, fn 12

h. Despite the Agreement of 4th March 2014 not being revisited, amended or varied, by the Plaintiff, as sought in the First Defendant's letter of 15th January 2020[15], Ashish Kumar, affirmed in evidence, on behalf of the Plaintiff its endorsement of the subsequent changes that were reached by the parties to the terms of the initial Agreement ;

(1) that the Plaintiff would pay the amount of $200,000 (Two Hundred thousand Dollars), in addition to the contract sum of $2 million, to cover the First Defendant's costs for the relocation of houses for squatters, getting the scheme plan done and rezoning the land to industrial, despite, there being no formal variation in writing to the Agreement of 4th March 2014, signed by the parties.[16]

(2) Anything else, such as meeting the costs of complying with the conditions prescribed by the Ministry of Local Government, through the Suva City Council[17], for which rezoning was subjected to, would be the responsibility of Plaintiff, to be paid directly, from the Plaintiff's company account, as affirmed by the Plaintiff's witness, in cross-examination;`

Mr Kumar: So I just remind you again the $200,000. Since 2014 to the point we have received this letter-the 6 checklist. **Before that,** all things that has happened, relocating the houses, getting the scheme plan done, rezoning it to industrial. We are talking $200,000 on that.
Anything moving further which is extension of the road and all other things to meet the council requirements to get a proper lease that you come directly from my companies account. So two parts are separate. Of course the $200,000 is for it anyway but we needed to see what they are saying the $200,000 is for.[18]

i. No request, however, was ever raised by the Plaintiff with the First Defendant, as to the breakdown of additional costs that it had agreed it would meet, in order to comply with the conditions for rezoning set by the

[15] Ibid, **Exhibit P6**
[16] Transcript **p 36 of 96** (Evidence of Mr Kumar)
[17] **Exhibit 1 "D2"**
[18] Transcript p 37 of 96

Department of Town and Country Planning, as evident in this exchange, during the cross examination of Mr Kumar, on the contents of a letter sent by the Plaintiff's solicitors to the First Defendant's solicitors, on 9th June 2020[19];

Mr Maharaj: About these 6 conditions?
Mr Kumar: Yes
Mr Maharaj: Paragraph 12 (reading…) put your mind back to January 2020 to the time when the contract was terminated. I had asked you of any evidence when any letter was sent for a break down?
Mr Kumar: Yes
Mr Maharaj: But you don't have one.
Mr Kumar: I don't have one.
Mr Maharaj: So in other words there was no request made. The reason why I am asking as it says '*and the same had been communicated to the first defendant in numerous occasions'*.
I am asking you in what numerous occasions.
Mr Kumar: I think you mentioned in the past, yes.
Mr Maharaj: You don't have any evidence of that?
Mr Kumar: No.

(and further),[20]

Mr Maharaj: So if this letter is written on your instructions, I'm asking a simple question, show me evidence where you have made a request for breakdown on this additional costs.
Mr Kumar: I will have to get back to the lawyer to ask them if they have made any request, but as far as my knowledge is, to amend a sales and purchase agreement, which is a legal document, you need some kind of a breakdown.

Mr Maharaj: My question is prior to the termination of the contract, was there any communication , any letter for any kind of a breakdown?
Mr Kumar: Not that I know of.

[19] **Exhibit 1 "D7"**For some reason this letter was not adduced by the Plaintiff or its counsels directly, in evidence, despite the fact that it was their letter, and the Court is left to surmise that its contents did not fit with the primary case it pleaded.
[20] Transcript p 39 of 96

j. In short, whilst the Plaintiff's Director and witness affirmed, in evidence, *at trial*, the additional obligations the Plaintiff undertook to discharge, after entering into the Sale and Purchase Agreement with the First Defendant on 4th March 2014, it, at no time affirmed these additional obligations with the First Defendant ,(or discharged them), prior to the Agreement *being terminated on 5th May 2020 by the First Defendant* , despite, being specifically asked to reflect these additional obligations through an amendment to the initial agreement in a letter dated 15th January 2020,which it did neither heeded nor responded to, as set out in an email of 20th April 2020.[21]

k. Consequently, the First Defendant took action under clause 13 of the Sale and Purchase Agreement 'to rescind and retain for the Vendor's own benefit the deposit paid by the Purchaser as liquidated damages[22];

13.1 If the Purchaser shall make default in payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then and in any such case the Vendor without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:

(a) ……
(b) May rescind this Agreement for sale and thereupon all monies therefore paid or under the terms of sale applied in reduction of the purchase money shall be forfeited to the Vendor as liquidated damages

18. Further, the transaction contemplated under the Agreement of 4th March 2014 has never been completed or reached the stage where it would be submitted to the Director for Lands for his consent, because of the repudiation of the Agreement by the Plaintiff, its formal rescission/cancellation on 5th May 2020, and the initiation of these proceedings (Civil Action HBC 297 of 2020), on 19th August 2020[23].

[21] **Annexure P6**
[22] First Defendant's Closing Submissions –CONCLUSION p 21-22
[23] Transcript p 41 of 96

C. ANALYSIS

19. The Court has borne in mind the Plaintiff's contention that the determination of the central issues in this proceeding hinges on the evidence at trial, the type of evidence adduced and the credibility of the witnesses and the Court finds that there is a marked deviation between the case pleaded by the Plaintiff and supported by its written submissions from the evidence provided by its witness, particularly, when cross examined, at trial.

(1) **In submissions, the Plaintiff maintained that it had completed its obligations under the said Agreement.**

There are 2 separate issues clarified, however, in evidence. Firstly, the First Defendant had expanded an amount of $200,000 (Two Hundred Thousand Dollars), for relocating squatters, and having the Scheme Plan for rezoning purposes drawn up, which the Plaintiff agreed to defray by adding it to the initial purchase price. Secondly, the Plaintiff also agreed to separately meet the cost of the First Defendant complying with the conditions set by the Department of Town and Country Planning to be imposed by the Suva City Council, on which rezoning to Industrial use was made subject to, by paying it directly from company account, when it arose. Neither of these obligations were confirmed by the Plaintiff, despite agreeing to discharge them, for which it was asked to reflect in an amendment to the Agreement of 4th March 2014 on 15th January 2020 and despite a further reminder by email of 20th April 2020, to do so within 7 days. The Plaintiff's witness admitted, on cross examination, that the Plaintiff had not honored its obligations to amend the Agreement of 4th March 2014, to reflect these agreed changes.

(2) **In submissions, the Plaintiff maintained that it was the First Defendant's responsibility to meet the conditions required by the Suva City Council for which the change in zoning of the subject land, to Industrial was made subject to, and the Plaintiff would help.**

The First Defendant applied for and obtained the change in rezoning of the subject property to Industrial, in accordance with the Special Condition of the Agreement (clause 27). It was responsible also for complying with the conditions set by the Suva City Council[24], on which the approval was subject

[24] The cost of complying

to, however the parties in subsequent meetings agreed that the costs for doing so would be met or defrayed by the Plaintiff, directly from its office accounts. The Plaintiff's witness affirmed this subsequent agreement on cross examination, at trial.[25]. This was a critical admission, but a logical one, since the rezoning was being done at the Plaintiff's request and the cost for doing so was approximately $1.8million, a prohibitive sum for an organization like the Second Defendant[26]. A request for a meeting conveyed in a letter dated 15th January 2020 from the First Defendant to the Plaintiff, to progress this understanding was not heeded. The work on complying with the conditions could not continue without the financial support of the Plaintiff, which the meeting had been scheduled to confirm

(3) **In submissions, the Plaintiff maintained that the First Defendant was pressured to comply with the conditions set by the Council and whilst it would bear the cost of the First Defendant complying with the conditions, a breakdown of cost was not provided to the Plaintiff, despite requests being made to the First Defendant for it**.

The Plaintiff's witness, affirmed in cross examination, to the contrary, that in his capacity as Director, had not made any request to the First Defendant for a breakdown of the costs to be incurred, in complying with the rezoning conditions imposed by the City Council. Again this is a critical admission in the sense that it is a clear departure from the case being pleaded.

20. Given the disparity in the pleadings from the evidence adduced by the Plaintiff, the Court finds that its primary claim, based on the pleadings, has not been proven or affirmed in evidence at trial, on the balance of probabilities.

D. THE LAW

21. Specific Performance is a discretionary remedy which is granted by the Court based on the circumstances of the case. As affirmed by the House of Lords in *Cooperative Insurance Society Ltd v Argyll Stores* [1997] UKHL 17; [1998] AC 1; [1997] All ER 397;[1997] 2 WLR 898 (21st May, 1997);

[25] This was necessary
[26] See **Exhibit 1 "P13" Wood & Jepsen Consultants Report**.

"There are well established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, …, to do more perfect and complete justice "than would be the result of leaving the parties to their remedies at common law. (*Wilson v. Northampton and Bunbury Junction Railway Co*.(1874) L.R 9 Ch. App. 279, 284). Much therefore depends upon the facts of the particular case."[27]

22. In *Sharma v ILTB*-Civil Appeal No: ABU 005 of 2013, the critical fact which lead to the Court of Appeal ruling that 2 leases could not be the subject of specific performance was the evidence that that the survey plan they were drawn from (SO 5364), contained admitted errors which were attributable to the conduct of the Plaintiffs and the surveyor in the preparation of the Plan.

23. The facts pleaded in the Statement of Claim and the submissions presented in support, were notably at variance with the evidence presented by the Plaintiff's witness, at trial. The Plaintiff's case, as pleaded in the Statement of Claim is succinct and was limited wholly to the terms of the Sale and Purchase Agreement, dated 4th March 2014, with the only variation being the date of settlement and the Plaintiff agreeing to pay an additional sum of $200,000 (Two Hundred Thousand Dollars), being the cost of the First Defendant meeting regulatory costs. The Plaintiff assert that it was ready to pay this amount, but for the failure of the First Defendant to heed requests for the provision of a breakdown in costs.

24. In evidence, at trial, the Court noted, that Plaintiff's witness presented a case that differed from that pleaded in the Statement of Claim, particularly in relation to the matters that were agreed to, subsequent to the parties entering into the Agreement of 4th March 2014, which substantially altered the terms of the initial Agreement, without any formal amendment to reflect these changes.

Despite being repetitive, it is necessary that the obligations subsequently Agreed, to be discharged by the Plaintiff, *after* the Agreement of 4th March 2014 was entered into , needs to be highlighted;

(a) The parties agreed that the amount of $200,000 was to be added to the purchase price of $2 million to be paid by the Plaintiff, totaling $2.2 million.

[27] Per Lord Hoffman, paragraph 2

(b) The Plaintiff further agreed to pay the costs of the First Defendant complying with the conditions set by the Suva City Council for rezoning the subject property from Residential to Industrial. The costs of complying with these conditions was substantial, amounting to approximately $1.8 million.[28]

25. The Plaintiff affirmed, that prior to the termination of the Agreement on 5th May 2020, it had not made any request to the First Defendant for a breakdown of costs incurred by the First Defendant.[29] In short, the Court finds that the non-payment of the $200,000 and/or the costs sustained for complying with the Council's re-zoning conditions is not attributable to the lack of response from the First Defendant, but rather to the Plaintiff not willing to acknowledge and discharge this obligation.

26. The Plaintiff also pleads that on 9th June 2020 it wrote to the First Defendant advising them of its position that the Agreement stands valid and requested a discussion to progress settlement. The Plaintiff's pleadings is misleading on this issue because the documentary evidence clearly indicates that the letter from the First Defendant of 5th May 2020,[30] was not a 'letter notifying its intention to terminate the Agreement" rather, it was "a formal notification that the Agreement was rescinded/canceled". At best, the Plaintiff was being disingenuous,[31] in seeking a discussion on 9th June 2020 on an Agreement, which it must have known had been rescinded and canceled, earlier on 5th June 2020.

27. The Plaintiff particularizes loss in its pleadings in reliance on the pleadings and breach of the Agreement of 4th March 2014. The Court rather,' has outlined herein, that the pleadings on which breach of Agreement and loss are premised, are at variance with the case which emerged at the hearing, premised on the evidence provided by the Plaintiff's own witness, so the rhetorical query must be what facts are the loss claimed by the Plaintiff premised on?

28. Despite the consensus of the parties on the variation of terms, the Plaintiff had not heeded the request of the First Defendant, that it amend and vary the Agreement of 4th March 2014, meaning that this Agreement no longer reflects the understanding of the parties on the sale and purchase of the subject property.

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[28] Ibid fn 27
[29] Ibid, fn 21
[30] Exhibit P8
[31] *Dering v Earl of Winhelsea* [1775-1802] All ER 140 " If this can be founded on any principle, it must be, a man must come into a Court of equity with clean hands.."

29. The foregoing concern of the Court revolves around the Plaintiff's claim as pleaded in its Statement of Claim, premised on the Agreement of 4th March 2014, for which it seeks the equitable remedy of specific performance. There is considerable variance between the terms of this Agreement and the expanded Agreement, presented at trial, by the Plaintiff's own witness. This raises the fundamental question as to which Agreement does the Plaintiff seeks specific performance for? In *Legione v Hately* [1983] HCA 11;152 CLR 406, the High Court of Australia stated;

> " 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) 116 CLR 344). This in turn, depends on whether or not she performed her part of the bargain. A purchaser who has breached an essential condition is normally not entitled to specific performance"

30. The Plaintiff's solicitors relies on the facts as pleaded in the Statement of Claim filed on 19th August 2020, and the written submissions filed in support on 24th April 2024, in which it alleges breach of contract, by the First Defendant for which the remedy of specific performance is premised.
The position, as pleaded, is maintained in submissions, despite the clear difference in the case attested to, by the Plaintiff own witness, Ashish Kumar, in evidence, at trial.

31. In this regard, the dicta of the High Court of Australia in *Legione* is timely, although the query arising from it, would be framed differently –What Agreement is specific performance being sought for by the Plaintiff? Is it the Agreement entered into on 4th March 2014, on which the pleadings are premised, or is it the expanded Agreement emerging in evidence which the parties subsequently agreed to, but which has not been captured in a formal amendment to the initial Agreement?

32. The difference in terms of the initial Agreement of 4th March 2014, from the expanded terms, subsequently agreed to by the parties, are not reconcilable, in the sense of which version is the Court being asked to consider for the grant of specific performance and the Court, in the exercise of its discretion, refuses to do so accordingly, on this basis.

33. Finally, on the issue of consent the Court adopts the submissions filed by the First Defendant and refer to the Supreme Court's ruling in *Inspired Destinations (Inc) Ltd v*

Graham [2022] FJSC 50, and affirm that either party, the Vendor or Purchaser can lodge an application for consent to the Director of Land, pursuant to clause 25.1 of the Agreement. In this regard, there is no hindrance to the Plaintiff, as purchaser, applying for consent.

34. In summary, the Court finds that the Plaintiff has not established any basis on its pleadings, that the First Defendant has breached the terms of the Agreement of 4th March 2014, and that it has sustained loss for which the remedy of specific performance, and consequential orders for restraint, damages and cost, are sought. The orders for restraint sought in paragraphs 22(b) and (c) are refused, in any event, as contravening section 15-(1)(a) of the Crown *Proceedings Act* [Cap 24], and all other remedies are refused and dismissed, on the facts of this case

ORDERS:

1. **The Order for Specific Performance of the Sale and Purchase Agreement dated 4th March 2014 sought in paragraph 22(a) is refused and dismissed;**

2. **The restraint orders sought in paragraphs 22(b) and (c) are refused and dismissed**

3. **The alternative orders for damages, costs and ancillary relief sought in paragraphs 22 (d) to (f) are refused and dismissed.**

4. **Costs to the First Defendant summarily assessed at $2000 (Two Thousand Dollars), to be paid within 14 days of this Ruling.**

Savenaca Banuve
Judge

At Suva
20th January, 2025.