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IN THE SUPREME COURT OF FIJI

Civil Jurisdiction
Action No. 208 of 1982

BETWEEN:

RAM SHANKAR (s/o Ram Kissun) on his own behalf and on behalf of all other members of SUVA BOWLING CLUB — PLAINTIFF

and

SUVA CITY COUNCIL — DEFENDANT

Mr.W.D. Morgan for the plaintiff
Mr.A.B. Ali for the defendant

JUDGMENT

Interim Judgment was delivered in this action on the 6th December, 1984 in which it was held that the defendant council was in breach of its contract to grant to the plaintiff a sublease of part of the land in Crown Lease No. 4319.

When the hearing of this action was continued on the 22nd March, 1985, Counsel agreed that the issue as to whether the plaintiff was entitled to an order for specific performance and damages or only damages for breach of contract should first be argued.

They further agreed that if damages became an issue that the quantum of damages be assessed by the Chief Registrar.

The plaintiff seeks an order for specific performance of the contract and damages for delay. The sublease according to the plaintiff should have been executed by the defendant in February, 1980. There has been a delay of over 5 years and there has been, the plaintiff alleges, escalation in costs. The sublease was for the purposes of providing another bowling green, a purpose which was known to the defendant council.

There can be no doubt that the council was aware of the purpose because one of the covenants in the proposed sublease is that the land is to be used as a bowling green. The additional green will have to be constructed.

Mr Ali on behalf of the Council has not conceded that there is an enforceable contract.

Since no order has yet been drawn up and sealed in respect of the interim judgment the Council is not in a position at present to challenge the finding of the Court by taking the matter on appeal.

Mr Ali, therefore, has presented his argument on an assumption that there is a contract between the parties that his client council is in breach of that contract. This argument is entirely without prejudice to the council's right to appeal against the interim and final judgments.

Mr Ali has referred to a number of cases which do no assist him. I will refer to some of them later. His main argument, however, is that all the terms of the sublease are not ascertainable and an order for specific performance can not be made.

He indicated that the Council was adamant that it would not grant the sublease and would, if it was in breach of contract, pay damages instead.

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Mr Ali referred to the House of Lords case Johnson & Another v Agnew (1980) A.C. 367. This was a case where after a summary order for specific performance of a sale and purchase agreement had been obtained in the Court of first instance by the vendors, the mortgagees enforced their securities by selling the properties. The vendors then moved the Court for an order that the purchasers should pay them the balance purchase price. The judge made no order on the motion. On appeal, the Court of Appeal allowed the vendor's appeal and held that the order for specific performance should be discharged and damages awarded in lieu. The House of Lords on dismissing the appeal held that although a vendor has to elect at the trial whether to pursue the remedy of specific performance or that of damages, if specific performance was ordered the contract remained in effect and was not merged in the judgment, so that, if the order was not complied with, he might apply to the court to put an end to the contract, and, if he did so he was entitled to damages appropriate to the breach of contract.

If Mr Ali is relying on this case as authority for a proposition that, since the Council is adamant that it will not grant the sublease, damages is the remedy to which the plaintiff is entitled, he has overlooked the fact that it is the plaintiff which has the right to elect whether to claim damages if the Council refuses to perform its part of the bargain. The plaintiff has elected to seek an order for specific performance and the council will find that if the plaintiff obtains that order the Council's stubbornness may not prevent the plaintiff attaining its objective of having the sublease. The court has the power to direct that someone else executed the sublease on behalf of the Council if the final outcome of this action is confirmation of this court's finding that the contract is an enforceable one and there has been a breach of contract by the Council in its refusal to complete the sublease.

I will consider Mr Ali's main argument later. At this stage I have to decide whether this is a case where specific performance of the contract should be ordered or whether it is a case where damages for breach of contract should be awarded.

There is no doubt in my mind that damages would not compensate the plaintiff. It has for years been endeavouring to obtain more land to build more bowling greens. It has not enough greens to cater for the very large membership it has. That membership will in time grow with the growth of Suva, and more greens will be required, a situation that the majority of the "city fathers" can not see or refuses to acknowledge. The Council also refuses to acknowledge that the head lease requires the Council to use the land for bowling greens and for no other purpose. Lord Diplock has this to say in Sudbrook Trading Ltd. v Eggleton and Others 3WLR 315 at p. 321:

> "The real issue is whether the court has jurisdiction to enforce the lessors' primary obligation under the contract to convey the fee simple by decreeing specific performance of that primary obligation, or whether its jurisdiction is limited to enforcing the secondary obligation arising on failure to fulfil that primary obligation, by awarding the lessees damages to an amount equivalent to the monetary loss they have sustained by their inability to acquire the fee simple at a fair and reasonable price, i.e. for what the fee simple was worth. Since if they do not acquire the fee simple they will not have to pay that price, the damages for loss of such a bargain would be negligible and, as in most cases of breach of contract for the sale of land at a market price by refusal to convey it, would constitute a wholly inadequate and unjust remedy for the breach. That is why the normal remedy is by a decree for specific performance by the vendor of his primary obligation to convey, upon the purchaser's performing or being willing to perform his own primary obligations under the contract."

Halsbury Vol. 44, Fourth Edition, paragraph 414 at p. 288 states:

> "Since land may have 'a peculiar and special value' to a purchaser, a claim for specific performance of an agreement to sell or grant an interest in land will not be refused on the ground that damages would be an adequate remedy, even if the interest to be granted is a lease for a short term....."

Mr Ali's query as to how the Court would ascertain all the terms of the sublease is either a query as to whether the known terms are complete or whether they are certain.

A most unsatisfactory aspect of this case is that the plaintiff prepared a sublease at the request of the Council incorporating all the covenants and conditions required by the council and incorporating the minor amendments required by the Director of Lands. The document was executed in duplicate by the authorised officials of the plaintiff club and sent to the Town Clerk on 22nd February, 1980 for execution by the Council.

The correspondence indicates that the lease was sent by the Council to its solicitors. The Council did not disclose the existence of this document in the affidavit sworn by the Town Clerk. It was a highly relevant document and should have been disclosed.

The lease documents have not been produced by the Council. It must be assumed that either the documents have been lost or destroyed by the Council or it has knowledge of their whereabouts and refuses to state where it is or to produce it.

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As an argument for not granting an order for specific performance the Council through Mr Ali now argues that the terms of the sublease are not known and can not be ascertained by the Court.

Fortunately, for justice to be done, that argument can not prevail. All the terms and conditions of the sublease are known and can be readily ascertained.

Virtually all the terms of the sublease are contained in the Council's letter dated 5th October, 1979 to the president of the plaintiff club and attached draft of the covenants which the Council required to be inserted in the sublease.

The land can be identified, the rental and the term has been agreed. The Council has directed which covenants it required inserted in the sublease. The land has been surveyed and the plan accepted and lodged under DP No 5025.

The amendments required by the Director of Lands are contained in Mr Rabo's letter of the 15th February 1980 written on behalf of the Director of Lands to the Town Clerk. Mrs Freeman, the Secretary of the Club incorporated those amendments in the final sublease which she retyped, had executed by the Club officials, and sent to the Town Clerk for execution by the Council.

Mr Ali stated that the four cases referred to by him refer to the method of ascertaining damages. I am not concerned with that issue. However, I have looked at the cases and they do not appear to be relevant even to the issue of damages. For example the first of the four cases Eccles v Bryan and Pollock (1948) CW 93 is a case of a sale "subject to contract" where the vendor withdrew before completion of exchange of copies of the contract.

I have now to consider whether the plaintiff is entitled to damages as well as the order for specific performance.

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Where an order for specific performance of a contract is made damages are not usually awarded in addition. Damages may, however, be awarded where special damages arise from delay in performance.

I do not consider this is a case where damages for delay should be awarded. There has been a delay of 5 years but during that time the club has not had to pay the rent or rates. The sublease is to be co-terminuous with the head sublease which expires in the next century about the year 2062. The loss of 5 years from that term is negligible.

Mr. Morgan mentioned that the cost of constructing another green will be higher now than the cost of five years ago. That may well be so but I do not consider that such loss was ever contemplated when negotiations began for a lease as far back as 1972. No basis was laid in the statement of claim for an alternative claim for special damages.

I consider that justice will be done if the Council is ordered to perform its part of the contract by granting the sublease.

The defendant requested the plaintiff to prepare the sublease and I shall direct that it prepare the sublease although it is the lessors' solicitors who usually prepare the document.

I declare that the agreement between the parties for the defendant to grant to the plaintiff a sublease of Lot 1 on DP 5025 being part of the land contained in Crown Law No. 4319 ought to be specifically performed and carried into execution and I do so order and adjudge the same accordingly.

And I further order that the plaintiff do prepare in triplicate the said sublease in registerable form incorporating therein the terms and conditions requested by the defendant and agreed to by the plaintiff and incorporating

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the amendments required by the Director of Lands as Head Lessor.

And it is ordered that the sublease in triplicate be delivered to the defendant Council for execution by its authorised officers and that the said officers do execute the said sublease in triplicate within 14 days after delivery to the defendant or such extended time as this Court shall allow and do deliver the said three executed copies to the plaintiff.

And it is ordered that the defendant do produce to the Director of Lands on request by the plaintiff its copy of the said Crown Lease No. 4319 to enable the plaintiff to register the sublease under the provisions of the Land Transfer Act. Such production to be made within 7 days of such request.

And it is ordered that if there is any dispute as to the covenants and conditions to be inserted in the sublease the terms in dispute are to be settled by the Court.

The parties are to be at liberty to apply.

The plaintiff is to have the costs of this action to be taxed on the higher scale.

R.G. KERMODE
J U D G E

SUVA
1ST May, 1985.