IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL ABU 74 OF 2014
(High Court HBC 405 of 2008)

BETWEEN	:	**MCF HOLDING TRUST**
		Appellant
AND	:	**TOM WYNYARD**
		First Respondent
AND	:	**GULF PACIFIC (FIJI) LIMITED**
		Second Respondent

Coram	:	**Calanchini P**
Counsel	:	**Mr S Valenitabua for the Appellant** **Mr P Knight for the Respondents**
Date of Hearing	:	**24 March 2015**
Date of Ruling	:	**6 May 2015**

RULING

[1] This is a renewed application for leave to appeal the interlocutory decision of the High Court delivered on 8 August 2014. In that decision the Court held that the

execution of the option agreement dated 20 May 2005 did not require the prior consent of the Minister for Lands in terms of section 6(1) of the Land Sales Act Cap 137. The application was supported by an affidavit sworn on 28 October 2014 by Livai Tuisarawere. Although the application was opposed by the Respondents there were no answering affidavits filed on their behalf. The parties filed written submissions prior to the hearing.

[2] The application was filed pursuant to section 12(2) (f) of the Court of Appeal Act Cap 12 (the Act) which provides that no appeal shall lie without the leave of the judge (of the court below) or of the Court of Appeal from any interlocutory judgment given by a judge of the High Court. Rule 26 of the Court of Appeal Rules (the Rules) provides that when an application may be made either to the court below or to the Court of Appeal, it shall be made first to the court below. The Appellant's earlier application to the High Court Judge for leave to appeal was refused in a written decision dated 14 October 2014. The application comes before me by virtue of section 20(1) of the Act which states that the powers of the Court of Appeal to grant leave to appeal may be exercised by a justice of appeal.

[3] In an action claiming specific performance of an option agreement for lease of land and or damages the Appellant as second Defendant in the court below sought an interlocutory ruling on the validity of the option agreement. The Appellant sought the determination on the basis that the option agreement was void ab initio since there was no prior consent from the Minister to enter into the option agreement as required by section 6(1) of the Land Sales Act. The issue in the interlocutory application before the learned Judge was whether an option agreement to lease freehold land was caught by section 6(1) of the Land Sales Act. In paragraph 40 of his decision the learned Judge concluded:

> *"I can find nothing in section 6(1) _ _ _ justifying me tampering with its language or straining to give its actual language other than its natural meaning. The ministerial consent was required only for contract of lease not for agreement that grants an option to lease. Option agreement taken in its entirety allowed Plaintiff to obtain necessary approvals or consent within a maximum time period of 18 months. It also obliged the owner to keep the option open for*

the period and also to give all necessary assistance in order to obtain such approvals and consent."

[4] The learned Judge concluded that the execution of the option agreement dated 20 May 2005 did not require the consent of the Minister for Lands under section 6(1) of the Land Sales Act. It is against that decision that the Appellant now renews the application for leave to appeal to the Court of Appeal.

[5] The approach of the Court when considering an application for leave to appeal is well settled and was once again discussed in the recent decision of **Lakshman –v- Estate Management Services Ltd** (unreported ABU 14 of 2012; 27 February 2015). The authorities indicate that the tests to be applied are (1) whether the interlocutory judgment of the court below raised sufficient doubt to justify its reconsideration by the Court of Appeal and (2) whether substantial injustice would result if leave were refused in the event that the interlocutory decision was wrong. In addition a distinction is drawn between an interlocutory order that relates to practice and procedure and one that affects substantive legal rights. Although not decisive it is fair to say that leave to appeal an interlocutory order that has the practical effect of determining legal rights of one or both of the parties is more likely to be granted.

[6] The first question for consideration then is whether the interlocutory judgment is attended by sufficient doubt to justify its being reconsidered by the Court of Appeal. It is convenient to commence with section 6(1) of the Land Sales Act which states:

"No non-resident or any person acting as his 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."

[7] The proviso to section 6(1) exempts from this requirement any purchase or lease of land which is less than 1 acre in area. It was not disputed that the land in question was freehold land and exceeded one acre in area. Nor was it disputed that the First Respondent was a non-resident for the purposes of section 6(1) of the Land Sales Act.

[8] The learned Judge in his interlocutory judgment concluded that the contract made on 20 May 2005 was an option agreement between the Appellant as owner and the First Respondent as developer. In consideration of the option price of $50,000.00 paid on the execution of the option agreement by the developer, the owner (the Appellant) granted to the developer an option to lease the land for a term of five years from the date of the exercise of the option. The option agreement expressly stated that the exercise of the option by the developer was to be called *"the development lease."* The option was required to be exercised by the developer within one year and was subject to the satisfactory completion and approval of a feasibility study. There was provision in the option agreement for the extension of the option period by a further six months upon payment of a sum in addition to the $50,000.00.

[9] It was not disputed that both the $50,000.00 and the additional sum for the six months extension were both paid. The Appellant was also required to obtain the necessary statutory approvals, including the section 6(1) approval during the option period. Upon exercising the option the Appellant and the Respondents were required to enter into a separate formal lease agreement, a form of which was attached to the option agreement.

[10] In his submissions, Counsel for the Appellant informed the Court that the option was exercised by the Respondents on 17 November 2006 by letter addressed to the Appellant. However the development lease itself was never executed.

[11] From the above outline of the relevant facts, it is possible to identify three points in the transaction that may have triggered the requirement for prior ministerial consent. The first is prior to the parties entering into the option agreement dated 20 May 2005. The second is prior to the exercise of the option by the Respondents on 17 November 2006. The third is prior to the parties entering into the formal lease agreement.

[12] The learned judge was called upon to consider the requirement for ministerial consent in the context of the option agreement made on 20 May 2005. This is apparent from the summons issued by the Appellant under Order 33 Rule 4 of the High Court Rules. The Appellant sought a determination on certain questions of law including:

> *"(1) Having regard to the provisions of section 6 of the Land Sales Act _ _ _ whether the said Agreement for an option to lease Kaba Island by a non-resident was or is illegal, void and unenforceable at law as contended by the 2nd Defendant or was or is the Agreement a valid, legal and enforceable contract of lease of land as contended by the Plaintiffs."*

[13] It would appear that the second part of the question was misconceived. Clearly, if the option agreement was a valid, legal and enforceable contract for the lease of land, then ministerial consent would have been required. That could not have been the position of the Respondents since according to the terms of the option agreement the requirement was to obtain the necessary approvals in the option period before exercising the option. The learned judge restricted himself to considering the first part only of the question. What the learned judge was asked to determine was whether ministerial consent under section 6 of the Land Sales Act was required to be obtained prior to the parties entering into the option agreement on 20 May 2005. It was certainly not disputed that consent had not been obtained prior to 20 May 2005.

[14] Whether there is a sufficient attending doubt in the judgment of the learned Judge in the court below depends almost entirely on the answer to the question whether an option agreement to lease is a contract to take on lease any land. If the answer is yes then the option agreement is caught by section 6(1) and in the absence of prior ministerial consent the option agreement is void. If the answer to the question is no, then there was no requirement to obtain the minister's consent prior to entering into the option agreement.

[15] An option to lease is an undertaking by the grantor of the option that he will lease certain property to the grantee if he wishes to lease it within a specified period. It may be granted by a contract between the grantor and the grantee. The contract however binds only the grantor until it is exercised. The option agreement may be described as an *"irrevocable offer"* on the part of the grantor. The grantee is under no obligation to do anything if he does not wish to exercise the option on the terms specified in the option agreement. The grantor's only obligation in the option period is to refrain from disposing of his proprietary interest to anyone other than the

grantee. When the option is exercised in accordance with its terms the original unilateral agreement (the option agreement) is converted into a bilateral agreement that creates reciprocal rights and obligations on both parties (See: The Law of Real Property – Megarry and Wade 8th Edition at pages 626 – 627).

[16] In **United Dominions Trust (Commercial) Limited –v- Eagle Aircraft Services Ltd** [1968] 1 WLR 74 Lord Denning MR stated the nature of an option agreement in this way at page 81:

> *"In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. This acceptance must correspond with the offer."*

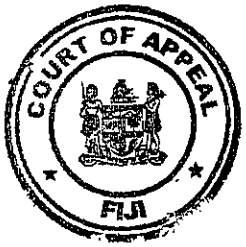
[17] Therefore it is only when the option to lease has been exercised is there a binding agreement to take a lease and in this case the terms of that lease were annexed to the option agreement. The relationship of lessor and lessee comes into being and is formally created upon the exercise of the option being the acceptance of the irrevocable offer to enter into a lease agreement. As a result it seems to me that the option agreement in this case cannot be said to constitute a contract to take a lease since that contract only came into existence upon the subsequent exercise of the option. There was no requirement for ministerial consent prior to executing the option agreement. I have therefore concluded that the learned Judge's interlocutory judgment does not contain any error that would require it to be reconsidered by the Court of Appeal.

[18] As a result the application for leave to appeal is dismissed. The Respondent is entitled to costs which are fixed summarily in the amount of $1,800.00 to be paid within 28 days from the date of this Ruling.

Orders:

(1) Application for leave to appeal dismissed.

(2) *Appellant to pay costs in the sum of $1,800.00 to the Respondents within 28 days from the date of this Ruling.*



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL