IN THE COURT OF APPEAL FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0076of 2015
(High Court Case No. HBC 045 of 2014)

BETWEEN	:	**NEW WORLD LIMITED**
		Appellant
AND	:	**VANUALEVU HARDWARE (FIJI) LTD**
		1st Respondent
AND	:	**BASHIR KHAN**
		2nd Respondent
Coram	:	**Basnayake, JA** **Almeida Guneratne, JA** **David Alfred, JA**
Counsel	:	**Mr. K. Narayan for the Appellant** **Mr. F. Haniff for the Respondents**
Date of Hearing	:	**6 May 2016**
Date of Judgment	:	**27 May 2016**

JUDGMENT

Basnayake, JA

[1] I have read in draft the judgments of Guneratne JA and Alfred JA and agree that this appeal be dismissed and the costs awarded as per the Order.

Almeida Guneratne JA

Introduction

[2] This is an appeal from a judgment of the High Court of Labasa dated 21st October 2015. The learned Judge of the High Court held that the agreement of 25th January, 2014 described in paragraphs 4 and 5 of the Appellant's (original plaintiff's) statement of claim was null and void in terms of Section 13 of the State Lands Act (Cap. 132) for want of written consent by the Director of Lands. Consequently, the learned Judge ordered that indemnity costs be paid by the Appellant to the Respondents to be assessed by the Master if not agreed upon by the parties. The Judgment is found at pages 4 to 11 of the Record of the High Court. (RHC, Vol.1).

The Basis of the Appellant's Statement of Claim

[3] The Statement of Claim averred *inter alia* thus:

> "1. By an agreement in writing dated 10th August, 2006 the Plaintiff agreed with the Defendants' to take a lease from the 1st Defendant of all the 1st Defendant's land and improvements comprised in Lease Number 26463 being Allotment 17 Section 1 Labasa Township comprising an area of 21.2 perches and Crown Lease No. 9129 being Lots 2A, 2B, and 2C, on Plan M2444 Labasa Township comprising an area of 548m together with car parking spaces loading and unloading bay and electricity substation on Lease No. 26465 at the time owned by the 2nd Defendant (now being Crown Lease No. 713833) the Demised Premises) for a period of 3 years commencing on 1st September 2006 with a right of renewal for a term of five years thereafter.
>
> 2. The parties have been involved in litigation which is still pending primarily to determine whether the right of renewal was exercised by the Plaintiff such litigation being Labasa High Court Consolidated Civil Action Numbers 12 and 30 of 2011.

3. The disputed renewed term is due to expire on 31 August 2014.

4. During the course of the above litigation and on 25th January 2014 the Plaintiff And Defendant entered into negotiations to settle the above proceedings to grant a tenancy for a further term.

5. The negotiations culminated in an agreement (the Agreement) between the parties on the same terms except for the rental and a right of renewal as the expiring agreement on the following terms:
   (i) Plaintiff will pay $26,000.00 per month for 10 years effective from 1st January 2014.
   (ii) Plaintiff will pay $50,000.00 to the 2nd Defendant to fix frontage and rear to give new face lift.
   (iii) Plaintiff will change and bring new look inside the building
   (iv) Plaintiff will fix drainage and sewage system".

Defence and Counter Claim

[4] The Respondents (original defendants) while admitting the background history averred in paragraphs 1 to 3 of the statement of claim denied paragraphs 4 and 5 thereof and in paragraph 12 pleaded thus:

> *"Further and/or alternatively, the Defendants say that in any event, the Agreement reached on 25 January 2014 or on any date thereafter – which is denied by the Defendants – is null and void as the written consent of the Director of Lands had not been first had and obtained prior to the entering of any such agreement."*

Application by the Respondents for a Preliminary Determination under Order 33 Rule 4 of the High Court Rules

[5] Upon the Respondents filing summons under Order 33 Rule 4 for a preliminary determination on the legality of the alleged new tenancy agreement claimed by the

Appellant, the learned Judge made the impugned judgment referred to in paragraph [2] above.

Interpretation of Section 13(1) of the State Lands Act (Cap 132) – the Central Issue

[6] Section 13(1) of the State Lands Act decrees as follows:

> **"13**.-(1) 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 Crown Lands Act*
>
> *(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, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*
>
> *Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."*

[7] A plain reading of the said provision shows two essential pre-conditions for it to be set in motion, one a procedural, the other substantive in nature. (i) Procedurally, for any action to be instituted, the written consent of the Director of Lands is required and (ii) substantively, for any agreement as contemplated therein to be valid, the "written consent" of the Director of Lands is required.

[8] In so far as the procedural requirement is concerned, the appellant's averment that, it "has obtained consent from the Director of Lands" (vide: paragraph 10 of the statement of claim – page 16 of the RHC, Vol.1) has been admitted by the Respondents (vide: paragraph 10 of the Statement of Defence – page 576 of the RHC, Vol. 3).

Re: Validity of the alleged agreement of 25th January, 2014 – the central issue for determination

[9] At the outset, Mr. Narayan who appeared for the Appellant submitted that, the fact that there was "no written consent" given by the Director of Lands for the said agreement is conceded. However, he was heard to submit that there was general and / or implied consent. Having said so, learned Counsel adverted to the grounds of appeal urged in the Notice of Appeal dated 22nd October, 2015 in his endeavour to attack the correctness of the High Court Judge's judgment where His Lordship had held that the agreement in question was null and void for want of written consent by the Director of Lands.

The Grounds of Appeal

[10] The grounds of appeal are contained at page 2 of Volume 1 of the RHC, viz:

> "1. The Learned Trial Judge's decision is contrary to the evidence and the developing principles in the area of law relating to provisions of Section 13 of the State Lands Act and similar legislation.
>
> 2. The Learned Trial Judge failed to properly consider and/or apply the relevant principles of law as to the determination of whether the Agreement dated 25th January, 2015 was illegal, null and void and misapplied the principles enunciated in **Prasad v Chand.**
>
> 3. The learned Trial Judge erred in law and in fact in not holding that the Director Land's consent endorsed on the Agreements entered between the Plaintiff, its predecessor's and Defendants from 1991 acted as a general consent to the Appellant as opposed to any third party to any dealings by subletting or by virtue of the holding over clause in all the agreements.

4. The Learned Trial Judge failed to properly interpret and apply the holding over clause and his decision was contrary to the evidence led by the Plaintiff.

5. The Learned Trial Judge erred in law in awarding indemnity costs in all the circumstances".

[11] Within the framework of the said grounds and elaborating on the written submissions dated 13th April, 2006 filed on behalf of the Appellant, Counsel submitted thus:

(i) From the year 1991 until the present dispute arose as many as on four previous occasions the Director of Lands had given his consent as a matter of course in relation to the dealings between the Appellant and the Respondent had had between them. In that context, counsel referred to paragraph 8 of the Respondents' written submissions. (re: page 244 of the RHC, vol. 8 and page 447 of the RHC, vol.2) and continued his endeavour by referring to "the first litigation" between the parties – where a signed consent in that context had not been present, but an injunction had been granted on a communication preferred by the Appellant's solicitors, for which reliance was placed on the authorities found in tab (6) attached to the Appellant's written submissions.

ii) Thereafter, counsel went on to the 2nd litigation that had taken place between the parties which had involved an extension of time for an indefinite period, a factor which counsel sought to highlight, adverting to as he did to page 625 of Volume 3 of the RHC.

iii) Counsel's efforts did not end there. He then proceeded to comment on a 3rd successive Agreement between the parties which again involved an extension for an indefinite period of the lessor-lessee relationship between the parties in which context he stressed on "the holding over clause" contained in Clauses 6.1 of the said agreement (vide: page 628 of Vol,3 of the RHC).

iv) To bolster that line of argument, Mr. Narayan then went on to refer to the pending litigation between the parties in the Lautoka High Court case (ABU 11 & 12 of 2011) which argument he sought to support by reference to two authorities contained in tab (5) and in tab (2) respectively attached to his written submissions.

v) From those initial premises, Counsel was heard to submit that, given the fact that consent by the Director of Lands had been given in those past dealings, there was no further consent required. He re-iterated his submissions recapped in (ii) above. Referring to the authority referred to at tab (3) of the written

submissions, counsel submitted that the, ***Prasad v Chand*** *decision referred to therein is distinguishable. The court had in that case had not made an order for eviction. (but I pause to reflect in saying that, no "implied consent" was acknowledged.)*

vi) Consequently, Counsel argued that "seeds had been sown – in regard to an argument based on 'implied consent' that remained to be germinated. Counsel sought support for that argument on the basis of the order staying execution in the present case (vide: vol.8 pf the RHC at pages 2429 – 2431).

vii) Finally, Counsel contended that, even in the absence of specific written consent" as envisaged in Section 13 of the State Lands Act – in as much as a stay order had been granted as referred to above, it was an open point as to whether even in the absence of "specific written consent" by the Director of Lands whether "implied/general consent" could be accommodated as a purposive interpretation to be placed on the provisions of Section 13 of the State Lands Act.

viii) In conclusion Counsel submitted that given the past dealings between the parties which he somewhat innovatively referred to as a historical criterion, consent was implied.

Counter- Submissions made on behalf of the Respondent

[12] Mr. Haniff's short submission was that:-

(i) The past dealings between the parties cannot be construed as constituting "implied consent" in as such as the agreement dated 25th January, 2014 was an independent transaction for which 'written consent' was required by Section 13 of the State Lands Act.

(ii) The cases of **Subramani v Prices Incomes Board (**1981) FCA 70 and **Nagabai Kewal v Manikam Reddy** [1982] FCA 30 did not accept the notion of 'implied consent'. On the contrary, those cases disapproved of an argument based on 'implied consent'.

[13] Mr. Hanif also touched on several other aspects in seeking to substantiate his submissions recapped above which I think are not necessary to go into to determine this Appeal.

Reflections on the submissions made on behalf of the parties

[14] At the outset I wish to state that I agree with Mr. Haniff's submissions recapped at paragraph (12) above. The law looks forward not back. The agreement of January 25th, 2014 was an independent transaction. How can one look into the past dealings between the parties and infer any "implied consent" when the Statute requires "written consent" by the Director of Lands?

[15] At this point, I recall the celebrated dictum in an English decision that "the common law shall supply the omission of the legislature".(per Byles, J in **Cooper v Wandsworth Board of Works** [1863] 14 CB (NS) 180. That was in the context of the applicability of the principles of natural Justice where a statute is found to be silent. But, I have not come across any authority where the courts have read into the express terms of a statute which require "written consent by a statutory functionary as including "implied consent" on the basis of "past dealings between parties." This is the argument in essence and in effect that was advanced before this court by learned counsel for the Appellant. However, the court's power and duty is to give effect to the intention of the legislature. That intention is clear from Section 13 of the State Lands Act which requires "written consent of the Director of Lands" if the agreement dated 25th January 2014, was to be given effect to.

[16] Even assuming that the seeds of a notion of implied consent had been sown (the authorities relied upon by the Appellant's counsel for that argument I have already rejected earlier); certainly this court is not inclined to allow them to germinate. That would amount to Judicial legislation which would be obnoxious to the applicable Constitutional doctrine of the separation of powers.

Re: The Issue of the Order for Indemnity Costs awarded by the Learned High Court Judge

[17] On that aspect, I had the advantage of going through my brother Justice Alfred's concurring judgment which was given to me in advance and I have nothing to add to what his Lordship has said.

Conclusion

[18] For the aforesaid reasons I hold that, there is nothing I could see in the Judgment of the learned High Court Judge that may have warranted any interference.

David Alfred, JA

[19] I have read the draft of the Judgment of my learned brother Almeida Guneratne J with which I concur. I however would add a few words of my own, in the light of the arguments advanced by Counsel on both sides.

[20] It is not open to Counsel for the Appellant to approbate and reprobate. He cannot say that consents were applied for and granted in the past, but it is not necessary for the lease in question.

[21] This is because there cannot be any implied consent of any sort when the wording of section 13(1) of the State Land Act (Cap 132) is crystal clear as to its import. This section states that it shall not be lawful for the lessee to, inter alia, sublease the land "without the written consent of the Director of Lands first had and obtained." This means the Director's consent is needed, before the lease, and it has to be in writing.

[22] I am of opinion that this Appeal can and ought to be disposed of upon the basis that when there is a legal requirement for consent, that consent has to be expressly given and

may not be inferred from the preceding circumstances. The argument that consent had been implicitly given in the previous consents falls to the ground when it is considered that every preceding lease had been expressly consented to in writing by the Director of Lands (Director) and when it is further noted the Director's representative said in his evidence that the Director did not give consent to the lease in question.

[23] I turn now to the submission of Counsel for the Respondent. It strains credulity to breaking point to suggest that when the record states a judge said "not" he actually said "now". In my judgment this argument breaks down in limine. If the judge had actually said "now", he would not then have said each case depends on its own facts and circumstances. This can only mean the law is not settled and there is no binding precedent for the courts to follow, each judge being free to decide according to the particular facts of the case before him. This argument ought not to be further entertained for to do so would be opening a Pandora's box, where it may be argued that though the record states a judge said "cheese" the word that actually fell from his lips was "chalk".

[24] Finally, I opine, that an order for costs, on an indemnity basis, can only be made, if the following 3 prerequisites are met:

(1) It has been specifically pleaded.

(2) Counsel for the party asking for such costs had warned Counsel for the other side that if he continued his argument, then the former would ask for indemnity costs.

(3) That these costs must pertain exclusively to the proceedings at hand and do not arise from extraneous proceedings or situations.

The basis why I say this is as follows:

Re: (1) This is Trite Law.

Re: (2) I refer to Kirby P's decision in: *Huntsman Chemical Company Australia Limited and Anor v International Pools Australia Pty Limited and Ors* [1995] NSWSC 26. His Honour in para 13 alluded to the practice uniformly followed by the Court of Appeal and said if the legal representatives of parties to an appeal

consider that the appeal or points in it are obviously hopeless and doomed to fail they should warn their opponents that continued prosecution of the appeal or of the hopeless points will result in an application to the court for a special costs order. (This is an order for costs on an indemnity basis).

Re: (3) I refer to para 56 of the Respondent's submission where the Appellant's conduct is described as reprehensible in wanting to occupy the premises by filing any number of applications. These were patently not the subject matter of the action before the court below.

[25] Counsel for the Respondent answered in the negative when I asked him regarding (1), (2) and (3) above, whether it had been pleaded; whether he had warned Appellant's Counsel and whether it referred to the instant proceedings. Thus it follows that the Respondent is not entitled to costs on an indemnity basis in the court below nor here. He is only entitled to party and party costs throughout. In the court below these costs are to be taxed if not agreed upon by the parties and here will summarily assessed by this court, in the sum of $4,000.00.

Orders of the Court:

1. *The judgment of the High Court is affirmed and the appeal is dismissed subject to the variation on the award of indemnity costs as contained in the concurring Judgment of Alfred, JA.*

2. *However, on the principle that costs of a suit follow the event, a sum of $4000.00 is awarded as costs of this Appeal, taking into consideration this Court's variation of the High Court Judge's award on indemnity costs and the order in dismissing this appeal.*

3. *This shall be in addition to the costs awarded by the High Court Judge.*

4. *The aforesaid sum shall be paid by the Appellant to the Respondents within 21 days of this Judgment.*

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Hon. Mr. Justice E. Basnayake
Justice of Appeal

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Hon. Mr. Justice Almeida Guneratne
Justice of Appeal

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Hon. Mr. Justice David Alfred
Justice of Appeal