

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No.: HBC 202 of 2018

BETWEEN : **AMINA BIBI** also known as AMINA ALI of 35 Ono Street, Samabula, Suva in the Republic of Fiji, Domestic Duties as the executrix and trustee of the Estate of Liakat Ali.

PLAINTIFF

AND : **DIRECTOR OF LANDS** of Nasova Road, Suva.

1ST DEFENDANT

AND : **THE ATTORNEY GENERAL** for and on behalf of the 1st Defendant and the Government of Fiji.

2ND DEFENDANT

Appearances : **Mr Salvin Nand for the plaintiff**
(Ms) Olivie Faktaufon for the defendants

Hearing : **Thursday, 21st January, 2020.**

Decision : **Friday, 01st May 2020.**

DECISION

[A] INTRODUCTION

(01) The matter before me stems from the plaintiff's, Liakat Ali's Originating Summons filed on 10-09-2018 seeking the grant of the following orders;

1. *A DECLARATION that the Director of Lands acted unfairly and beyond his powers in the way he obtained and executed the Notice to Repossess and described as stateland North West of Wailoaloa Cemetery, dated 10th day of September, 2012 against the Plaintiff since a Notice of Approval for Rezoning dated 26th of January, 2006 had been granted to the Plaintiff.*

2. *A DECLARATION that the Plaintiff's Approval for Rezoning for Hotel and Tourism Development on land described as stateland North West of Wailoaloa Cemetery is therefore still valid and binding.*
3. *A DECLARATION that the Director of Lands acted unfairly, illegally and beyond his powers in the way he later approved a Tourism Development Lease to a Abdul Aziz of Wailoaloa, Nadi on the same piece of land described as Stateland North West of Wailoaloa Cemetery, later on in 2012.*
4. *AN ORDER that the Tourism Development Lease LD Ref. 4/10/1245 issued to Abdul Aziz of Wailoaloa, Nadi on the same piece of land described as Lot 1 NDSW 1062 Land North West of Wailoaloa crematorium, be declared null and void and of no effect.*
5. *COSTS of this application and further Orders and/or relief as this Honourable Court may deem just and equitable.*

- (02) The application is made pursuant to Order 7, rule 2 of the High Court Rules, 1988 and the inherent jurisdiction of the Court. The application is supported by an affidavit sworn on - 09-09-2018 by the plaintiff, Liakat Ali.
- (03) The application was opposed by the defendants. The defendants filed an affidavit in opposition through Mr Apisai Vulwalu, the Divisional Land Manager West, Ministry of Lands and Mineral Resources.
- (04) The plaintiff, Mr Liakat Ali passed away on 01/11/2018. His spouse Amina Ali was appointed Executrix and Trustee of the estate of Liakat Ali.
- (05) On 28-06-2019 an order was made by the Court substituting Amina Ali as plaintiff in the case.

[B] THE AFFIDAVITS

- (01) The **affidavit in support** sworn by Liakat Ali is substantially as follows;

1. *That I am the within named Plaintiff in the action herein and I am duly authorized to make this affidavit on my own behalf.*
2. *That I depose that the information herein are within my knowledge and are true as well file reference made to that effect.*
3. *That on the 30th of September, 2005 the Director of Lands issued me a Notice of Approval for lease on land known as stateland North West of Wailoaloa*

Cemetery, annexed hereto and marked with letter "LA 1" is a copy of the Approval Notice of Lease.

4. *That as per the conditions of the approval I started building a shed for agricultural purposes and also started grazing goats as planned.*
5. *That later on in the year, I applied for rezoning of the said piece of land to the Director of Lands and Surveyor General which was later approved in a letter from the Ministry of Lands and Mineral Resources dated 26th January, 2006. Annexed hereto and marked with letter "LA 2" is a copy of the Approval Letter for Rezoning.*
6. *That as per the conditions of the approval for rezoning, I started work in surveying the land; that survey application was approved in 2008 by the Director of Town and Country Planning. Annexed hereto and marked with letter "LA 3" are copies of the Survey Quotation, Survey Report, Survey Plan and Approved Plan by the Director of Town and Country Planning.*
7. *That in February of 2012, hurricane and flood damaged the land and altered its geographical features resulting in the need to resurvey the land because of the damaged survey beacons.*
8. *That the flood also created three waterways on the property.*
9. *That it also caused my house to slide into one of the waterways, damaged vegetation and kill livestock.*
10. *That although I was left in such situation, I ensure that the property was safe from outsiders, especially people who took sand from the property unlawfully. Annexed hereto and marked with letter "LA 4" is a copy of my Police Statement dated 17th April, 2012.*
11. *That in September of 2012, I received a Notice to repossess the property by the Director of Lands based on the Agricultural Landlord and Tenants Act and breaches to my 1st Lease approved in 2005. Annexed hereto and marked with letter "LA 5" is a copy of the Repossession Notice.*
12. *That I am reliably informed that such Notice was obtained unfairly and illegally and that the Director of Lands had acted Ultra Vires in that I was then working on the conditions as per the approval of lease for Hotel and Tourism Development.*
13. *That upon enquiry with the Registrar of Titles Office, I also found out that the Application to Cancel Lease upon Re-entry by the Defendant hasn't been registered, hence, my Tourism Development Lease should be seen as still valid.*

Annexed hereto and marked with letter "LA 6" is a copy of the Cancellation Application.

14. *That in 2013 filed an application in the Agricultural Tribunal at Lautoka against the Defendant which was struck out for non-appearance of my Counsel in 2016.*
15. *That through that application in 2013 I found out that the Defendant had approved a Tourism Development Lease to a Abdul Aziz in a notice dated 4th December, 2012. Annexed hereto and marked with letter "LA 7" is a copy of the Approval Notice of Lease.*
16. *That I verily believe that such approval for lease to Mr Abdul Aziz wasn't done following the right procedures and I am still adamant that the Defendant had acted unfairly and illegally in granting the same.*
17. *That on my visits to the property in August of 2018, I noticed no survey being done on the said property.*
18. *That by the end of 2012, my land rent account with the Defendant was nil.*
19. *That I humbly pray to this Court to grant my application as per in Summons filed herewith.*

(02) The **affidavit in opposition** of Mr Apisai Vulawalu is substantially as follows;

1. *By virtue of my position I am qualified and authorized to swear to the particular contents of this affidavit on behalf of the 1st and 2nd Defendants. I further stated that matters herein deposed are within my knowledge unless I state that I have been informed or advised and verily believe such information or advise to be true and correct.*
2. *I swear this affidavit in response to the Plaintiff's affidavit filed on 10th September 2018 and served on the Defendants on 25th October, 2018 ('Affidavit').*
3. *The contents of paragraphs 1 and 2 of the Affidavit are noted and needs no response.*
4. *The contents of paragraph 3 of the Affidavit are agreed to. The Plaintiff was the former lessee of Stateland without the title located North West of Wailoaloa Cemetery in Nadi with an estimated area of 1.9943 hectares subject to survey ('subject land'). The subject land was issued to the Plaintiff for agricultural purposes under an approval notice of lease dated 30th September, 2005 for a term of 30 years commencing on 1st July, 2005.*

5. *In response to the contents of paragraph 4 of the Affidavit, I have no knowledge of the same.*
6. *The contents of paragraph 5 of the Affidavit are agreed to. On 26th January, 2006 permission was granted to the Plaintiff to rezone the subject land however subject to the approval of rezoning by the Director of Town and Country Planning ('DTCP').*
7. *In response to the contents of paragraph 6 of the Affidavit, I state the following:*
 - (a) *On 20th September, 2007, Cadastral Solutions Limited wrote to the Divisional Surveyor Western requesting survey instructions over the subject land. The Lands Department received this written request on 21st September, 2007. Annexed as "AV1" is a copy of the said request;*
 - (b) *On 5th December, 2007 a survey instructions were issued to Cadastral Solutions Limited to proceed with the survey of the subject land. The Plaintiff was required to seek approval from DTCP and the same was to be provided to the 2nd Defendant; and*
 - (c) *The Plaintiff had not, till the cancellation of the approval notice of lease issued to him, provided the approved survey plan to the 2nd Defendant.*
8. *In response to the contents of paragraphs 7, 8, 9 and 10 of the Affidavit, I cannot comment on the same as I am not privy to these matters except to state that the Plaintiff had failed to make such information known to the 2nd Defendant.*
9. *The contents of paragraph 11 of the Affidavit are agreed to. I further state the following:*
 - (a) *Since 2007, no DTCP approved survey plan to rezone the subject land had been submitted to the 2nd Defendant;*
 - (b) *An inspection was carried out on 27th April, 2012 which revealed that the Plaintiff had abandoned the subject land which was left uncultivated. Annexed as "AV2" is a copy of the said inspection report.*
 - (c) *As at 27th April, 2012 the Plaintiff also owed outstanding rental arrears of up to \$1,366.53. Annexed as "AV3" is a copy of the statement of account for the subject land; and*
 - (d) *As a consequence of the aforesaid; a notice to re-enter the subject land was issued to the Plaintiff on 12th June, 2012. A subsequent notice was also issued to the Plaintiff on 10th September, 2012. Annexed as "AV4" are copies of the said notices.*

10. *The contents of paragraph 12 of the Affidavit are denied. I reiterate that the permission to rezone was subject to the Plaintiff obtaining DTCP approval. Since 2007, no approval was submitted to the 2nd Defendant and as such the subject land remained zoned for agricultural purposes. The failure of the Plaintiff to cultivate the subject land and pay outstanding rental arrears justified the re-entry.*
11. *The contents of paragraph 13 of the Affidavit are denied. No tourism development lease had been issued to the Plaintiff. I further state that the documents at annexure "LA 6" could not be registered with the Registrar of Titles as the subject land is state land without title under an approval notice of lease.*
12. *The contents of paragraph 14 of the Affidavit are agreed to. I further state the following:*
 - (a) *On 26th September, 2013 the Plaintiff had filed an application for relief against the forfeiture with the Agricultural Tribunal Annexed as "AV5" is a copy of the said application;*
 - (b) *On 17th February, 2016 the Agricultural Tribunal struck out the Plaintiff's application for non-appearance; and*
 - (c) *On 8th June, 2016 the Agricultural Tribunal struck out the Plaintiff's application to reinstate his application. Annexed as "AV6" is a copy of the ruling by the Agricultural Tribunal.*
13. *The contents of paragraph 15 of the Affidavit are agreed to only, to the extent that the subject land was issued to Mr Abdul Aziz for a five year term for tourism purposes. This following re-entry of the subject land as a consequence of the Plaintiff's failure to cultivate the subject land and pay outstanding rental arrears.*
14. *The contents of paragraph 16 of the Affidavit are strongly denied and I reiterate paragraph 13 herein.*
15. *In response to the contents of paragraphs 17 and 18 of the Affidavit, I state that the outstanding rental arrears were not cleared at the time of re-entry.*
16. *In response to the contents of paragraph 19 of the Affidavit, the Defendants humbly seek the following order of this honourable Court:*
 - (a) *An order dismissing the Plaintiff's Originating Summons filed on 10th September, 2018;*
 - (b) *An order for costs against the Plaintiff; and*

(c) Any other order this honourable Court deems fit and proper.

[C] **CONSIDERATION AND THE DETERMINATION**

(01) On the 30th September, 2005 the Director of Lands has issued “Approval Notice of Lease” without title, in favour of Liakat Ali (deceased) in relation to a piece of Crown Land known as stateland North West of Wailoaloa Cemetery, in the District of Nadi, in the province of Ba, for an area of 1.9943 hectares (subject to survey) for a period of 30 years from 01st July, 2005. [Annexure LA-1 referred to in the affidavit of Liakat Ali].

(02) The lease was over Crown Land for agricultural purpose. The agreed rent was \$250.00 per annum.

(03) The lease is subject to the conditions set out in the Crown Lands (Leases and Licenses) Regulations. The lease is a protected lease under the provisions of the Crown Lands Act.

(04) Clause (9) of the lease provides:

“The lessee shall plant at least one half of the demised land suitable for cultivation with crops in a good and husband-like manner within the first two years of this lease and three quarters within four years and the said minimum of three-fourths of the land shall be kept under cultivation as aforesaid for the remainder of the term”.

(05) A lease is a species of contract, as French CJ, Hayne and Kiefel JJ said in **“Willmott Growers Inc v Willmott Forests Ltd (Receivers and Managers appointed) (In liqn)”**¹.

(06) Clause (28) of the lease provides:

“This contract is subject to the provisions of the Agricultural Landlord and Tenant Act and may only be determined whether during its currency or at the end of its term, in accordance with such provisions. All disputes and differences whatsoever arising out of this contract for the decision of which the Act makes provisions shall be decided in accordance with such provisions”.

(07) Clause (29) of the lease defined what would constitute an event of default by the lessee. Clause (29) provides;

¹ (2013) 251 CLR 592,604; [2013] HCA 51 at 39

“In the event of any breach by the lessee of any covenant or condition in this lease the lessor may enter upon and take possession of the lease or may, at the discretion of the Minister, impose a penal rent in respect of such breach”.

- (08) On the 26th January, 2006 the Director of Lands has granted permission to the Lessee, Liakat Ali to rezone the area from residential to Hotel/Tourism development subject to the approval of rezoning by Director of Town and Country Planning. [Annexure LA-2 referred to in the affidavit of Liakat Ali].
- (09) “Cadastral Solutions Limited” had carried out a field survey on the land at the request of Liakat Ali, the Lessee. [Annexure LA-3 referred to in the affidavit of Liakat Ali].
- (10) On the 20th September, 2007 Cadastral Solutions Limited wrote to the Divisional Surveyor Western requesting survey instructions over the Crown Land. [Annexure AV-1 referred to in the affidavit of Apisai Vulawalu].
- (11) Apisai Vulawalu asserted in paragraph 7(b) of the affidavit in opposition that on the 05th December, 2007 survey instructions were issued to Cadastral Solutions Limited to proceed with the survey on the crown land.

The Lessee, Liakat Ali has not denied receiving any such survey instructions.

- (12) The letter (Annexure LA-2) asserted that the permission granted to the plaintiff to rezone the area from residential to Hotel/Tourism development was subject to the approval of rezoning by the Director of Town and Country Planning. The letter continued that *“on approval of rezoning by the Director of Town and Country Planning, you will be issued a development lease for term ranging from 2 to 5 years and upon satisfactory completion of the development, a 99 year lease for Hotel/Tourism development will be issued”*.
- (13) **The defendants allege that the plaintiff had not, until the cancellation of the approval notice of lease issued to him, provided the approved survey plan to the first defendant. The plaintiff did not challenge this.** Therefore, as Counsel for the defendants argued, the subject Crown Land remained zoned for agricultural purposes. It is common ground on the pleadings that no Hotel/Tourism development lease had been issued to the plaintiff.
- (14) On the 12th June, 2012 and 10th September, 2012 a Notice to re-enter the subject land was issued to the plaintiff by the first defendant on the following grounds;
 - (A) The land was being deserted, non- occupied and not cultivated.
 - (B) The plaintiff owes rent of \$1,510.28 for a period more than 12 months.
- (15) As I understand the averments in the plaintiff’s affidavit in support of summons, the plaintiff claimed that he had been wrongly evicted and he challenges the validity of the

Notice to re-enter on the following grounds; (reference is made to paragraph (12), (13) and (18) of the affidavit in support of Summons).

(12) *That I am reliably informed that such notice was obtained unfairly and illegally and that the Director of Lands had acted Ultra Vires in that I was then working on the conditions as per the approval of lease for Hotel and Tourism Development.*

(13) *That upon enquiry with the Registrar of Titles Office I also found that the application to cancel lease upon re-entry by the defendant hasn't been registered, hence, my Tourism Development Lease should be seen as still valid*

(18) *That by the end of 2012, my land rent account with the defendant was nil.*

[Emphasis added]

(16) I cannot acknowledge the force of this criticism. I find the plaintiff's challenges on the Notice to re-enter unconvincing because;

(A) Since 2007, no DTCP approved survey plan to rezone the subject land had been submitted to the first defendant.

(B) The subject land was inspected on 27-04-2012. **Upon inspection, it was found that the land is lying idle, overgrown with shrubs and bushes. This is in clear violation of clause (09) of the agricultural lease condition which provides;**

“The lessee shall plant at least one half of the demised land suitable for cultivation with crops in a good and husband-like manner within the first two years of this lease and three-quarters within four years and the said minimum of three-fourths of the land shall be kept under cultivation as aforesaid for the remainder of the term”.

Clause (29) of the lease defined what would constitute an event of default by the lessee. Clause (29) provides;

“In the event of any breach by the lessee of any covenant or condition in this lease the lessor may enter upon and take possession of the lease or may, at the discretion of the Minister, impose a penal rent in respect of such breach”.

The inspection report at annexure marked AV-2 referred to in the affidavit of Apisai Vulawalu, continued that “*There is a structure on site being dilapidated to ruins hence the whereabouts of the lessee are not known when enquiring within the locality*”.

- (C) As at 27-04-2012, the plaintiff owed outstanding rental arrears of \$1,366.53 for a period of not less than twelve months. [See, annexure AV-3 – the statement of Account). The outstanding rental arrears were not cleared at the time of the re-entry on 10-09-2012.
- (D) Therefore, having regards to the continuing and persistent failure to meet his obligations under the Approval Notice dated 30.09.2005 insofar as deserting such holding and leaving it uncultivated and unoccupied for a period of not less than twelve months coupled with his failure to pay rent for more than twelve months, the landlord’s re-entry was valid, because it was entitled to terminate the lease for breaches of the lease by the tenant.
- (17) Therefore, as Counsel for the defendants argued, the Notice to re-enter is the possible legal consequence of the failure of the plaintiff to cultivate the land and the failure to clear the rental arrears.
- (18) On the hearing of the plaintiff’s summons, out of the blue, Counsel for the plaintiff made a scathing attack on the Notice to re-enter issued by the first defendant. I do not intend to set them out in detail or verbatim. However, as I understand his submissions, the gist of the issues raised are that; (i) The Director of Lands failed to consider the pre-requisites of Section 105 of the Property Law Act (2) The Notice to re-enter was not properly served on the plaintiff. (3) The procedure and safeguards in Section 37 of the Agricultural Landlord and Tenancy Act have not been complied with. (4) Denial of natural justice.
- (19) This is not unsatisfactory. There is no notice at all in the plaintiff’s affidavit in support of summons in relation to the plaintiff’s stance. I cannot accept that it would be in any way proper to entertain such a bold submission which effectively sprung on the defendants and the Court at the last minute. I get the distinct impression that Counsel for the plaintiff’s argument and scathing attack on the Notice to re-enter issued by the first defendant, was formulated and perhaps conceived as the proceedings developed.
- (20) Be that as it may, the contract of tenancy constituted by the “Approval Notice of Lease” (Annexure LA-1 referred to in the affidavit of Liakat Ali) is governed by the provisions of Agricultural Landlord and Tenant Act [Cap 270] [ALTA] as the land was ‘agricultural land’ within the meaning of Section 2 of ALTA. Section 2 of the ALTA defines agricultural land means land, together with any buildings thereon, used or proposed to be used predominantly for the growing of crops, dairy farming, fruit farming, forestry, horticulture, bee keeping, poultry keeping or breeding or the breeding, rearing or keeping of livestock. Section 3 (1) of ALTA further confirms that ALTA applies to all

agricultural land in Fiji subject to certain exceptions which do not concern the subject land in this case.

- (21) ALTA is a special Act which deals with rights in agricultural land. Section 105(2) of the Property Law Act is a general law empowering the High Court to grant relief against forfeiture of a lease. However, Section 105(8) (e) of the Property Law Act provides that Section 105 does not extend to any contract of tenancy of agricultural land which is subject to the provisions of ALTA. ALTA establishes a special regime for the regulation of contracts of tenancy of agricultural land. Therefore, it is a complete misstatement of law for the plaintiff to say that “*the Director of Lands should comply with the prerequisites of Section 105 of the Property Law Act and Section 57 of the Land Transfer Act before issuing Notice to re-entry*” .
- (22) It is true that the Notice to re-entry had been issued pursuant to Section 57 of Land Transfer Act, Section 105 of Property Law Act and under Section 37(1) (a) of Agricultural Landlord and Tenant Act.
- (23) The subject land was inspected on 27-04-2012. Upon inspection, it was found that the land is lying idle, overgrown with shrubs and bushes. This is in clear violation of clause (09) of the agricultural lease condition which provides;

“The lease shall plant at least one half of the demised land suitable for cultivation with crops in a good and husband-like manner within the first two years of this lease and three-quarters within four years and the said minimum of three-fourths of the land shall be kept under cultivation as aforesaid for the remainder of the term”.

Clause (29) of the lease defined what would constitute an event of default by the lessee. Clause (29) provides;

“In the event of any breach by the lessee of any covenant or condition in this lease the lessor may enter upon and take possession of the lease or may, at the discretion of the Minister, impose a penal rent in respect of such breach”.

The inspection report at annexure marked AV-2 referred to in the affidavit of Apisai Vulawalu, continued that “*There is a structure on site being dilapidated to ruins hence the whereabouts of the lessee are not known when enquiring within the locality*”.

The Director of Lands is not required to issue any notice to the plaintiff who had ‘deserted the land and left it uncultivated and unoccupied for a period of 12 months or more’. Under Section 37(1) (a) of ALTA the Director of Lands is empowered to re-enter the land and terminate the lease without giving any notice to the plaintiff-lessee. There was an entitlement given under Section 37(1)(a) to re-enter and forfeit the lease without giving any Notice.

Section 37 (1) (a) of ALTA is in the following terms;

Termination by Landlord

37(1) A landlord may terminate his contract of tenancy and may recover possession of an agricultural holding –

(a) without notice where the tenant deserts such holding and leaves it uncultivated and unoccupied for a period of 12 months or more.

- (24) The Court of Appeal held in “**Suma Raju v Bhajan Lal**”² that ALTA is a special Act dealing with rights in agricultural land. In that case the Court of Appeal further held that a contract of tenancy under ALTA was a creature of statute and could only be determined in the manner provided by the ALTA. As stated, ALTA establishes a special regime for the regulation of contracts of tenancy of agricultural land. Under that regime Agricultural Tribunals are empowered to grant relief against forfeiture. See; Section 22(g) and 37(2).
- (25) Section 38(2) further empowers the Agricultural Tribunal to grant relief against forfeiture in such terms, if any, as to costs or expenses as the Tribunal in the circumstances of the case thinks fit.
- (26) For the sake of completeness, Section 22(g), 37(2) and 38(2) of ALTA are reproduced below in full.

22.(g) grant relief against eviction, re-entry or forfeiture in respect of any holding whether created or in existence before or after the commencement of this Act;

37. (2) (a) The tenant may, at any time before the expiry of a notice lawfully given and served upon him under the provisions of paragraphs (b) and (c) of subsection (1) and of section 39, apply to the tribunal for relief against forfeiture and pending the award of the tribunal, such tenant shall not be evicted.

38.(2) In case of relief, the tribunal may grant it on such terms, if any, as to costs or expenses as the tribunal in the circumstances of each case thinks fit.

- (27) **It follows that the only rights which were available to the deceased lessee to apply for relief against forfeiture were those specified in ALTA.**
- (28) On the 26th September, 2013 the plaintiff had filed an application for relief against forfeiture with the Agricultural Tribunal (Annexure AV-5). On the 17-02-2016, the Agricultural Tribunal struck out the plaintiff’s application for non-appearance. On 08-

² (1976) 22 FLR 163 at 176.

06-2016, the Agricultural Tribunal dismissed the plaintiff's application to re-instate his application. (Annexure AV-6) **This brought to an end the plaintiff's only right to relief against forfeiture. The only right which the plaintiff had to apply for relief against forfeiture arose under ALTA.**

- (29) The plaintiff has no subsisting right to pursue a claim for relief against forfeiture under the general law, viz, Section 105(2) of the Property Law Act. Because Section 105(8)(e) provides that Section 105 does not extend to any contract of tenancy of Agricultural land which is subject to the provision of ALTA. Quite clearly, as Counsel for the defendants submits, the plaintiff encounters a fatal problem under Section 105(8) (e) of the Property Law Act. To pursue a claim for relief against forfeiture under the general law would be a serious abuse of process. The only right to relief against forfeiture which was available to the plaintiff was those specified in ALTA. [See, sections 22(g), 37(2) and 38(2)].

For these reasons, I consider that the Originating Summons seeking relief against forfeiture should be dismissed with costs. So in the end , I am driven to conclude that counsel for the defendants is right.

- (30) On the hearing of the plaintiff's summons, Counsel for the defendants made an alternative submission³. She submitted that;
- The plaintiff has abandoned the subject land for more than 12 months
 - Left it uncultivated and unoccupied.
 - This clearly indicates his unwillingness to render substantial performance of his obligation under the approval notice of lease.
 - Therefore, Section 38 ALTA Notice is not necessary to effect re-entry and forfeiture of the lease. There is a common law right to terminate the lease without such notice being given. Counsel for the defendants argued that the first defendant was entitled to re-enter and take possession of the demised premises as it did on 10-09-2012.

- (31) My attention was drawn to the following decisions;

- **Wash Investments Pty Ltd & Others v SCK Properties Pty Ltd and Others⁴**
(Supreme Court of Queensland decision)

³ The alternative plea based on repudiation of the contract in the nature of a renunciation had not been pleaded in the defendants' pleadings. There was no alternative plea that the contract of tenancy was able to be terminated even absence of notice under Section 38 for the plaintiff's repudiation of the contract.

⁴ (2016) QCA 258 [Supreme Court of Queensland]

- **Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Limited**⁵

- (32) A lease is a species of contract, as French CJ, Hayne and Kiefel JJ said in Will Mott Growers INC v Willmott Forests Ltd (Receivers and Managers appointed) (In Liq).⁶ Therefore, as Mason J said in Progressive Mailing House Pty Ltd v Tabali Pty Ltd,⁷ the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases.” In that case a lessor was held to be entitled to damages for loss of bargain where it had re-entered in consequence of the lessee’s repudiation in asserting that, in the circumstances which then existed, it was under no liability to pay rent. It was held that the right to terminate the lease for the lessee’s repudiation was not excluded by an express term which entitled the lessor to re-enter for the lessee’s breach.

As the plurality⁸ said in Koopahntoo Local Aboriginal Land Council v Sanpine Pty Ltd,⁹ the term repudiation is used in different senses. Their Honours said:¹⁰

“Firstly, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfill it only in a manner substantially inconsistent with the party’s obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. ... Secondly, it may refer to any breach of contract which justifies termination by the other party. ... There may be cases where a failure to perform, even if not a breach of contract which justifies termination by the other party. ... There may be cases where a failure to perform, even if not a breach of an essential term ... manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but willingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.”

The question here is whether the plaintiff in the case before me evinced an unwillingness or an inability to render substantial performance of the contract – Approval Notice of Lease.

⁵ (2007) 233 CLR 115, 135, (2007) HCA 61 at 64.

⁶ (2013) 251 CLR 592, 604; [2013] HCA 51 at [39].

⁷ (1985) 157 CLR 17, 29.

⁸ Gleeson CJ, Gummow, Heydon and Crennan JJ.

⁹ (2007) 233 CLR 115, 135; [2007] HCA 61 at [44].

¹⁰ *ibid.*


- (33) In Shevill v Builders Licensing Board¹¹ it was said that “Repudiation of a contract is a serious matter and is not to be lightly found or inferred”.
- (34) The facts of “Wash Investments Pty Ltd” (supra) are very different from the present case.
- (35) In “Wash Investments”, the applicant’s lawyers wrote to the respondent in terms which the trial judge found to be a repudiation of the lease. The Court held that the letter is a deliberate and unequivocal notification by the first applicant that it no longer intended (nor could) fulfill the terms of the lease in a manner substantially consistent with its terms.
- (36) In the case before me, there is no unambiguous statement or communication from the plaintiff which would suggest that he is unable to comply with the lease, particularly the obligation to cultivate the land and to pay rent in the amounts which the lease required. It is difficult for me to characterize the conduct of the plaintiff which preceded the re-entry and forfeiture of the lease (in the nature of abandoning, leaving it uncultivated and unoccupied) as an admission of an inability to perform the contract. They may not constitute repudiation. Therefore, I cannot accept the alternative submission of the defendants.
- (37) Finally, the subsequent approval of a tourism development lease to a third person was at the discretion of the Director of Lands having lawfully affected re-entry and forfeiture of the lease.

[D] ORDERS

- (01) The plaintiff’s Originating Summons filed on 10-09-2018 applying for relief against forfeiture is dismissed.
- (02) Considering the circumstances of this case, I make no order as to defendants’ costs on this application.



At Lautoka
Friday, 01st May 2020


.....01/05/2020.
Jude Nanayakkara
[Judge]

¹¹ (1982) 14 CLR 620, 633.