

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC 140 of 2014**

**BETWEEN** : **SOUTH SEAS COLD STORAGE CO., LIMITED** a company duly incorporated in the Fiji Islands and having its registered office in Suva.

**PLAINTIFF**

**AND** : **FIJI SHIPS AND HEAVY INDUSTRIES LIMITED** a company incorporated in the Fiji Islands and having its registered office at Suva and a Government commercial company duly established under the Public Enterprises Act 1996.

**DEFENDANT**

**BEFORE** : Justice Riyaz Hamza

**COUNSEL** : Mr. Shelvin Singh for the Plaintiff  
Mr. Ramesh Prakash for the Defendant

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**RULING**

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**INTRODUCTION AND BACKGROUND**

[1] The Plaintiff commenced this action by way of a Writ of Summons, issued on 22 May 2014.

[2] As per the Statement of Claim filed the Plaintiff submits that by an agreement dated 25 July 2011, the Plaintiff agreed to lease part of the property comprised in Crown Lease No. 16260, being SO Plan No. 3731, Lot 1, from the Defendant, for a term of 15 years, at the annual rent of F\$61,920.00.

- [3] The Plaintiff states that at all material times the Defendant was aware that the Plaintiff's purpose of taking the said lease was to construct a fish processing plant for sale of processed fish to Pacific Fishing Company Limited.
- [4] It is further submitted by the Plaintiff that by letter dated 29 January 2014, the Defendant refused its permission to build and unlawfully and in breach of the said lease and in breach of Section 91 of the Property Law Act (Chapter 130) terminated the lease by re-entry.
- [5] Accordingly, the Plaintiff claims the following reliefs against the Defendant:
- (a) A declaration that the Notice of Termination of Lease by Re-entry, dated 29 January 2014, given by the Plaintiff to the Defendant is unlawful, null, void and of no legal effect.
  - (b) An order for specific performance of the Lease Agreement dated 25 July 2011.
  - (c) Further or alternatively, an injunction restraining the Defendant whether by itself, its agents, servants, agents or otherwise howsoever from dealing with the property comprised in Crown Lease No. 16260, being SO Plan No. 3731, Lot 1, the subject of the Lease Agreement, dated 25 July 2011, until further Orders of the Court.
  - (d) Further and/or alternatively, special and general damages for breach of contract.
  - (e) Damages for contravention of the Commerce Commission Decree 2010.
  - (f) Such further and/or other relief as this Honourable Court deems fit and proper.
  - (g) Costs of and incidental to this action on a full and indemnity basis.

- [6] On 1 August 2014, the Defendant filed their Statement of Defence. Therein the Defendant prays that the Plaintiff's claim be dismissed with costs.
- [7] A Pre-Trial Conference had been held between the Solicitors for the Plaintiff and the Defendant and the Minutes of the said Pre-Trial Conference have been filed in Court on 11 August 2015.
- [8] The Minutes of the Pre-Trial Conference record the following:

**AGREED FACTS**

1. The Plaintiff is a limited liability company having its registered office at Suva.
2. The Defendant is a limited liability company having its registered office at Suva and is also a Government owned commercial company duly established under the Public Enterprise Act 1996.
3. By an Agreement dated 25 July 2011, the Plaintiff agreed to lease part of the property comprised in Crown Lease No. 16260, being SO Plan No. 3731, Lot 1 ("**Lease**") from the Defendant for a term of 15 years at the annual rent of F\$61,920.00.
4. As required under Sections 6 and 7 of the Land Sales Act (Chapter 137), the Minister of Lands gave his consent to the said Agreement on 3 November 2011, which consent was inter-alia subject to the following terms:
  - i) That the transfer of the said property be completed within three (3) months from the date this consent is given.
  - ii) That the funds for the project be brought from offshore.
  - iii) That the proposed developments on the said property be completed within two (2) years from the date of transfer.
  - iv) That clearance be obtained from the Commissioner of Inland Revenue and the Governor, Reserve Bank of Fiji.
  - v) That FTIB approval be obtained if the said property will involve any commercial/business activity.
  - vi) That the consent of Director of Lands be obtained.

5. By letter dated 16 September 2013, the Defendant, through its solicitors Messrs. Lateef & Lateef served on the Plaintiff a Notice of Breach of the Lease Agreement for not having constructed a building contrary to the lease terms and to the satisfaction of the Defendant.
6. By letter dated 26 September 2013, the Plaintiff through its solicitors Messrs. Parshotam Lawyers responded to the said Notice of Breach of Lease denying any breach of the lease conditions.
7. By letter dated 2 October 2013, the Defendant sought the Plaintiff's plans for approval as requested by its Board under clause 16 of the Lease agreement.
8. On 17 October 2013, the Plaintiff provided its plans to the Defendant for its consideration.
9. By letters dated 1 November 2013 and 11 November 2013, the Plaintiff followed up for the Defendant's consent for its proposed development.
10. By letter dated 12 November 2013, the Defendant advised that its board was deliberating on the consent and that once a decision was made, it would be communicated to the Plaintiff.
11. At all material times, the Plaintiff duly paid rent and rent was received by the Defendant without any condition.
12. At all material times, the Plaintiff and the Defendant were entities to which the Commerce Commission Decree 2010 applied and other law relating to Companies.
13. By letters dated 28 November 2013 and 17 January 2014, the Plaintiff, by its solicitors, followed up with the Defendant for consent to build but without response from the Defendant.
14. By letter dated 28 January 2014, the Plaintiff put the Defendant on notice that it considered the delay by the Defendant unreasonable and that it was now to file proceedings in Court to compel the Defendant to provide its consent to the proposed development works.

15. The Defendant took possession of the premises by a notice of re-entry dated 29 January 2014.

### **ISSUES**

1. Whether the Defendant was aware that the Plaintiff had obtained the lease to construct a fish processing plant for sale of processed fish to Pacific Fishing Company Limited?
2. Was the Defendants notice of breach and termination of lease issued?
3. Whether by letter dated 29 January 2014, the Defendant refused the Plaintiff permission to build a fish processing plant and why it was refused?
4. Whether Section 105 of the Property Law Act applies to the plaintiff's claim?
5. Whether the Defendant breached Section 105 of the Property Law Act by terminating the lease by re-entry?
6. Were the grounds for re-entry by the Defendant proper?
7. Whether the Plaintiff was ready, willing and able to attend to its proposed development at all material times or was it only after it was served with the Notice of Breach?
8. Whether at the material time, the Defendant was aware that the Plaintiff required a larger area of land from the Defendant and had been in negotiations for the land?
9. Whether at the material time, the Defendant was aware that as a result of the failure to acquire a larger piece of land, one of the shareholders of the Plaintiff withdrew from the project and was subsequently substituted by a new stakeholder. Whether the Plaintiff was in breach of its lease dated 25 July 2011?
10. Whether at the time plans were provided for approval, the Defendant was within the 2 years' time for development work as required under the Lease?

11. Whether, if the Plaintiff was in breach as alleged, which is denied, the said breach was capable of being remedied and the Defendant failed to require the alleged breach to be remedied?
12. Whether, the Defendant accepted the Plaintiff's plans for the purposes of approval subsequent to the notification of breach, re-entry and taking possession without any condition as if there was no breach?
13. Whether times, by accepting payment of rent without condition, the Defendant accepted that there was no breach of lease condition by the Plaintiff or was it accepted without prejudice to its rights?
14. Whether the Defendant terminated the lease agreement when there was no breach of the Lease?
15. Whether the said notice of termination by re-entry was issued immediately on the Plaintiff giving notice of application to Court to compel the Defendant to give its consent?
16. Whether the Defendant's conduct in events leading to the termination of the said Lease Agreement amounts to misleading and deceptive conduct and unconscionable conduct as defined in the Commerce Commission Decree?
17. Whether the termination of the Lease was unlawful and has thereafter caused the Plaintiff to lose its opportunity to build its proposed fish processing factory within the 2 years required under the Lease? Has this loss of opportunity caused the Plaintiff loss in profit?
18. Whether the Plaintiff has suffered any loss and damage as a result of the Defendant's conduct as particularized in paragraph 15 of the Claim?
19. Whether the Defendant's conduct was unconscionable and in breach of Sections 75 and 76 of the Commerce Commission Decree 2010?
20. Whether the Plaintiff is entitled to exemplary damages against the Defendant for allegedly terminating the Lease is unlawfully?
21. Whether the Director of Lands via letter dated 05/03/14 gave the Defendant consent to institute proceedings against the Defendant?

[9] This matter was fixed for trial on 9 May 2016 and 10 May 2016. On 9 May 2016, the Counsel for the Defendant submitted to Court that prior to this matter being heard through evidence of witnesses, the Defendant wishes to raise certain questions as preliminary issues to be determined by Court, pursuant to Order 33, Rule 3 of the High Court Rules 1988, which allows a point of law to be raised and argued prior to trial.

[10] The preliminary points of law which the Defendant submits ought to be determined first are as follows:

1. Is there compliance with the statutory requirements stipulated in Section 6 of the Land Sales Act?
2. Is the Lease Agreement valid and enforceable in law or is it void *ab initio* in light of the fact that the Ministerial Consent in respect of this Lease was applied for and granted after the Lease had commenced?

[11] Hearing into the said preliminary issues of law was taken up before me on 10 May 2016 and 30 May 2016. Both Counsel for Plaintiff and Defendant were heard. The parties also filed detailed written submissions, and referred to case authorities, which I have had the benefit of perusing.

### **LEGAL PROVISIONS AND ANALYSIS**

[12] This preliminary application has been made in terms of Order 33, Rule 3 of the High Court Rules 1988. Order 33, Rule 3 provides:

*“3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”*

[13] Counsel for the Defendant submitted to Court that in terms of Order 33, Rule 3 of the High Court Rules a point of law can be raised at any time of the trial and that it need not necessarily be pleaded. In support of this contention he referred to the case of

***Niranjan & Sons v Attorney-General*** [1957] FJLawRp 13; [1956-1957] 5 FLR 78 (31 July 1957); where Chief Justice Hyne stated as follows:

*“Both Counsel addressed the Court at some length.*

*In addressing the Court Mr. Lewis (Counsel for the Defendant) first took certain objections in law before proceeding to deal with the law applicable to the case generally.*

*He quoted Buller and Leake 10th Edition p. 50, in support of his right to raise points of law at that stage. He cited the following:*

*“Either party is entitled to raise on his pleading any point of law and in a proper case to have it argued and disposed of before the trial.”*

*This was not done in the present case, but still citing from Buller and Leake at p. 50, he submitted further that-*

*“Neither party is bound to place on his pleading an objection on a point of law. Order XXV Rule 2 merely says that he shall be entitled to do so. At the trial he may urge any point of law he likes whether raised on the pleading or not ...”*

*If the defendant wants to avail himself of his point of law in a summary way he must demur, but if he does not demur he does not waive an objection and may say at the trial that the claim is bad on the face of it.”*

[14] The Counsel also referred to the case of **Denarau Corporation Ltd v Vimal Deo** [2015] FJHC 112; HBC32.2013 (24 February 2015); where His Lordship Justice Ajmeer held:

*“With due respect to counsel, this is not an application to set aside proceedings for irregularity hence O.2, r.2 (2) has no application. The defendant has taken a preliminary objection in relation to evidence which the plaintiff attempts to lead against the defendant. Preliminary objection on point of law could be taken at any stage of the proceedings before judgment or order is given. Moreover, evidence must be objected at the time when it is sought to bring. The plaintiff attempts to lead or read affidavit evidence in these proceedings. So the defendant is entitled to take objection in relation to that affidavit on the ground that it is defective. There is no need for the defendant to file a formal application to raise such objection.”*



[15] Section 6 of the Land Sales Act is reproduced below:

*“6.-(1) 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:*

*Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.*

*(2) The Minister responsible for land matters may require any application for his consent mentioned in subsection (1) to be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms whether by way of imposition of bond or otherwise upon which such consent is conditional.*

*(3) No appeal shall lie against a decision by the Minister responsible for land matters made under this section.*

*(4) The provisions of this section shall not apply to dealings in native land, as defined by the Native Land Trust Act, or to the original grant of any lease or licence by the Native Land Trust Board (Cap. 134).”*

[16] The preliminary objection taken up by the Counsel for the Defendant is that the Lease Agreement between the parties was entered into on 25 July 2011, whereas the Minister of Lands granted his consent to the Agreement only subsequently, on 3 November 2011. The Defendant submits that this is not in compliance with Section 6(1) of the Land Sales Act. Therefore, that the Lease Agreement is void *ab initio* in light of this fact.

[17] The fact that the Lease Agreement is dated 25 July 2011 and the fact that as required under Sections 6 and 7 of the Land Sales Act, the Minister of Lands gave his consent to the said Agreement on 3 November 2011, are facts agreed between the parties. This fact is further confirmed when examining the Lease Agreement, a copy of which was tendered to Court by the Defendant during the hearing of this matter [As part of the Defendant’s Bundle of Documents]. In terms of the said Lease Agreement, the term of the lease is for a period of 15 years, commencing 1 July 2011.

[18] In terms of Section 6(1) of the Land Sales Act the prior consent in writing of the Minister of Lands is required for a non-resident or any person acting as his agent, to make any contract to purchase or to take on lease any land. A "non-resident" has been defined in the Act to mean "an individual or a company not a resident as hereinafter defined". The term "resident" has been defined as: "in the case of an individual means an individual who is a Fiji citizen or an individual whose home is in Fiji and who has been resident in Fiji for not less than seven years at the date of the dealing or in the case of a company means a company, the controlling interest in which is held by a resident or residents as hereinbefore defined".

[19] I must emphasize at the very outset that there is no material available before this Court (at this point in time) to establish that the Plaintiff Company is a non-resident Company, as defined in the Act or to establish that the controlling interest in the Plaintiff Company is held by a non-resident. None of the pleadings filed in the case specifically refer to the fact that the Plaintiff Company is a non-resident Company.

[20] The Statement of Claim and the Minutes of the Pre-Trial Conference (Agreed Facts) makes reference only to the fact that the Plaintiff is a limited liability company having its registered office at Suva. And similarly, that the Defendant is a limited liability company having its registered office at Suva and is also a Government owned commercial company duly established under the Public Enterprise Act 1996.

[21] Even the Lease Agreement makes no mention that the Plaintiff Company is a non-resident Company.

[22] The document titled Application for Consent to a Dealing (in terms of Sections 6 and 7 of the Land Sales Act), a copy of which was tendered to Court by the Defendant during the hearing of this matter [As part of the Defendant's Bundle of Documents], describes the two companies in the following manner:

FIJI SHIPS AND HEAVY INDUSTRIES LIMITED (The Defendant Company): A company incorporated in the Fiji Islands and having its registered office at Eliza Street, Walu Bay, Suva.

SOUTH SEAS COLD STORAGE CO., LIMITED (The Plaintiff Company):  
Incorporated in the Fiji Islands and having its registered office at Senegran  
Drive, Walu Bay, Suva.

[23] The Citizenship/Nationality of the two companies have been described as “Fiji Registered Company.”

[24] This fact in itself would have been sufficient for this Court to have overruled the preliminary objection taken up by the Counsel for the Defendant. However, since consent from the Minister of Lands, in terms of Sections 6 and 7 of the Land Sales Act, is usually requested by an individual or a company which is not a resident in Fiji, and also due to the fact that the Counsel for the Plaintiff in his written submissions filed has admitted that “The Plaintiff is a foreigner”, I have decided to examine this matter further.

[25] Furthermore, in terms of the proviso to Section 6 (1) of the Land Sales Act, the prior consent in writing of the Minister of Lands is required for a non-resident or any person acting as his agent, to make any contract to purchase or to take on lease any land, where the extent of the said land exceeds in the aggregate an area of one acre.

[26] One acre is equivalent to 4046.86 square metres. In terms of Schedule One of the Lease Agreement, the land which is the subject matter of this case contains an area of approximately 4300 square metres, which is more than one acre. This is further confirmed in the application seeking consent of the Minister of Lands.

[27] During the hearing of this matter both Counsel for the Defendant and Plaintiff, made reference to several case authorities on this subject.

[28] In **Hunter v. Apgar** [1989] FJLawRp 39; [1989] 35 FLR 180 (15 September 1989):

*“The Plaintiffs who were non-residents entered into an agreement with the Defendants to purchase land in Fiji. The agreement was conditional upon obtaining the consent of the Minister which in due course was forthcoming. The Defendants then rescinded the agreement. The High Court (Per Palmer J), giving its ruling on a preliminary issue held that Section 6 of the Land Sales Act*

*was intended to ensure that the Minister's consent was obtained prior to the contract for the sale of the land being entered into and that consent given subsequently to the formation of the contract was void."*

[29] In ***Sakashita v Concave Investment Ltd*** [1999] FJLawRp 18; [1999] 45 FLR 13 (5 February 1999):

*"The Plaintiff who was a non-resident reached an agreement with the Defendant Company to purchase land in Fiji. Later the Plaintiff rescinded the contract and sought return of deposits paid. The High Court (Per Fatiaki J) held (i) that absent the minister's prior consent the effect of Section 6 of the Land Sales Act was that the contract was void and (ii) that the Plaintiff was entitled to the return of the deposits under the law of restitution."*

[30] The primary question raised before the Fiji Supreme Court in ***Gonzalez v Akhtar*** [2004] FJSC 2; CBV00011.2002S (21 May 2004) [Also reported in [2004] FJLawRp 22; and [2004] FLR 156 (21 May 2004)]; was whether a contract for the sale of land can be enforced if it was entered into without the prior consent, in writing, of the Minister, in terms of Section 6 (1) of the Land Sales Act. The Supreme Court held:

*"In arriving at this conclusion, we are of course conscious of the fact that the only penalties for contraventions of the Act contained in s 17 are for "wilful" breaches. It does not follow that non-wilful breaches of s 6(1) carry no sanction. The subsection is couched in mandatory terms. It is neither directory, nor regulatory. It requires not just consent, but "prior" consent in writing. The legislature must have intended the subsection to perform some function. It was not included in the Act simply as an expression of hope. There is nothing to indicate that any distinction was to be drawn, for the purposes of s 6(1), between an "innocent" failure to obtain the requisite consent, and a wilful failure to do so. Nor is there any warrant for the distinction between speculators and genuine developers, urged by Mr. Patel, said to be implicit in the subsection. A speculator may contravene the subsection innocently, while a genuine developer can do so wilfully. The Act, when read as a whole, allows for contracts in breach of s 6(1) to be treated as unenforceable, while deliberate breaches of the subsection are punished by criminal sanctions."*

[31] This approach was followed by the Court of Appeal in ***Covec (Fiji) Ltd v Singh*** [2008] FJCA 81; ABU0083.2007S (7 November 2008) and ***Covec (Fiji) Limited v Singh*** [2009] FJCA 57; ABU83.2007 (3 December 2009).

[32] However, the Counsel for the Plaintiff submitted to Court that the facts of all the above cases must be distinguished from the facts of the instant case. He submitted that the Lease Agreement in the instant case had a Conditional Precedent in the form of the following clause: *“This Lease is subject to the Minister of Lands and Director of Lands consent being first obtained by the Lessee at the Lessee’s own cost.”*

[33] In ***Port Denarau Marina Ltd v Tokomaru Ltd*** [2006] FJCA 27; ABU0026U.2005S (6 December 2006); [2006] FJLawRp 56; [2006] FLR 462 (6 December 2006); the Fiji Court of Appeal held:

*“[38] S 6(1) does not prohibit the making of a contract to seek the Minister’s consent to a specified transaction. Otherwise, to what is the Minister to consent? And it cannot make any difference whether the proposed transaction is described in general terms, or whether it is specified in the form of a proposed agreement of sale and purchase, or lease, annexed to the contract. Is it fatal that in a single document, the agreement goes on to provide that in the event the Minister consents, the parties are bound to enter into a transaction in that form? This seems a critical feature. It would not be conducive to business development or investment if the only way to obtain the Minister’s consent was for the parties to agree to seek consent in a form that allowed either party to withdraw even if consent was obtained. One only has to consider the elaborate agreement in issue here, clearly the product of many hours of professional time, to see that any such approach would be unproductive and unrealistic. In the absence of clearer language courts should not ascribe such a legislative intent to a statute.*

*[40] We conclude the contract before us is distinguishable from those in issue in **Hunter v Apgar**, **Sakashita** and **Gonzales**. It is sufficiently plain that the obligation to grant the subleases did not arise unless and until satisfaction of the condition that the Minister of Lands consented to the grant. The Minister had the opportunity to consider the proposed subleasing “right at the outset”. The agreement did not infringe s 6(1), and Question 1 should be answered in the negative.”*

[34] The Fiji Court of Appeal in ***Narayan v Narayan*** [2011] FJCA 22; ABU0037.2010 (10 March 2011); having analysed all the aforesaid judgments, was in agreement with the finding reached in ***Port Denarau Marina Ltd v Tokomaru Ltd*** (*Supra*). The Fiji Court of Appeal held as follows:

7. *These provisions have been the subject of determination by the High Court and the Court of Appeal in various cases. To start off, there is a decision*

of the High Court in **Hunter v. Apgar** [1989] 35FLR 180 where Palmer, J ruled that the agreement was void and unlawful and therefore of no effect and was unenforceable on the reasoning at page 185A where His Lordship said:

"The Land Sales Act aims directly at the non-resident. It provides a mechanism to ensure that a non-resident cannot obtain any enforceable right in relation to land right at the outset, [unless] the Minister has had the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent to the same".

8. In **Sakashita v. Concave Investment Ltd** (Unreported) High Court of Fiji at Suva, Civil Action No. HBC 0121 of 1998, 5th February 1999, where a Japanese businessman entered into a "Memorandum of Agreement" on 15th May 1997 to purchase land payable in instalments. The agreement was also subject to various conditions precedent one of which was that the purchaser would obtain "the necessary approval from the Minister of Lands for this purchase and also the approval from FTIB and the RBF". The Minister's consent was endorsed on 17th June 1997. The purchaser then sought a declaration that "the Agreement was in breach of **Section 6(1)** of the Land Sales Act Cap. 137 and was therefore null and void". Fatiaki, J held that the agreement was in breach of Section 6(1) of the **Land Sales Act** Cap. 137 in reliance upon Palmer, J's decision in **Hunter**.

9. In relation to the question whether the Minister's consent obtained after the agreement had been entered into was of any effect, His Lordship Fatiaki, J expressed the view, correctly in my opinion, that once a contract had been entered into without the Minister's consent the contract was illegal, void and unenforceable and the obtaining of consent after this was of no effect.

10. **Gonzalez v. Akhtar** [2004] FJSC2 is another case where the same issue arose. The purchaser, Mr. Gonzalez was an American resident who entered into an agreement in 1985 to purchase some land from a Fiji resident without the Minister's consent. When dispute arose between the parties, Mr Gonzalez lodged a caveat. He also commenced proceedings seeking an order for specific performance or damages. The Supreme Court held that **Hunter v. Apgar** was correctly decided and applied it to the facts of Gonzales with the effect that the subject contract was illegal and unenforceable.

11. This case made it quite clear as did the other cases that once an agreement was held to be void for illegality no cause of action could be established upon it. Thus, no action for damages for breach of contract could be sustained. In **Gonzalez** damages were claimed for fraud and that would have succeeded as something outside the contract had the Court found any but the Court did not find any fraud and therefore did not award any damages on that ground.

12. **Port Denarau Marina Ltd v. Tokomaru Ltd** [2006] FJCA 27 is a decision of the Supreme Court of Fiji (Court of Appeal) given on 6th December, 2006. It raised the same question as in **Hunter**. The question for it was whether an agreement entered into in 1999 between the parties, one of whom was a non-resident of Fiji infringed the provisions of Section 6(1) of **Land Sales Act** Cap.137.

13. The Agreement before the Court was described at paragraph [5] in the following terms:

*"The Agreement is an elaborate document running to 38 pages with numerous schedules in addition. Following detailed conditions of terms, the agreement provided for payment in three stages:-*

*A payment on account of the deposit on execution, the balance of the deposit (which was 10% of the purchase price) upon satisfactory due diligence and the balance on the completion, which was to take place 10 days upon satisfaction of the Conditions, or such other date as may be agreed. The conditions were refined as the conditions precedent referred to Clause 4.1 of which the following is relevant....*

*The vendor and the purchaser were only obliged to proceed to completion if the following conditions are satisfied or waived:*

- a. All authorizations necessary for: –
  - o (i) the parties to sign and complete this agreement; and
  - o (ii) the purchaser to own operate and conduct the Business and entitled to Sub Leases or Sub lease

14. The Supreme Court (Court of Appeal) was able to distinguish the decisions in **Hunter v. Apgar**, **Sakashita** and **Gonzalez** by reasoning that the conditions which had applied in this case was such that no contract had been entered into prior to the Minister's consent. At paragraph [40] the Court said:

*"We conclude the Contract before us is distinguishable from those in issue in **Hunter v. Apgar**, **Sakashita** and **Gonzalez**. It is sufficiently plain that the obligation to grant the sub-leases did not arise unless and until satisfaction of the condition that the Minister of Lands consented to the grant. The Minister had the opportunity to consider proposed sub-leasing "right at the outset". The agreement did not infringe Section 6(1) and Question 1 should be answered in the negative".*

15. Thus, the decision in **Port Denarau** stands on its own facts which allowed the court to conclude that the obtaining of the Minister's consent was a condition precedent to the formation of the contract."

[35] Having reached the said conclusion the Court of Appeal thereafter went on to elaborate and clarify the law in relation to conditional contracts in the following manner:

16. *As much argument had occurred in both **Gonzalez** and **Port Denarau** in relation to conditional contracts, as has taken place in the hearing of this case, it might be a good idea for me to clarify the position in so far as conditional contracts are concerned.*

17. *A condition to which the contract is subject could either be a condition **precedent** or a condition **subsequent**. Generally, if a contract is subject to the happening of some event and such a condition is regarded as a condition precedent to the formation of the contract, no contract will arise until the condition precedent has been fulfilled. An example is **George v. Roche** [1942] HCA 22; (1942) 67 CLR 253 which involved an agreement for the sale of a business. The agreement provided that a newspaper agency was required to be purchased at the value placed on it by a named Valuer. The named Valuer refused to value the agency and a majority of the High Court held that valuation by the person named was a "condition" precedent to the formation of a contract and that the refusal by the valuer to value had the result that there was no contract: see at paragraph [741] of **Carter and Harland – Contract Law in Australia 3rd Edition**.*

18. *Similarly, if a foreign entity entered into a contract to buy land in Fiji without the Minister's consent there could be a clause in the contract which clearly stipulated that the obtaining of the Minister's consent was a pre-condition for the contract to arise. In that situation, as there was no contract until the Minister's consent was obtained, no breach of Section 6(1) or 7(1) of the **Land Sales Act** Cap.137 would have been committed.*

19. **Conditions** subsequent are conditions which are required to be fulfilled after the contract has been entered into. Thus a contract may have a stipulation that the consent of the local authority for the erection of a building on the subject land shall be obtained within six months of the date of the contract. In that event, the contract would have arisen but was voidable at the option of either party if the condition was not fulfilled within the stipulated time. Alternatively a condition which was capable of being waived could be waived by the person for whose benefit it was drafted and the contract could be made unconditional.

20. *Where the contract is subject to say finance approval, it is usually a condition subsequent. Where negotiations were "subject to contract", this is a condition precedent to the formation of a contract. See **Masters v. Cameron** [1954] HCA 72; (1954) 91 CLR 353.*



21. *The difference between a condition precedent and a condition subsequent as it relates to the present issue is that in a condition precedent no contract arises until the Minister's consent is obtained and therefore there is no breach of Section 6(1) of the Land Sales Act Cap.137. In contradistinction, a contract does arise when a condition is subsequent and therefore if the contract has been made without the consent of the Minister the conditions subsequent would not save it from illegality under Section 6(1) of the Land Sales Act Cap.137."*

[36] The above reasoning was followed by His Lordship Justice William Calanchini (In the High Court), in ***Resort in Park and Garden Ltd v Naidu*** [2012] FJHC 883; HBC164.2009 (24 February 2012); where he held "A contract, the formation of which is subject to Ministerial consent ("a conditional precedent to formation" contract) is not caught by Section 6 of the Act."

[37] Based on the above authorities, it is clear that where there is in existence an appropriately worded contract that the agreement/contract is subject to the consent of the Minister of Lands, there will be no breach of Section 6 of the Land Sales Act.

[38] In this case the Lease Agreement entered into between the parties on 25 July 2011 has the specific Conditional Precedent:

*"This Lease is subject to the Minister of Lands and Director of Lands consent being first obtained by the Lessee at the Lessee's own cost."*

[39] Therefore, it is clear from the above that the Lease Agreement is conditional to the approval or consent of both the Minister of Lands and the Director of Lands. The Lease Agreement makes it clear that the consents of both the Minister of Lands and the Director of Lands are conditions precedent to the formation of the legal relationship between the parties. It is agreed by parties that in this case the Minister of Lands granted his consent in respect of the Lease Agreement on 3 November 2011.

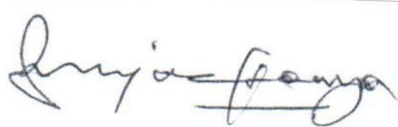
[40] For the aforesaid reasons, I am of the opinion that the Lease Agreement entered into between the Plaintiff and the Defendant in this case, is not in contravention with the provisions of Section 6 (1) of the Land Sales Act. By virtue of this fact, I am of the view that the Lease Agreement is not void *ab initio*.

[41] Considering all the above, this Court is of the opinion that the preliminary objection raised by the Defendant is without merit.

[42] Accordingly, I make the following Orders:

**ORDERS**

1. The preliminary objection taken up by the Defendant is overruled.
2. I order that the Defendant pay summarily assessed costs in the sum of Fijian Dollars \$3,000.00, to the Plaintiff, within one month of this Ruling.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 14<sup>th</sup> Day of May 2020

**Solicitors for the Plaintiff : Shelvin Singh Lawyers, Barristers & Solicitors, Suva.**  
**Solicitors for the Defendant : Lateef & Lateef Lawyers, Barristers & Solicitors, Suva.**