IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 32 of 2012

BETWEEN: **JAMES L PETERS and JIMME PETERS** (presently of Portland Oregan United States of America but previously residing at Seashell Cove Resort, Savusavu, Nadi.

PLAINTIFFS

A N D: **SEASHELL @ MOMI LIMITED** a limited liability company having its registered office at 142 Toorak Road, Suva and owner/proprietor at Seashell @ Momi Limited previously known as Seashell Cove Resort and situated at Momi Savusavu, Nadi.

1ST DEFENDANT

A N D: **PANDEY MOMI BAY LIMITED** a limited liability company having its registered office at Level 10, FNPF Place, 343 Victoria Parade, Suva.

2ND DEFENDANT

Appearances: Mr Roopesh Singh for the Plaintiffs
Ms S. Saumatua for the Defendants
Date of Hearing: 15 August 2019
Date of Ruling: 04 February 2020

RULING

INTRODUCTION

1. The background to this case might be stated shortly.

2. Seashell Cove Resort ("**the Resort**") sits on Certificate of Title Folio 4343 Register Volume 44. In October 2002, the Resort was owned and operated by Seashell Cove Resort Limited ("**SCRL**"). The plaintiffs were frequent visitors and were very fond of the Resort.

3. On 22 October 2002, SCRL and the plaintiffs entered into an agreement (see endnotes). By this agreement, SCRL allowed the plaintiffs to use a particular accommodation unit in the hotel vicinity in return for a fee. That fee was paid by the plaintiffs annually. The particular accommodation unit in question is referred to in the agreement as **"Bure 2A"**[i].

4. On 08 April 2005, some three years or so after the Agreement between SCRL and the plaintiffs, SCRL decided to sell the Resort to Seashell@Momi Limited (**"SML"**). It is undisputed that, prior to purchasing the Resort, SML knew of the arrangement between the plaintiffs and SCRL and in particular, that Bure 2A was rented out to the plaintiffs at a rental of $12,000 per annum and that the term of the tenancy expired on 31 October 2006[ii].

5. On 23 April 2015, ten years after SML acquired the Resort from SCRL, SML would sell the Resort to the current defendant, namely Pandey Momi Bay Limited (**"PMBL"**).

PLAINTIFFS WERE ALLOWED TO CONTINUE TO USE BURE 2A AFTER SALE OF RESORT

6. After SML bought the Resort in 2005 from SCRL, SML would allow the plaintiffs to continue to use Bure 2A in the same terms as agreed between the plaintiffs and SCRL.

7. It is particularly noteworthy that, on 27 October 2006, about one and a half years after SML bought the Resort, SML would give the plaintiffs a letter demanding that the plaintiffs vacate Bure 2A by 31 October 2006. This date, 31 October 2006, was actually also the date when the Agreement came to an end (the commencement date was 01 November 2002 for a term of four years.

AGREEMENT AUTOMATICALLY RENEWABLE ANNUALLY

8. The agreement also provided that it was *"automatically renewable thereafter annually"* and also that the *"agreement will be renewed after four years providing both parties agree to any change in lease payments"*.

This Agreement is for 365 days per year, with a minimum of four years beginning November 1st, 2002 and is automatically renewable thereafter annually. The cost for this lease is US10,000 for the first year and $F12,500 each year thereafter, payable on November first of each year. This agreement will be renewed after four years providing both parties agree to any change in lease payments.

9. It appears from affidavits filed earlier in this case that, at the time approaching the end of the four-year term of the agreement, SML was desirous of increasing the rental. The amount that SML had in mind was considerably more than what the plaintiffs were prepared to settle on. As it turned out, the parties could not agree on a new rate.

10. This then prompted the plaintiffs to file the original claim on 24 February 2012 against SML. The statement of defence filed by SML pleads that SML was not bound by the agreement between the plaintiffs and SCRL as SCRL was not privy to that arrangement.

STRIKING OUT CLAIM AGAINST SML

11. As the claim against SML took its normal course, an interlocutory application was filed by SML in April 2015 for Security for Costs, obviously, on account of the fact of the plaintiffs being non-residents.

12. On 13 July 2015, I did make an Order for Security For Costs against the plaintiffs in the sum of FJD$30,000-00 (thirty thousand dollars). The Order directed the plaintiffs to post security in 30 days, failing which I would strike out the claim.

13. Notably, the plaintiffs had deposed in an earlier affidavit they filed that they had substantial assets in the United States of America. However, they either refused to or could not comply with the relatively nominal security ordered by this Court. I did strike out the plaintiffs' claim against SML on 11 August 2015 as a result and this was never appealed.

PMBL ADDED AS DEFENDANT

14. It is important to note that, shortly before I struck out the claim against SML, I had already ordered on 23 June 2015, on an application of the plaintiffs, that PMBL be

added as defendant. The only remaining action before me now is the one against PMBL, which, as I have said above, was SML's successor in title.

PMBL'S STRIKING-OUT APPLICATION

15. What is before me now is PMBL's application to strike out the plaintiffs' subsisting claim against it. The application is filed pursuant to Order 18 Rule 18(1) (a) and (d) of the High Court Rules 1988 on the ground that (a) the claim against PMBL discloses no reasonable cause of action and/or (b) that it is an abuse of process. The application is supported by an affidavit of one Sanjay Pratap sworn on 25 February 2019. James L Peters opposes the application by an affidavit he swore on 08 April 2019. Pratap responds by an affidavit he swore on 29 April 2019.

16. In considering an application under Order 18 Rule 18(1) (a), it is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend – the courts will not strike out the claim.

17. In considering Order 18 Rule 18(1) (b), the Courts will strike out a claim on this ground if its process is being used, not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or where its process is being misused. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment".

PMBL'S SUBMISSIONS

18. Both counsel have filed substantive submissions.

19. PMBL argues that the plaintiffs' claim is based on a tenancy agreement entered into on 28 October 2002 with SCRL. They point to what appears to me to be errors in the description of the plaintiffs' names.

20. PMBL also submits that, at the time the agreement was executed, PMBL was not even in existence. The company was incorporated on 30 September 2014, that is,

some twelve years after the agreement between the plaintiffs and SCRL. Hence, PMBL could not have been a party to the agreement.

21. PMBL also submits that the said Agreement expired on 31 October 2006 and is no longer in force. There is no legal obligation on the part of PMBL to renew the Agreement as PMBL is a *bona fide* purchaser for value without notice.

22. PMBL also highlights that the plaintiffs have cleared their personal belongings from Bure 2A and that Bure 2A has since been dismantled due to some renovations being carried out at the Resort. This appears to have caught the plaintiffs' counsel by surprise.

UNREGISTERED INTEREST – LEASE OR LICENCE?

23. The title to the agreement describes it as an "Agreement for the exclusive lease of Bure 2A". The parties all seem to take it for granted that the agreement was a "lease" arrangement. The interest which the plaintiffs assert out of the Agreement in question was not registered on Certificate of Title 4343. Was it then an equitable lease? Or was it simply a license agreement? Denning L.J. said in **Facchini v. Bryson** (1952) 1 TLR 1386

> *" . . . the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it" (1952) 1 TLR, at pp 1389, 1390.*

24. In **Daydream Island Ltd v Vuki** [2007] FJHC 14; HBC284.2005 (18 May 2007), Madam Justice Phillips, posed the question whether the agreement at issue was a lease or a licence and cited **Radaich –v- Smith & Anr.** (1959) 101 CLR 209, where Windeyer J emphasized that the distinction between a lease and a license is determined by looking at the nature of the rights which the parties intend on the person entering the land:

> "Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land. When they have put their transaction in writing this intention is to be ascertained by seeing what, in accordance with ordinary principles of interpretation, are the rights that the instrument creates. If those rights be the rights of a tenant, it does not avail either

party to say that a tenancy was not intended. And conversely if a man be given only the rights of a licensee, it does not matter that he be called a tenant; he is a licensee".

25. Whereas a lease confers an interest in the land, a license merely confers a personal interest, it (license) being merely a permission to do something on or over the land but creating no interest in the land (see **IDC Group v Clark** [1992] EWCA Civ 14); **Street v Mountford** [1985]AC 809[iii]; **IDC Group v Clark** [1992] EWCA Civ 14).

26. Windeyer J in **Radaich** said as follows:

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is *an interest in land* as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes.

27. To determine whether an interest in land has been given, the relevant questions to ask are: (i) whether a legal right to exclusive possession is given and (ii) whether it is for a specific term. The distinction, as Windeyer J went on to say, lies in firstly, whether a legal right of exclusive possession has been given and secondly, whether that right has been given for a specific term, or from year to year or for life:

> And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second."

28. Butt, **Land Law** 5th edition Law Book Company at paragraph says the same thing[iv].

RIGHT TO EXCLUSIVE POSSESSION – TRANSFERABILITY

29. To support the finding of a leasehold interest, an exclusive right to possession must be transferrable or assignable. Otherwise, it will, not support a leasehold interest because a leasehold interest is – by its nature – transferable (see **Richardson v Landecker** (1950) 50 SR (NSW) 250 at 255; 67 WN 149 at 151).

30. To emphasise transferability as the distinguishing feature, the High Court of Australia in **Wik Peoples v Queensland ("Pastoral Leases case")** [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173 (23 December 1996) cited the Privy Council case of **O'Keefe v Malone** [1903] AC 365 at 377 as authority that:

> ....an exclusive and transferable licence to occupy land for a defined period is in truth a lease.

31. A fortiori, that an exclusive yet non-transferable "lease" to occupy land for a defined period is in truth a license.

TERM MUST BE DEFINED

32. Obviously, the term of a leasehold agreement is defined by the commencement date and the completion date.

PROPRIETARY INTEREST IN LEASE RUNS WITH THE LAND & BINDS SUCCESSOR IN TITLE.

33. Because a lease confers a proprietary interest, that interest, if registered under the Land Transfer Act, attaches to and runs with the land and is binding against any successor in title. An unregistered equitable lease in the **Walsh v Lonsdale**[v] sense, however, will, not bind a successor in title who is a *bona fide* purchaser for value without notice.

34. On the other hand, the mere personal interest conferred by a contractual license cannot bind a successor in title (see **Ashburn Anstalt v Arnold** [1988] EWCA Civ 14 per Fox LJ; **Lloyd v Dugdale** [2001] EWCA Civ 1754 per Sir Christopher Slade; **Habermann v Koehler and Another** [2000] All ER (D) 1739).

ISSUES

35. I accept that the following, arguably, are factors which might support an argument that the Agreement in question, though not registered, created an equitable lease in Bure 2A in favour of the plaintiffs:

(i) all parties understand the Agreement as a lease.

(ii) the title to the Agreement describes their "arrangement" as a lease and as "for the exclusive lease of Bure 2A for a minimum period of 4 years".

(iii) the lease has a definite commencement period and runs for a term of four years.

(iv) there is a stipulated rental paid annually.

36. However, having said that, there is nothing in the Agreement or in the circumstances of this case to indicate that whatever interest the plaintiffs had in Bure 2A was transferable or assignable by them. In saying this, I take into account the following:

(i) there is not a single clause in the agreement to say that the plaintiffs are at liberty to assign or transfer their interest in Bure 2A.

(ii) the subject-matter of the Agreement is a single accommodation unit in the Resort.

(iii) the Resort is an upmarket beach resort, presumably with a high booking rate.

(iv) the plaintiffs had been frequent guests of the hotel for many years prior to the Agreement. There is a suggestion in one of the affidavits filed earlier that they had grown to love the hotel.

(v) the arrangement appears to be for their personal convenience. They did not enter into the Agreement for investment purposes, or because they wanted to set up residence here in Fiji, but purely for their convenience as frequent guests at the hotel.

(vi) had the plaintiffs not entered into that arrangement, Bure 2A would be available to other guests on a nightly basis.

37. Could all these, combined, be the tipping point?

DISCUSSION

38. The agreement was for a term of four years from 01 November 2002. It was renewable *"after four years providing both parties agree to any change in lease payments"*(my emphasis). Towards the end of the four-year term, the plaintiffs and SML talked about the lease payment 6. However, they were not able to agree on an

amount. SML had then sent a Notice to the plaintiffs to vacate the Bure by 31 October 2006.

39. Regardless of whether the agreement was a tenancy or a lease agreement or whether it was a mere contractual licence, the arrangement was only renewable if the parties agreed to a change in the payment.

40. Assuming it was a tenancy or a lease agreement, there is no mechanism in the Agreement as to how the payment was to be reassessed at this time. From where I sit, what is clear at least is that by 30 October 2006, SML was adamant to have the plaintiffs vacate Bure 2A. In my view, there is no covenant in the Agreement to bind SCRL or its successors into an obligation to agree to a new rental. If there was, that in itself is potentially problematic as it could amount to an agreement to agree. Nor is there any obligation on the part SCRL or its successors to agree to process of review.

41. However, I am of the view that the Agreement in question was not a tenancy or lease agreement but was a mere contractual license and that the plaintiffs were mere lodgers. As Lord Templeman said in **Street v Mountford** (supra):

> "…. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own. If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy."

42. All that SML could have done was to give notice to vacate, which it did.

43. In essence, to try to enforce the agreement on SML, in the particular circumstances of this case, is to coerce SML into an arrangement which it no longer wants.

44. In any event, there is no reason to doubt the affidavit of Sanjay Pratap sworn on 25 February 2019 who swore *inter-alia* that the plaintiffs have since technically vacated Bure 2A and have removed all their belongings and personal fittings. I accept this as evidence that the plaintiffs have given vacant possession.

45. The only question that then remains is whether or not the plaintiffs are entitled to damages for any improvements they may have carried out on Bure 2A.

46. I accept that the plaintiffs had expended money in remodeling Bure 2A. However, these were carried out to customize Bure 2A to their taste. They carried out no capital improvement which resulted in the addition of any permanent structural improvement which boosted some aspect of the value or the use of the Resort.

47. The Bure, as I gather, was never in a state of disrepair before the agreement. It was readily available to other guests in the condition that it was before the agreement.

48. I am of the view that the plaintiffs would not succeed in claiming damages for their custom improvements.

CONCLUSION

49. For all the above reasons, I am of the view that the plaintiffs have an extremely weak case against PDML. Accordingly, I strike out the case as disclosing nor reasonable cause of action and as an abuse of process.

50. I order costs in favour of the defendant which I summarily assess at $2,000 (two thousand dollars only).

.....

Anare Tuilevuka
Judge
Lautoka

[i] The following agreement was entered into by SCRL and the plaintiffs on 22 October 2002:

AGREEMENT BETWEEN SEASHELL COVE RESORT AND MR. JIM AND MS. JIMMIE PETERS FOR THE EXCLUSIVE LEASE OF BURE 2 A FOR A MINIMUM PERIOD OF 4 YEARS

This Agreement is for 365 days per year, with a minimum of four years beginning November 1st, 2002 and is automatically renewable thereafter annually. The cost for this lease is US10,000 for the first year and $F12,500 each year thereafter, payable on November first of each year. This agreement will be renewed after four years providing both parties agree to any change in lease payments.

This agreement is for Bure 2A and its garden and view and includes Water for the bure. Electricity, Sewer connection and one parking space somewhere out of the way.

If for some reason the resort was closed or there was a labour dispute, Seashell Cove Resort would do everything in their power to gain Jim Peters' access to Bure 2A. Expansion of Bure 2A is authorised with limits that do not exceed the frontage of other bures and in agreement with the Sigatoka Health Department. Colour Scheme to remain the same as the rest of the resort theme.

The cost of the expansion is all born by Peters. Any expenses that are funded by Seashell – i.e. Labour or Materials, will be settled by Peters' at the true cost. Interior changes to be completed by Peters' include rewiring, plumbing and all necessary works that are required for a complete interior remodel. Furnishings that are currently in 2A are the property of Seashell with the exception of the closet in the bedroom and the valances on the windows.

The Furnishings provided by Jim Peters will remain the property of Mr Peters.

The external remodel will be completed well before the resorts' Christmas season. During the construction, Peters will reside in Bure 2B and in return Peters will "Tighten" that unit also.

Mr Peter will have the same rights as other guests – use of the Bars, Restaurant, Swimming Pool and Dive Facilities. Any extended Credit by Seashell will be settled weekly.

The Unit 2A will at all times remain appropriate and look appropriate and in accordance with the rest of the resort.

Mr Peters will be available for consulting and/or a Director on Seashell 's board of Directors.

[ii] As SML had pleaded at paragraph 7 of its Statement of Defence (**note the claim against SML was struck out on 11 August 2015**):

7. THAT as to the allegations contained in paragraph 7 of the Statement of Claim, the Defendant says as follows:

(a) that it purchased the freehold property comprised in Certificate of Title No. Folio 4343 Register Volume 44 from the previous owners Seashell Cove Resort Limited on or about 02nd day of June 2005 for valuable consideration.

(b) that it was aware that Bure 2A was rented out to one Jim Peters at a rental of $12,000-00 per annum and that the term of the tenancy expired on 31st October 2006.

(c) the Defendant denies that it was bound by the contract to renew the Plaintiff's tenancy on the same terms and conditions as alleged as there was no privity of contract between the parties. The said agreement was made between the Plaintiffs and the Defendant's predecessor in title. (d) save as aforesaid the Defendant denies each and every allegation contained in paragraph 7 of the Statement of Claim.

[iii] In this case, Lord Templeman said:

"…. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot

call the place his own. If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy."

[iv] i.e. that a leasehold interest is created, and the relationship of landlord and tenant arises, whenever one (the "landlord" or "lessor") gives another (the "tenant" or "lessee"):

(i) the legal right to exclusive possession of land,
(ii) for a period ("term") that is certain (or capable of being rendered certain) and that is less than the term for which the landlord holds the land.
(my emphasis)

[v] **Walsh v Lonsdale** (1882) 21 ChD 9.