

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

CIVIL JURISDICTION

Civil Action No. HBC 111 of 2019

BETWEEN : **AVIN KUMAR NARAYAN** and **PRIYA NARAYAN** both of 49 Promenade Avenue, Robin, Queensland, 4226, Australia, Businessman and Compliance Officer respectively.

PLAINTIFFS

AND : **THE ATTORNEY GENERAL** for and on behalf of the Director of Lands of Suvavou House, Victoria Parade, Suva, Fiji.

DEFENDANT

Appearances : **Mr. Adish Kumar Narayan for the plaintiffs**
Mr. Josefa Mainavolau for the defendant

Hearing : **Friday, 13th March, 2020.**

Judgment : **Friday, 14th August, 2020**

J U D G M E N T

[A] INTRODUCTION

(01) The matter before me stems from the plaintiffs' amended originating summons filed on 01-08-2019 seeking the grant of the following orders;

[1] *A declaration that the Director of Lands is not entitled to demand the payment of \$59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the Plaintiffs to Mahendra Deo and Shireen Lata Singh;*

[2] *A declaration that the demand by the Director of Lands for the payment of a penal rental of \$59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the Plaintiffs to Mahendra Deo and Shireen Lata Singh is arbitrary, unreasonable, unconstitutional, unjustified and/or unlawful.*

- [3] *Further and/or in the alternative, a declaration that clause 23 of State Lease No. 20700 in respect of the imposition of a penal rent is void for uncertainty and unenforceable;*
- [4] *And order that the Director of Lands do forthwith and in any event not later than 7 days endorse consent on the transfer to be submitted to the Director of Lands; and*
- [5] *An award for damages to be assessed;*
- [6] *An order that the Director of Lands pay the plaintiffs' costs of these proceedings on a solicitor/client full indemnity basis or on a gross sum award to be assessed.*
- (02) The prayer for relief at paragraph four (04) of the amended originating summons has been resolved between the parties.
- (03) The application is opposed by the defendant.
- (04) The parties have filed five (05) affidavits for consideration;
- [i] Affidavit of Avin Kumar Narayan in Support sworn on 6th May, 2019 (“**the plaintiffs’ affidavit**”);
- [ii] Affidavit of Laisenia Kidianaceva in Opposition sworn on 12th June, 2019 and filed on 12th July, 2019 (“**the defendants affidavit**”);
- [iii] Affidavit of Avin Kumar Narayan in Reply sworn on 23rd July, 2019 (“**the plaintiffs’ affidavit in reply**”);
- [iv] Supplementary Affidavit of Laisenia Kidianaceva sworn on 21st August, 2019 (“**the defendant’s supplementary affidavit**”); and
- [v] Supplementary Affidavit of Avin Kumar Narayan in Reply sworn on 24th September, 2019 (“**the plaintiffs’ supplementary affidavit**”).

[B] BACKGROUND

- (01) The dispute concerns the State Land known as “Navakai Foreshore Reclamation” (part of) located at Lot 28 in the province of Ba, Nadi Town comprised in State Lease No. 20700 containing an area of 1350m².
- (02) The State Land had been leased to “Juxta Beach (Fiji) Limited” on 17-03-2017 for a term of Ninety Nine (99) years commencing on the 31-01-2017 at the yearly rental of \$1,200.00 (Annexure marked AKN-2).

(03) It is a “Protected Lease” under the provisions of the State Lands Act. The State Lease contain the following particular clause; [Clause (3)]

The lessee shall, within twelve months from the date of commencement of this lease, erect on the demised land, to the satisfaction of the lessor, a building for residential purposes in accordance with the provisions of the Public Health Regulations or any By-Laws made under the provisions of the Local Government Act, 1972 and such building shall be designed and used as a single dwelling unit unless the lessor’s consent is obtained and then only upon such conditions as the Lessor shall stipulate.

(04) Prior to the registration of the subject lease to the original lessee, the same had entered into a sale and purchase agreement with the plaintiffs’ on 26-09-2014.

(05) The plaintiff acquired the leasehold interest in the land under the subject lease from the Original Lessee through a transfer dealing No. 848612 registered on 07-08-2017.

(06) Since the transfer of the subject lease to the plaintiffs, no development was carried out to comply with clause (3) of the lease.

(07) On the 26th November, 2018 the Lands Department received a letter dated 20-11-2018 from the plaintiffs’ Solicitors accompanied with documents in support of the plaintiffs’ application for consent to transfer their leasehold interest in the subject lease.

(08) The application for consent to a transfer of leasehold interest in the land was executed for a transfer of the land in the subject lease from the plaintiffs to Mahendra Deo and Mrs. Shireen Singh.

(09) The defendant says that in January, 2019 the Lands Department carried out an inspection in the land and it was discovered that there was no development carried out by the plaintiffs.

(10) The plaintiffs do admit that there was no development carried out.

(11) The defendant says that the plaintiffs were informed of the breach of clause (3) of the lease. The plaintiffs say that they were never issued or notified of any breach of the lease conditions until their Solicitors lodged the consent application.

(12) The plaintiffs say that their Solicitors received an email from the Lands Department on 01-02-2019 advising that they have conducted an inspection and were assessing penal rent for the sale of undeveloped lot.

(13) On the 19th February, 2019 consent was granted by the Director of Lands to the transfer of subject lease from the plaintiffs to the purchaser subject to payment of penal rent of \$59,625.60 being breach of lease condition for non-development. (annexure marked AKN-8).

- (14) The plaintiffs say that in the interest of avoiding any further losses they undertook to pay under protest the sum of \$59,625.60 as claimed in the Director of Lands letter of 19th February, 2019 on the conditional grant of consent. (annexure marked AKN-11)

[C] **CONSIDERATION AND THE DETERMINATION**

- (01) The Director of Lands has granted consent to the application for consent to transfer Lot 28 on State Lease No. 20700 from the plaintiffs to Mahendra Deo and Shireen Lata Singh, on the condition that the plaintiffs pay a penal rent of \$59,625.60 on the property.

- (02) The plaintiffs primarily seek the following declarations and orders;

[1] *A declaration that the Director of Lands is not entitled to demand the payment of \$59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the plaintiffs to Mahendra Deo and Shireen Lata Singh.*

[ii] *A declaration that the demand by the Director of Lands for the payment of penal rental of \$59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the Plaintiffs to Mahendra Deo and Shireen Lata Singh is arbitrary, unreasonable, unconstitutional, unjustified and/or unlawful.*

- (03) A number of challenges were ventured by Counsel for the plaintiffs. It is the primary submission of Counsel for the plaintiffs that;

(A) The imposition of penal rent is a direct contravention of Section 94 of the Property Law Act.

(B) The Director of Lands cannot enforce the rights to impose penalty without issuing Notice of breach under Section 105(1) of the Property Law Act. Counsel relied on **Danam and Company Ltd v A.G.**¹

(C) Director of Lands is not entitled to impose a condition for his endorsement of consent to the transfer. Counsel relied on **Chandra Mani v Director of Lands.**²

(D) The imposition of penal rent in the absence of any statutory power by the Director of Lands to do so, was unlawful.

(E) The imposition of penal rent is unlawful in the absence of any regulations having being made by the Minister for the definition, methodology, formula.

¹ Lautoka High Court Civil Case No. HBC 209 of 2002L, Decision 17-10-2003, Unrepresented.

² (2004) FJHC 537.

- (04) On the other hand, Counsel for the defendant submitted;
- (A) The Director of Lands had already allowed for the initial transfer of the subject lease from the Original lessee to the plaintiff on the condition that the plaintiff would develop the same within 12 months from the transfer in 2017. This the Director of Lands did without extracting a penalty for the breach.
 - (B) It is common ground on the pleadings that the plaintiff had not built a dwelling on the land as per clause (3) of the State Lease.
 - (C) As a consequence of the plaintiffs default, the Director of Lands has imposed a penalty in the form of penal rent.
 - (D) The Director of Lands is not relying on Section 105 of the Property Law Act, 1971.
 - (E) The Director of Lands is entitled to impose penalty in the form of penal rent for a breach of the lease condition. The defendants relied on the decision in Lautoka City Council v A.G.³
 - (F) The case before this Court and the decision in Lautoka City Council (supra) is distinguishable from the case of Danam (supra).
 - (G) In the case of Danam there was a single breach. In the present case the breach was continuous.
 - (H) The Section 41 of the State Lands Act, 1946 (SL Act) empowers the Minister to make regulations not inconsistent with the SL Act, whether general or to meet particular cases, that may be convenient for the administration of the SL Act or that maybe necessary or expedient to carry out the objectives and purposes of the SL Act. This includes the power to make regulations that prescribe the form and terms of leases of State land and the covenant and conditions upon and subject to which leases may be issued. Therefore, the State Lands (Leases and Licenses) Regulations 1980 (**‘Regulations’**) is a product of the Minister’s exercise of his/her powers under section 41 of the SL Act.
 - (I) When making its decision to impose a penalty for breach, the Director of Lands in the present case relied upon condition 23 of the subject lease. This condition is found in law – reference is made to regulation 21(j) of the Regulations which states as follows:
“General conditions

21. *All leases shall be subject to the following conditions in so far as they*

³ Lautoka High Court Civil Case No. HBC 0071 of 2005, Date of decision 12-12-2005, (Unreported)

are applicable to the circumstances of any case –

(j) *that in the event of any breach by the lessee of any covenant or condition in the lease the lessor may enter upon and take possession of the demised land or may at the discretion of the Director impose a penal rent in respect of such breach.”*

(J) Clearly the Minister, through the regulations, has authorized the Director of Lands to exercise administrative decision making discretion, and that discretion is to impose a penal rent in respect of a breach to the lease conditions.

Let me now turn to the first declaration sought on the plaintiffs’ amended originating summons.

A declaration that the Director of Lands is not entitled to demand the payment of \$59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the plaintiffs to Mahendra Deo and Shireen Lata Singh.

(05) The plaintiffs applied for consent for the transfer to Mahendra Deo and Shireen Lata on 20/11/2018. The defendant granted consent on 19/02/2019 subject to payment of penal rent of \$59,625.60. The letter of 19/02/2019 (annexure AKN-8) is clear. It reads:

“Please be advised that approval is granted subject to payment of penal rent of \$59,625.60 being breach of lease conditions for non-development”.

(06) **The consent to the transfer is given. A condition of payment is attached to the consent.**

(07) The Director of Lands did not have recourse to Section 105(1) of the Property Law Act, Cap 130. Therefore, the payment demanded by the Director is not “compensation” for the breach of the covenant under Section 105(1) or (2) of the Property Law Act. Compensation under Section 105(1) is not payable until Notice to forfeit the lease is served on the lessee. No such Notice has been served. Likewise Section 105(2) is inapplicable because the lessor has not proceeded to enforce the right of re-entry or forfeiture.

(08) In this case the Director makes it clear that the payment he demands is not in respect of any legal or other expenses incurred in relation to the license or consent. The Director says at annexure AKN-8 “.....**penal rent of \$59.625.60 being breach of lease condition for non-development”.**

(09) Therefore, it is rather a fine or sum of money in the nature of a fine for breach of lease conditions for non-development. Section 94 of the Property Law Act provides;

“No fine for license to assign

94. *In all leases containing a covenant, condition or agreement that the lessee shall not, without the license or consent of the lessor, assign, underlet, part with the possession or dispose of the demised premises or any part thereof, that covenant, condition or agreement shall, **unless the lease contains an express provision to the contrary**, be deemed to be subject to a proviso to the effect that **no fine or sum of money in the nature of a fine shall be payable for or in respect of any such license or consent**, but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the license or consent.”*

[Emphasis Added]

- (10) I stress the words **“unless the lease contains an express provision to the contrary”** in Section 94. As there is express provision to the contrary in the subject lease, i.e, clause 23, the proviso to Section 94 of the Property Law Act is **not** applicable in the present case. The language of Section 94 appears to me to present **no** difficulties of construction and to make clear the limitation of its scope.
- (11) Clause 23 of the subject lease is in the following terms;

*“Default by the lessee in the fulfillment of any covenant or condition expressed or implied herein shall render this lease liable to cancellation by re-entry and possession by the lessor or **to the imposition of a penal rent**”.*

(Emphasis added)

- (12) As there is express provision to the contrary in the subject lease, i.e, clause 23, I am satisfied that the Director had right in law to attach a condition of payment in the nature of a fine to the consent. The Director has right in law to require any payment in the nature of a fine to grant consent to the transfer.

I therefore decline the first declaration and the order sought on the originating summons.

- (13) In **Danam & Co. Ltd -v - Attorney General** (supra), the plaintiff sold a Crown Lease and required consent to the sale. The Director granted his consent to the transfer, but advised that the consent would not be endorsed on the executed transfers until current rental had been paid and also until the plaintiff as transferor had paid \$72,000.00 being 20% of the sale price as penalty **for non-compliance with the building condition in the two leases”**.

The plaintiff refused to pay the \$72,000.00 penalty and the Director refused to endorse his consent. The Plaintiff applied to the Court by Originating Summons or a decision whether the Director was entitled to impose the penalty.

The plaintiff had not within the first two years of the lease erected the required building. The issue for the Court was whether the plaintiff's breach was a continuing breach or a breach "*once and for all*". The Court decided it was a single breach and that the Director had already extracted the penalty for that breach from the original lessee before they sold the two leases in question to the plaintiff. Consequently the Court held that the Director was not entitled to demand a penalty from the plaintiff for its failure to erect the building before in its turn it on-sold the lease.

- (14) The present case is quite different in its facts from Danam. In Danam, as there was no express provision to the contrary in the leases, the proviso to Section 94 of the Property Law Act must be deemed to be implied in them.

In the present case, there is express provision to the contrary in the subject lease. Therefore, the proviso to Section 94 is not applicable.

To go back in time for a moment, in the present case, the Director of Lands had already allowed for the initial transfer of the subject lease from the original lessee to the plaintiff on the condition that the plaintiff would develop the same within 12 months from the transfer in 2017. This the Director of Lands did without extracting a penalty for the breach. Can you simply put the clock back as if nothing has taken place?

- (15) In "**Lautoka City Council**" (supra) the plaintiff is the successor in title to a Crown lease No. 1430, a seventy five year lease that commenced on 01st January, 1946. It purported to sell its leasehold interest for which it needs the consent of the Director of Lands. The Director of Lands granted consent to the transfer. The consent letter stated "*.....consent has been granted to the dealing listed below. The necessary consent will be endorsed subject to the following conditions;*

- (01) *Payment of \$15,992.50 being penalty for non-compliance of building action.*

- (02) *....."*

The plaintiff paid the money under protest to enable its sale to proceed. Thereafter, it seeks refund of that money. Its case is that the Director had no right at law to impose that penalty. The High Court said that there is no right reserved to the lessee to decide for itself that the house has become uninhabitable and demolish it and not replace it. **The High Court held that the Director is entitled to enforce the penalty for the unauthorized demolition provided in Clause 16.**

(16) In **Chandramani** (supra), the issue was whether the Director of Lands could insist on the prior clearance of rent arrears arising from increases made unilaterally by the Director of Lands, before endorsing his consent to an assignment of a State lease. The conditions that the Director imposed for his endorsement of consent to the transfer were intended to secure arrears of rental monies which he considered rightly due to the State. In this case too, there was no express provision to the contrary in the lease. Therefore, the Court applied the proviso to Section 94 and held that the imposition of the condition on grant of consent and endorsement thereof tantamount to an unreasonable withholding of consent.

(17) The case before me is quite different from **Danam** and **Chandramani**. What is critical to note is that in the case before me, there is express provision to the contrary in the subject lease, i.e, clause 23. Therefore, the proviso to Section 94 of the Property Law Act is not applicable. The proviso cannot be deemed to be implied in them.

In **Danam** and **Chandramani**, there was **no** express provision to the contrary in the subject lease. Therefore, the Court held that the proviso to Section 94 of the Property Law Act must be deemed to be implied in them.

(18) Therefore, the plaintiffs cannot derive any assistance from the High Court decisions in **Danam** and **Chandramani**. I could not see how the decision in **Danam** and **Chandramani** could have been of assistance to the plaintiffs.

(19) Counsel for the defendant relied on the High Court decision in “**Lautoka City Council**” (supra). Here the lessee complied with the condition and built the house, then, years later, demolished it. The Director imposed a penalty. He did this when he found out about it, when the lease was put before him because the lessee wanted to transfer it, and he gave consent to the transfer. Justice Finnigan held that the Director was entitled to enforce the penalty which was in the nature of rent by requiring that it be paid by the liable party before the transferee was allowed into possession.

(20) So I turn to the second declaration sought by the plaintiffs on the amended originating summons.

*A declaration that the **demand by the Director of Lands for the payment of a penal rental of \$59,625.60** or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the plaintiffs to Mahendra Deo and Shireen Lata Singh is **arbitrary, unreasonable, unconstitutional, unjustified and/or unlawful.***

(Emphasis added)

(21) The plaintiffs argue that the imposition of the penalty is arbitrary, unconstitutional and **unreasonable**⁴. The plaintiffs are seeking relief in the field of public law. I am surprised. They ought to proceed by way of application for judicial review under Order 53 of the High Court Rules.

⁴ **Wednesbury rule; Associated Provincial Picture House Ltd v Wednesbury Corporation (1947) Vol 2 – ALL E.R. p680**

- (22) This relief is available upon judicial review. This declaration should have been sought on an application for judicial review. To allow this to proceed would be an abuse of process of the court.
- (23) This is a blatant attempt to avoid the protections for the defendant for which Order 53 provides. **It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority is arbitrary, unreasonable, unconstitutional, unjustified and/or unlawful, to which he is entitled under public law, to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 of the High Court rules for the protection of such authorities.**
- (24) The plaintiffs cannot question the reasonableness, lawfulness and the constitutionality of the demand of the Director of Lands without an application for judicial review filed in Court under Order 53.


I therefore, decline the second declaration and the order sought on the amended originating summons.

In view of the approach I have adopted, I do not think that it is necessary to delve into the alternative declaration sought by the plaintiffs.

ORDERS

- (1) I decline the declarations sought.
- (2) Judgment for the defendant.
- (3) The defendant is entitled to costs on this application which I summarily assessed at \$2,000.00 which is to be paid within (07) days from the date of the judgment.




.....
Jude Nanayakkara
[Judge]

**At Lautoka
Friday, 14th August, 2020**