

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 72 of 2020

IN THE MATTER of the PROPERTY LAW ACT

AND

IN THE MATTER OF AN APPLICATION under section 105(2) by the
lessee for relief against forfeiture of lease

BETWEEN

YADUA ISLAND (FIJI) LIMITED a limited liability company having its
registered office at 51-55 Foster Road, Walu Bay, Suva.

PLAINTIFF

AND

ĪTAUKEI LAND TRUST BOARD a statutory body having its registered office at 431 Victoria Parade, Suva.

DEFENDANT

AND

YAVUSA LEWEIMOTU TRUST

INTERESTED PARTY

Counsel : Mr. Nand A. with Ms. Prasad S. for the Plaintiff
Ms. Vokanavanua Q. for the Defendant
Mr. Tuifagalele N. for the interested party

Date of Hearing : 21st April 2021

Date of Judgment : 09th September 2021

JUDGMENT

[1] The plaintiff filed this Originating Summons seeking the following orders against the defendant:

1. An order by the court for relief by way of reinstatement of the Native Lease No. 28062 being Lot 1 SO 5580 together with the variation No. 819722 lease granting relief to the plaintiff against the purported forfeiture of the aforesaid

lease by the defendant lessor on such terms and conditions as the court considers appropriate.

2. An injunction restraining the defendant from exercising or further exercising its rights as lessor pertaining to the purported forfeiture of the lease aforesaid or interfering with the plaintiff's possession pending the hearing and determination of the application for relief.

[2] The interested party filed summons on 20th March 2020 pursuant to Order 15 rule 6 of the High and the court after hearing the application granted order to add the interested party.

[3] The defendant filed a summons on 19th April 2021 at 4.20pm seeking to have the hearing of the substantive matter adjourned. The reason for the adjournment is, that the defendant could not file its affidavit in opposition.

[4] When this matter was first mentioned before this court on 03rd March 2020, it made the following orders;

Affidavit in opposition to be within 14 days.

Reply if any to be filed within 14 days from the service if the affidavit in opposition.

[5] The defendant had more than a year to file its affidavit in opposition. In the affidavit in support of Rosyanne Vunibaka, an employee of the defendant states that the 1st defendant is yet to comply with the directions of the court in filing its affidavit in opposition and the reason for the failure to file its documents on time is due to miscommunication and misunderstanding between its officers. There cannot be a misunderstanding or miscommunication since the defendant was represented by the Legal Officer of the defendant on the day the court made orders and even thereafter it was the same Legal Officer who represented the defendant. For these reasons the court is of the opinion that there are no valid grounds to adjourn the hearing.

[6] The facts of this matter are briefly as follows. The defendant on 12th December 2006 granted the lease in respect of the property described above (the Property) to the

plaintiff. The parties subsequently agreed to vary the said lease and the Lease Variation No. 819722 was registered on 02nd October 2015.

[7] By the lease variation clauses 2(d) and 2(e) were replaced with the following clauses:

The clauses 2(d) and 2(e) were varied and replaced the two clauses with the following:

2(d) To prepare and lodge with the lessor, for the Lessor's approval, on or before 1st July 2017 detailed design plans, elevations and specifications (hereinafter called "the plans") of a tourist resort to be constructed of substantial materials on the land comprising of tourism, Hospitality, entering offices, shops and accommodation unit together with central facilities, staff quarters and other building ancillary to the resort (hereinafter called "the Tourist Resort").

2(e) To commence construction on or before the end of the 1st July 2018 of the Tourist Resort in accordance with the plans as approved in writing by the Lessor and to complete construction of the Tourist resort on or before 30th June 2020.

[8] The plaintiff prepared the plans and lodged with the defendant on 23rd June 2017 and received a stamped copy of the cover letter submitted with the plans but the plaintiff did not receive any response from the defendant.

[9] The defendant on 13th December 2018 issue notice under section 105 of the Property Law Act 1971 and paragraphs 2, 3 and 4 of the said notice read as follows:

The following below stipulates the specifics of the breaches that were identified within your leasehold.

Clause 2(e): Failure of Lessee to commence construction within the timeline given:

"To commence construction on or before the end of the 1st July 2018 of the Tourist Resort in accordance with the plans as approved in writing by the Lessor and to complete construction of the Tourist resort on or before 30th June 2020".

As above mentioned breaches does constitutes a breach of terms and conditions of your tenancy, you are hereby required to remedy the breach and pay to the Board as compensation the sum of **Eleven Thousand Four Hundred and Forty Five Dollars (\$11,445.00)**.

TAKE NOTICE that if you fail to remedy the breaches, and pay as herein demanded, within six months from the date of service of this notice nor be granted relief against forfeiture under section 105 of the Property Law Act, your lease of the said holding will thereupon terminate and you are to quit and give vacant possession to the Board as Landlord.

[10] The plaintiff paid \$11,445.00 to the defendant and the official receipt issued by the defendant is annexed to the affidavit in support.

[11] Section 105(1) and (2) of the Property Law Act 1971 provides:

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -
 - (a) specifying the particular breach complained of; and
 - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
 - (c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.
- (2) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to

all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

- [12] After lodging the plans for approval the plaintiff did not receive any response, it wrote to the defendant on 22nd March 2018 informing the defendant that the plaintiff did not receive any feedback or approval in relation to the plans. In response to the said letter the plaintiff received an email informing that the plans provided were concept plans and designs and that the defendant did not receive proper building plans. In reply to the said email the plaintiff wrote an email referring to clause 2(d) of the agreement. Clause 2(d) requires the plaintiff to submit for approval “detailed design plans, evaluations and specifications”. On 26th March 2018 the defendant sent an email that no detailed building plans were provided. The defendant served on the plaintiff with Breach Notice dated 13th December 2018 pursuant to section 105 of the Property Law Act 1971.
- [13] The plaintiff’s position is that in terms of section 105(1)(c) of the Property Law Act 1971 breach of lease shall not be enforceable by a right of re-entry or forfeiture under any proviso or stipulation in a lease if the lessee makes reasonable compensation in money in satisfaction of the lessor.
- [14] Section 105(1)(c) of the Property Law Act 1971 provides further that the lessee is also required to remedy the breach if it is capable of remedying the breach. In the notice sent to the plaintiff there were two requirements to be satisfied by the plaintiff that is to pay the compensation and to remedy the breaches within six months.
- [15] From the letter dated 19th June 2019 it is clear that the plaintiff has lodged the building plans for defendant’s approval on 10th June 2019. However, the defendant informed the plaintiff that since there was a pending legal matter they have been advised by the legal officer that they could consent to any dealings until that matter was settled.

- [16] In the original lease date 13th December 2006 there was no prescribed time period to complete the construction work. Clause 2(e) of the original lease required the plaintiff to complete the construction work in a timely manner.
- [17] The learned counsel for the interested party submits that the plaintiff has not done anything for the last almost sixteen years. The plaintiff cannot be blamed for the delay from 2006 until the entering of the variation of lease.
- [18] From the above it is clear that the delay has been caused by the defendant. If the defendant promptly responded to the plaintiff's submission of the plans there could not have been any delay in this matter. The defendant cannot penalize the plaintiff for its own mistakes. The plaintiff is therefore entitled to a judgment as prayed for in the Originating Summons.

ORDERS

1. Order (1) sought in the Originating Summons is granted and the defendant is ordered to reinstate the Native lease No. 28062 being Lot 1 SO 5580 together with the variation No. 819722.
2. There will be no order for costs.


Lyone Seneviratne



JUDGE

09th September 2021.