

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

**HBC 62 of 2016**

**BETWEEN** : **SAGADEO NAIDU** as Executor and Trustee of the Estate of Guruswamy Bhaktar formerly of Solovi in Nadi but now of USA.

**PLAINTIFF**

**AND** : **ANDREW SUBBA REDDY** of Transmeter Road, Malolo, Nadi.

**FIRST DEFENDANT**

**AND** : **DIRECTOR OF LANDS** Government Buildings, Suva.

**SECOND DEFENDANT**

Appearances: Mr. Daveta with Mr. Chand for the Plaintiff  
Ms. Vikash for the first Defendant  
Mr. J. Mainavolau for the second Defendant

Date of Hearing: 05.11.2021

Date of Ruling: 07.12.2021

# **R U L I N G**

## **INTRODUCTION**

1. Before me are two applications.
2. The first is the first defendant's application to strike out the plaintiff's amended statement of claim filed on 16 August 2019 under Order 18 Rule 18(1) (a) of the High Court Rules 1988 as disclosing no reasonable cause of action.
3. The second is the plaintiff's application to amend its claim under Order 20 Rule 5.
4. I will deal with both applications simultaneously.
5. The Court may strike out a claim under Order 18 Rule 18 (1)(a) of the High Court Rules 1988 if it discloses no reasonable cause of action. In such an application, all that the Court is required to do is to look at the facts as pleaded in the Statement of Claim and assume that they are proved, and then ask – "is there a reasonable cause of action disclosed by these facts". Because I am dealing with both applications simultaneously, I will consider the facts as pleaded in the proposed amended statement of claim and assume they are established.
6. It is only plain and obvious cases when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable or when the action is one which cannot succeed or is in some way an

abuse of the process or the case unarguable where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion.

7. In National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000), the Fiji Court of Appeal said:

If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court.

8. In Cropper v Smith (1884) 26 Ch. D. 700 at page 710 Bowen L.J. said

Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.

and at page 711:

It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

### **THE FACTUAL MATRIX**

9. The plaintiff was the lessee of Agricultural State Lease No. 9062. The said lease expired on 31 March 1983. The Director of Lands then granted an extension to the plaintiff for a further twenty (20) years under ALTA. That extension expired on 31 March 2003.
10. After the expiry of that extension, the plaintiffs continued occupation of the said land. After some years, the Director of Lands then issued a fresh lease over the same land to the first defendant, Andrew Subba Reddy.

### **APPLICATION TO STRIKE OUT**

11. Miss Vikash acts for Andrew Subba Reddy.
12. She argues that when an agricultural lease, whether it's a state lease or an i-TLTB lease, has run its course, and thereafter, a further twenty-year extension granted under section 13 of the Agricultural

Landlord & Tenant Act has also run its course, the lease thereby reverts to the landlord which will either be the State or the i-TLTB as the case may be.

13. Once the land reverts to the landlord, it is the landlord's absolute prerogative and discretion to grant a new lease to anyone it wishes who has applied for it. Ms. Vikash relies on **Ministry of Lands and Mineral Recourses v Rafiqan Bi et al** Judicial Review No HBJ 01 of 2007 (Labasa) where Singh J said:

' ..... that lease had expired and therefore land reverted to the State. **Absent of clear known policy to the contrary** the department had the discretion to grant the lease to any one of the persons who applied for it. The applicant had lodged no application so they had no right to be heard...!'

14. The distinction made by Singh J is important.
15. I would breakdown what I think Singh J is saying as follows. Where a lease has been extended for a further twenty years under Agricultural Landlord & Tennant Act, and which twenty-year extension has run its course, there is no right to a further extension under the ALTA or under common law. However, there may be a public law claim based on the doctrine of legitimate expectation - but a claim based on legitimate expectation is only sustainable if there was, in the first place, a clear policy by the government that a further extension will be granted. Of course – if such a clear policy exists, an applicant who relies on it will have to come by way of Judicial Review under Order 53 of the High Court Rules 1988.
16. In my view, assuming there was a government policy in place, the right to challenge a refusal by the Director of Lands to grant a further extension over a particular parcel of land, would be subject to the doctrine of indefeasibility where a *bona fide* purchaser for value has acquired the land.
17. In this case, there is no government policy in place which promises such an extension, and the plaintiff has not theorized his case as such.
18. Ms. Vikash adds that a former sitting tenant whose lease has expired has no right of first refusal over an agricultural lease which has expired as such. It follows then that the Director of Lands in this case is under no statutory duty to consult such a former tenant as the plaintiff before leasing out the land afresh.
19. Ms. Vikash's argument is twofold. First, the proposed amended statement of claim does not particularize the fraud alleged. That in itself offends the rule about pleadings under Order 18 Rule 7 (1) of the High Court Rules 1988.
20. Second, even if the plaintiff had alleged facts and pleaded them in sufficient particularity, it is doomed to fail anyway.

## DISCUSSION

21. Fraud, if established, provides an exception to the principle of indefeasibility of title.
22. However, as Madam Justice Phillips has said (see references to this in **Chute v Wati** [2009] FJHC 247; HBC049.2008 (30 October 2009), what must be established is *actual fraud* and not just constructive or equitable fraud and that the fraud to be proved must be that of the registered proprietor.
23. Phillips J cited **Wallington –v- The Directors of the Mutual Society (1879) 5 App Cas at 697** as authority that general allegations of fraud are insufficient even to amount to an averment of fraud of which any Court ought to take notice.
24. In **Davy v Garrett** [1878] 7 Ch. D 473, Thesiger L.J at page 489 acknowledged the principle as follows:

“In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts... It may be not necessary in all cases to use the word “fraud”... It appears to me that a Plaintiff is bound to show distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence.”

25. In **Three Rivers District Council v Governor and Company of The Bank of England** [2003] 2 AC 1, Lord Millet said at paragraphs 184 and 186:

184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularized; and that it is not sufficiently particularized if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th Ed (1952), p 644; **Davy v Garrett** (1878) 7 Ch D 473, 489; **Bullivant v Attorney General for Victoria** [1901] AC 196; **Armitage v Nurse** [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularized, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which

tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.”

26. To the above, I would add that a party (A) who attempts to impeach the indefeasibility of title of a registered proprietor (B) on an allegation of fraud against (B) must also establish that the act of fraud on the part of (B) had resulted in a denial or a deprivation of a right or entitlement to him (A) who alleges fraud, such that the gain of the title by the said proprietor (B) was, accordingly, unlawful.
27. In this case, the plaintiff’s problem is not about the lack of particularity in the fraud he has alleged. Rather, his main problem is that fraud is simply irrelevant in the facts of this case. I say this because it is impossible for the plaintiff to establish in the first instance that he is entitled to be issued a lease. If he is not entitled to be issued a lease, then he cannot complain of being deprived of it by fraud or by any other means. Just as one cannot give what one does not have, similarly, one cannot be deprived of a right or entitlement that one did not have in the first place.
28. From the way the case was argued in court, it appears that the plaintiff’s main grievance is against the Director of Lands act of granting a lease to the first defendant and in particular, the alleged failure of the Director of Lands to follow proper procedures in “**re-entering the lease**” and their failure to give proper notice.
29. This aspect of the defendant’s case theory is not sustainable in law, in my view.
30. The fact of the matter is that the lease had expired after having been extended under ALTA. My understanding of a landlord’s right of re-entry is that, generally, it is exercisable whenever there is a breach of a term of the lease by the tenant and in order to be exercised validly, the appropriate notice must be given which gives the defaulting tenant an opportunity to remedy the breach or face the consequences of re-entry. The wording of section 38 of the Agricultural Landlord & Tenant Act which Mr. Daveta relies on is clear on that.

**38.-(1) A right of re-entry or forfeiture** under any proviso or stipulation in a contract of tenancy for a **breach of any covenant or condition**, express or implied, in such contract of tenancy shall not be enforceable, unless and until the landlord serves on the tenant notice-
31. This situation does not arise here. While the plaintiff had allegedly breached the lease by not cultivating it, the Director of Lands chose not to re-enter the lease. Instead, the Director chose simply to wait for the lease extension to run its course and then, after a lapse of some time, issued a fresh lease to the first defendant who had applied for it. That is the perfectly within the Director’s prerogative as owner.
32. I do not see any valid cause of action against the first defendant. I also do not see any strong cause of action against the second defendant.

**SHOULD I GRANT LEAVE TO THE PLAINTIFF TO AMEND THE CLAIM**

33. Should I allow the plaintiff to amend his statement of claim?
34. Mr. Daveta in his submissions said that his client is entitled under section 6 (b) of the Agricultural Landlord & Tenant Act to a further 10-year extension. Section 6(b) provides:

Term of contract of tenancy

6. Notwithstanding the provisions of any Act or agreement to the contrary but subject to the other provisions of this Act-
- (a) any contract of tenancy created after the commencement of this Act but before the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976\* shall be deemed to be a contract of tenancy for a term of not less than 10 years;
- (b) any contract of tenancy created after the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976\* shall be deemed to be a contract of tenancy for a term of not less than 30 years;
35. These provisions appear under Part II of the Act which is concerned about security of tenure. They are deeming provisions concerning the minimum term of an ALTA tenancy in the two circumstances under subsection (a) and (b) respectively. These provisions are not concerned about granting a right of extension.
36. The plaintiff also relies on the fact that they have continued in occupation of the lease in question. I do not see this as necessarily giving him any right to be issued a renewal of lease in the circumstances of this case.
37. On the facts of this case as pleaded in the statement of claim – and also even in the proposed statement of claim, it is impossible for the plaintiff to establish a right of first refusal and accordingly, I feel the claim should be struck out against both parties.

**ORDERS**

38. Accordingly, I so Order that the claim against the first and second defendants be struck out with costs to the first and second defendants which I summarily assess at \$850-00 (eight hundred and fifty dollars each).



.....  
Anare Tuilevuka  
**JUDGE**  
Lautoka

**07 December 2021**