IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
CIVIL ACTION NO. 174 OF 1981

000273

Between:

FIJI BIOMARINE LIMITED — PLAINTIFF

- and -

SUVA CITY COUNCIL — DEFENDANT

Mr. P.I. Knight for the Plaintiff.
Mr. V. Parmanandam for the Defendant.

J U D G M E N T

The plaintiff seeks a declaration that the defendant Council has already given approval for the use of the first floor of the Old Town Hall building in Suva as a private function room and restaurant or alternatively a declaration that the defendant is unreasonably withholding its approval for such use.

The parties on the 16th August, 1979, entered into an agreement whereunder the Council, as lessor, let to the plaintiff, as lessee, for a term of 20 years the Old Town Hall building erected on the land comprised in Crown Lease A/71. The agreement is an agreement to sub-lease the said land of which land the Council is lessee under the Crown Lease A/71.

Crown Lease A/71 states therein that the lease is a protected lease under the provisions of Ordinance No. 1 of 1888. That Ordinance was repealed by the Crown Lands Ordinance Cap. 138 (1955 Laws of Fiji) and by virtue of the repeal and savings clause 44 thereof, Crown Lease A/71 is deemed to have been granted under the analogous provisions of the Crown Lands Ordinance.

Section 13(1) of the Crown Lands Ordinance Cap. 113 (1967 Revised Edition Laws of Fiji) provides as follows :

> "13.(1) Whenever in any lease under this Ordinance there has been inserted the following clause :-
>
> 'This lease is a protected lease under the provisions of the Crown Lands Ordinance.'
>
> (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the wri ten consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.
>
> Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."

This provision now has application so far as Crown Lease A/71 is concerned.

Mr. Knight for the plaintiff, while contending that the Director of Lands' consent to this action is not required, at the Court's suggestion sought and obtained such consent (Acting Director of Lands' letter dated 27.5.81).

Mr. Parmanandam for the Council, however, argues that the Director of Lands' consent should have been obtained before the plaintiff instituted its action against the Council.

There is no merit in that argument. Section 13(1) does not require the prior consent of the Director of Lands to institute an action but a Court cannot deal with a

protected lease unless such consent is first obtained. The only way a Court can 'deal' with such a lease is by way of judgment or order. The Director of Lands' consent was produced to the Court before the hearing of this action commenced.

While the Court is concerned with a sublease of a protected lease, and the words specified in section 13(1) do not appear in the sublease, such words do appear in the head lease. A dealing by the Court with such sublease must be deemed to be a dealing with the protected lease. The section is designed to prevent dealing with or alienation of land the subject of a protected lease without the prior consent of the Director of Lands and any dealing with such land in respect of a sublease must be treated as a dealing with land the subject of a protected head lease.

Mr. Parmanandam raises another argument and that is that there is endorsed on the sublease the following:

"I HEREBY CONSENT TO THIS AGREEMENT.

(sgd) A.M. Rabo.
for Director of Lands
26 Feb. 1980".

He points out that the term of the lease commenced on the 1st February, 1980. There is attached to the agreement an addendum to the agreement also dated the 16th August, 1979, specifying that if the plaintiff opened for business before 31st December 1979 it would pay rental at the rate provided for the month of January, 1980.

Mr. Parmanandam argues that the plaintiff went into occupation before the date of the consent endorsed on the agreement.

The consent endorsed on a document by the Director of Lands is in most cases the formal recording of a written consent previously given by the Director of Lands.

Parties seeking consent of the Director of Lands are required to apply formally for such consent and pay a fee. The Director of Lands considers the application and indicates by letter, if consent is given, that consent will be endorsed on the document when presented.

Such written advice to the applicants must be treated as consent by the Director of Lands whether it is given subject to conditions or not. Endorsement of such consent on a document is not legally required but for practical purposes is required particularly for land transfer documents so that the Registrar of Titles will accept the document for registration.

The copy letter of the Director of Lands dated 1st June 1979 (marked MB1 annexed to the affidavit of Mr. M.B. Brain sworn the 28th April, 1981) advised the Council that the Director of Lands had been asked by the Minister to advise the Council "that there is no objection to the use of the Old Town Hall for the proposed aquarium" subject to the five conditions stated therein.

Condition (d) refers to "submission of the ublease agreement between the Council and Fiji Biomarine for formal consent". This indicates that the Director of Lands himself appreciated that he had consented to the proposed agreement and that that consent was to be evidenced by a 'formal consent' endorsed on the agreement.

Mr. Vishnu Chand, the Town Clerk, in his affidavit sworn the 14th day of April, 1981, claims the sublease is null and void but this is only repetition of Messrs. Parmanandam Ali & Co.'s views in their letter to Messrs. Cromptons dated the 17th February, 1981 (MB.8 annexed to Mr. Brain's affidavit sworn the 5th March 1981) which was written after the Council had arefused consent to the proposed change of user.

The prior consent of the Director of Lands to the sublease was obtained by the Counti on the facts before me in this action.

In the recitals in the sublease it is stated that the lessee (the plaintiff) desires to lease the land and the building "as an aquarium and for purposes ancillary thereto".

Clause 5 "USE OF DEMISED PREMISES" is the clause which has given rise to this action. It reads as follows :

> "The Lessor shall permit the Lessee to use the demised premises for the purposes shown on the plans attached hereto and subject to the prior approval of the Lessor which approval shall not be unreasonably withheld for any other purposes that the Lessee may reasonably require".

Attached to the lease are the plans referred to in Clause 5.

The upstairs or first floor portion of the premises shows "CONFERENCE 50 PEOPLE" indicating that the intended use of that part of the premises was as a conference room. By clause 5 use by the plaintiff was restricted to such use except with the prior approval of the Council.

In or about the month of July 1979 the plaintiff, according to Mr. Brain, submitted plans to the defendant showing the area on the first floor as being "conference centre". Mr. Brain further alleged that the plans were subsequently amended to show the said area as being "conference centre restaurant or shop to Council's satisfaction and that that amendment was approved and duly stamped by the defendant on the 23rd day of October 1979.

A copy of the said amended plan is annexed to Mr. Brain's affidavit sworn the 5th day of March 1981 marked MB2.

The amendment bears the Council's stamp and an initial and dated "23rd Oct. 1979". The initial is that of Mr. Vereniki Vatucawaqa the assistant building surveyor employed by the Council who gave evidence for the Council.

Mr. Brain in cross-examination alleged that the alteration to the plan was done in Mr. Parmar's office. Mr. Parmar is a senior engineer employed by the Council. Mr. Brain denied calling in to pick up the plaintiff's

plan on the 23rd October 1979 or that the amendment was made at the counter in the Council's office in the presence only of Mr. Vereniki.

When Mr. Vereniki gave evidence, it was clear that Mr. Brain had not been telling the truth about the amendment on which the plaintiff now relies. I accept Mr. Vereniki's evidence which discloses that on the 23rd October, 1979, after the Building Surveyor of the Council had on that date approved the plans on behalf of the Council, Mr. Brain called to collect the approved plan. Mr. Brain, he said, took the plan to the counter in the building section and requested an amendment after the plan had been approved. Mr. Brain, he said, wrote the words "centre restaurant or shop" on the approved plan. (Mr. Brain had to admit this in cross-examination). Mr. Vereniki said he told Mr. Brain that detailed plans would have to be submitted as a result of which Mr. Vereniki added the words. "To Council's satisfaction" and added the Council's stamp and his initials. Detailed plans were not submitted to the Council by the plaintiff until 9th January, 1981. They have not to date been approved by the Council.

Mr. Brain, who is a Director of the plaintiff company, must have been well aware that the sublease restricted the use of the first floor area to a conference room since he negotiated the lease.

In 1978 the plaintiff when seeking a lease of the premises submitted a sketch plan of how they proposed to adapt the building and the use to which it would be put. (MB6 annexed to Mr. Brain's affidavit sworn the 28th April, 1981).

On the left of MB6 is a description referring to the conference room which is relevant. It states :

> "For the more learned, there'll be a laboratory where studies will be conducted to observe marine life. Also to teach the public and school children more about the aquatic environment around Fiji. We even have a conference centre for serious discussion.

No mention was made by the parties of the Director of Lands' letter (MB4 annexed to Mr. Brain's affidavit sworn the 28th April, 1981). He said :

> "I have to advise that after giving due consideration to the educational value of the proposed aquarium it has been decided to charge a concession rental of $1000 per annum for the first two years and thereafter a rental of $1750 per annum until re-assessed in the tenth year".

The plans submitted to the Council for approval, and which were approved on the 23rd October 1979, did not disclose any change of user on the first floor to that disclosed in the plans attached to the lease.

The date 23rd October 1979 was remembered by Mr. Brain because it was that day that the Administrator of the Suva City Council vacated his office and Councillors took over. It is a reasonable assumption that Mr. Brain's actions that day was a consequence of his appreciation that he would thereafter have to deal with elected Councillors and not the administrator.

Mr. Brain must also have been aware that Mr. Vereniki was not the officer who had approved the plans and was only an assistant building surveyor. Having persuaded Mr. Vereniki to allow an amendment to the plan Mr. Brain on behalf of the plaintiff later alleged that the Council had approved the use of the area in question as a conference centre, restaurant or shop and the company now seeks to obtain a declaration to that effect.

I am in no doubt at all having heard and seen both Mr. Brain and Mr. Vereniki that Mr. Brain quite improperly prevailed on Mr. Vereniki to permit him to amend the plan. Mr. Vereniki should not have permitted any alteration to a plan, which had already been approved, on a verbal application by Mr. Brain. He was a patently honest witness but a simple man who believed his adding the words "TO COUNCIL'S SATISFACTION' would ensure that detailed plans were submitted and considered by the Council. He obviously did not appreciate that his

action would be interpreted by the plaintiff as the granting of consent to the use of the first floor as a restaurant.

Notwithstanding the alteration, the plaintiff is still bound by the restriction as to user contained in its lease. There is no evidence that the plaintiff at any time prior to the 23rd day of October, 1979, sought the Council's prior approval as sub-lessor to any change of user as regards the first floor of the premises. The first written application on the evidence before me is the plaintiff's formal application by letter addressed to the City Engineer of 8th January, 1981, (Exhibit MB.3 attached to Mr. Brain's affidavit sworn the 5th March, 1981.)

Whatever the legal effect may be so far as Mr. Vereniki's purported approval of the alteration is concerned, that approval was approval to building plans approved by the City Engineer. Such approval cannot be deemed to be an approval by the Council to a change of user which under the lease required the consent of the Council.

Holding that view it follows that I decline to grant the declaration sought that the Council has already given its approval to the change of user of the first floor of the premises as a private function room or restaurant.

The next issue to consider is whether the refusal of the Council to approve such change of user is unreasonable.

The head lease, A/71, also contains a condition which restricts the use of the premises by the Council and also restricts the use by others whom the Council permits to use the premises.

Clause 6 of the original lease was extremely restrictive permitting the premises to be used only for such purposes as a Town Hall is ordinarily used for.

To enable the Council to grant the sublease to the plaintiff the conditions regarding both the absolute prohibition against subletting and the restricted use of

the premises in the head lease A/71 were amended allowing subletting and change of user with the head lessor's prior consent.

So far as the Director of Lands is concerned (as head lessor) he approved the plaintiff's sublease with its restricted use. Any change of use by the plaintiff which could be considered a use to which a town hall is put would not require his consent because such use is exempted by clause 6 of the head lease. As between the parties to this action however such change would still require the Council's consent because of the express provisions of the sublease restricting use to that provided in the sublease.

I do not consider there can be any argument that use of part of town hall premises as a restaurant, whether licensed or not, is not a purpose for which a town hall is ordinarily used.

The Council cannot grant permission to such use without it first obtaining the Director of Lands' consent or it would itself be in breach of the head lease. I have referred earlier to the fact that the Director of Lands approved the sublease and decided to charge a concession rental.

If the Director of Lands' consent was sought to the proposed change of use he could conceivably seek an increased rental. It is debatable whether in such an event the Council could increase the rent payable by the plaintiff as a condition precedent to approving a change of user.

There is nothing in the sublease which obligates the Council to seek the Director of Land's approval to a proposed change of user by the plaintiff. Nor does the sublease either recognise that such approval is necessary or permit the plaintiff to seek the head lessor's approval to a change of user.

Refusal by the Council to permit a change of use of the premises for purposes "ancillary to use as an aquarium" could be held to be unreasonable but the consent of the Director of Lands would still be required. Mr. Knight relies on Vienit Ltd. v. W. Williams & Son (Bread St.) Ltd. (1958) 3 All E.R. 621, a case where a sublease contained a covenant requiring consent to any assignment and also a covenant requiring consent of superior lessor. The head lessor withheld consent unreasonably but lessors were prepared to consent. The Court held that the lessee's refusal to give consent, because the head lessor unreasonably refused consent, was unreasonable but no declaration was made that head lessor's refusal was unreasonable as the head lessor was not a party to the proceedings. Mr. Knight argues that this Court can hold that the defendant's refusal is unreasonable notwithstanding that the Director of Lands is not a party to this action.

I do not consider the case quoted by Mr. Knight has any relevance. First it is a case where consent to an assignment of the lease is concerned.

In such cases the personality and financial standing of the proposed assignee is what has to be considered.

A change of use however usually involves financial considerations. Rental of premises is usually based on the use to which premises are to be put. That is certainly true in the instant case so far as the head lease rental is concerned. Use of the area in question as a conference centre would normally involve charging for use of such centre. Use as a restaurant however whether licensed or not is not a minor change as Mr. Knight suggests but a substantial change. Mr. Brain clearly envisages that such a change would solve the defendant's financial difficulties. Its loss last year was $39,000.

It is usual, and I would say equitable, to provide machinery for re-assessment of rent in a lease if a change of user is sought which would increase the lessee's profit from

the premises. No such machinery was provided in the sublease. Instead there is provision for rent to be determined in a manner which satisfies me that the parties always intended the premises to be used as an aquarium and purposes ancillary thereto and nothing else.

There is provision for a fixed rent of $11,000 for years 1980 and 1981 increased to $11,750 in 1982 and thereafter. Rent in 1981 is $11,000 or 7% of the gross door takings whichever sum is greater. That percentage is increased to 12% in 1982. "Gross door takings" are defined as the gross collected by the lessee for admission to the premises.

In the Vienit Ltd. case the Court was not concerned with a "protected lease" where the Director of Lands consent as head lessor has to be obtained to any dealing or change of user.

In the Vienit Ltd. case the Court no doubt had in mind that the sub-lessor and sub-lessee could claim relief if the head lessor, whose withholding of consent the Court held was unreasonable, sought to terminate the lease. In the instant case the Court could not grant relief if the Director of Lands sought to determine the lease for what was a breach of lease A/71.

Holding that the defendant's refusal was unreasonable would not bind the Director of Lands and the result could be that the Council's lease could be jeopardised quite apart from the legal question whether this Court in any event is empowered to make a declaration which on the face of it puts the Court's seal of approval on the use of premises which the Director of Lands under the head lease can legally refuse to permit. He is not contractually or legally bound to grant consent whether the Court considers the Council's refusal is unreasonable or not.

The Council cannot permit use of the premises for any purpose not in accordance with the provisions of the

head lease or the sub-lease approved by the Director of Lands except where such use is not in breach of lease A/71. It is not legally or contractually bound to seek the head lessor's consent to the proposed change of use of the premises. Clause 5 of the sublease must be interpreted to restrict use to that permitted under the sublease or such use as does not require the Director of Lands' consent. The Director of Lands' consent to the sublease does not commit him to conse ting to any use the Council may approve.

Mr. Parmanandam also referred to the Suva (Drinking in Public Places) By Laws which prohibits drinking of liquor except with the consent in writing of the authority in control on any land owned by the authority.

I am not concerned with those By Laws because the alternative declaration sought by the defendant is in connection with proposed use as a private function room or restaurant. There is no mention of licensed premises.

The Council might refuse consent to drinking of liquor on the leased premises which are on land leased to the Council. No Court could compel the Council to consent to drinking on the premises if the By Laws applied.

I appreciate that the plaintiff has spent a great deal of money in renovating the premises and what it has provided for the City of Suva is a very valuable and attractive asset. The project deserves to succeed but regretably the company's aspirations have not so far been achieved. It suffered a loss in 1980 and there is no evidence that 1981 offers any hope of an acceptable profit. It may happen that the company cannot continue in business without being given an opportunity to increase its profits by such ventures as it now seeks to implement.

That however is a matter for the parties and the Director of Lands to consider. I am only concerned with the one remaining issue as to whether the Council's refusal to consent to the proposed user is unreasonable.

The short answer to that issue is that refusal to approve a use which would be in breach of the Council's lease with the Director of Lands cannot be considered unreasonable. The Council is not contractually bound to seek the Director of Lands' consent to a use which would require his consent. In my view the proposed use by the plaintiff would require his consent. The purpose for which the plaintiff might reasonably require to use the premises must be confined to the use permitted by the provisions of the sublease or which does not require the prior consent of the Director of Lands, namely a purpose for which a Town Hall is usually used whatever may be the limits of such use. Such purpose however would still require the Council's consent and refusal to grant it would be unreasonable.

As I consider, the Council's refusal was not unreasonable in the circumstances it follows that I decline to make the alternative declaration.

The plaintiff has failed to obtain a declaration and must pay the costs of this action.

I would make one observation. Clause 5 of the head lease provides :

> "The lessee will not alter the name or style by which the said buildings are at present known viz : The Victoria Memorial Hall".

The recitals in the lease disclose that the Victoria Memorial Hall was "erected by the Colonists of Fiji in memory of Her late Gracious Majesty". Queen Victoria has a place in the history of Fiji and in the hearts of its Fijian people, being the sovereign to whom they ceded their country.

Throughout these proceedings the premises have been called the "Old Town Hall."

The Council may consider it should hereafter comply with the provision of the lease so perpetuating the memory of Her Gracious Majesty and in furtherance of the trust created by the Fiji citizens long since dead who erected the building prior to 1908.

(R.G. KERMODE)
J U D G E

SUVA,
th August, 1981.