IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 382 OF 1978.

Between:

JAMNADAS SPORTS (FIJI) LTD. PLAINTIFFS

- and -

D.M. MUSTAPHA & OTHERS DEFENDANTS

Mr. H. Patel for the plaintiffs.
Mr. H.K. Nagin for the defendants.

J U D G M E N T

The plaintiff company was at all relevant times a tenant of shops numbered 3 and 4 on the ground floor of the defendants' commercial premises in Suva known as Epworth House.

Under an Agreement to Lease dated the 1st day of March, 1974, the defendant let the said shops to the plaintiffs for a period of 5 years from the 1st of April, 1972.

It is clear from the dates stated above that there was considerable delay in preparing or obtaining execution of the Agreement. The term was extended for a further period of 5 years and expired on the 31st March, 1982.

The Agreement contained a covenant to the effect that the said shops were not to be used for any purpose other than for business purposes without the prior written consent of the defendants.

The Agreement also, in clause 3(b), contained a covenant in the following terms :

> "3(b) The lessee paying the rent hereby reserved and performing and observing all and singular the covenants and conditions on its part herein contained and implied shall quietly hold and enjoy the said premises throughout the currency of this Agreement to Lease without any interruption by the lessors or their servants or agents."

About September, 1978, the defendants entered into a building contract with Narain Construction Company Limited to erect a double storey building arcade complex in front of the plaintiff's premises. The complex was to extend to the rear of the defendants premises. The result when the complex was completed was that the shops were in an arcade with other shops.

The plaintiffs allege that the building operations were a breach by the defendants of the covenant for quiet enjoyment contained in the said Agreement and also constituted a nuisance. They allege they have suffered damage as a result.

They originally sought orders which if granted would have prevented the defendants from erecting any building in front of their shops. The plaintiff is no longer in occupation of the said shops. The arcade complex was completed some time ago.

The plaintiffs' claim is now limited to claims for alleged special and general damages from the date the

building works commenced until their tenancy expired.

Before the building works commenced there were three ways the general public could obtain access to the plaintiffs' premises.

Epworth House has frontages onto Nina Street, Stewart Street and Marks Street. The plaintiffs two shops before building operations commenced had no frontage directly on to any of those streets. The public had access to the shops from those streets along a concrete footpath or across a piece of vacant land.

Directly in front of the plaintiffs' shops at the time was a vacant strip of land owned by the defendants with a boundary fronting on to probably the busiest intersection in Suva. The intersection is at the traffic lights near Burns Philp (s.s.) Co. Ltd. From this intersection the plaintiffs' premises were visible before the building complex was erected. With the permission of the defendants the plaintiffs had earlier constructed gardens on this vacant area and had used it for serving coffee to the public. On it they had also erected a board advertising their premises.

It was on this vacant area that building operations started about September, 1978. From the start of the operations the plaintiffs' premises were no longer visible from the intersection. Access to the shop across the vacant block was no longer possible except along a 1 metre wide strip of land left by the contractors in the early stages of their operations. Building operations inevitably created noise and dust and the plaintiffs complain their business suffered as a result. They allege that concrete dust damaged and soiled their goods which they had to sell at very reduced prices

The plaintiffs claim by way of special damages loss of profits amounting to $150 a day from 8th September, 1978, and also by way of special damages an unspecified amount

for alleged damage done to the plaintiffs goods. They also claim $100,000 general damages.

The Agreement is silent as regards access to the shops. While the plaintiff had for some years used the vacant land they had only a bare licence to do so. The Agreement made no mention of the land. They paid nothing for such use. There was no legal obligation on the defendant to permit the plaintiff by its officers and servants and their customers continued access to their shops across this land once the licence to use it was terminated.

Nor were the defendants restricted in any way by the terms of the Agreement from using their vacant land as they thought fit provided such use was not in breach of the covenant for quiet enjoyment. The defendants were not obliged to keep the section clear of any obstruction which would allow the public an uninterrupted view of the plaintiffs' premises.

The public did have access at all times to the plaintiffs' premises but such access both during building operations and since was not as convenient in the opinion of the plaintiff as it was previously. There is no doubt it was not so convenient but a large arcade complex in a busy part of the city must have generated public interest in the complex.

I have, however, to consider whether the building operations were in breach of the express covenant in the Agreement for quiet enjoyment or constituted a nuisance.

There have been a number of conflicting judicial statements as to what constitutes a breach of the covenant for quiet enjoyment.

In Sanderson v. The Mayor of Berwick-Upon Tweed /1884/ 13 Q.B.D. 547, Fry L.J. giving the judgment of the Court at p.551 said :

> ".....it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

This statement of principle was approved by Lindley L.J. in Robinson v. Kilvert /1889/ 41 Ch. D. 88.

It was held in Kilvert's case that a landlord who lets part of his property for the purpose of a particular trade is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder of his property.

The defendants in the instant case were not precluded from using the vacant land and building thereon provided that in doing so they were not in breach of the covenant for quiet enjoyment.

The plaintiffs main complaint at the time was that the erection of the buildings hid their shop from the public's view and that one access to their premises was blocked permanently. As a result they say their business suffered.

In Tebb v. Cave /1900/ 1 Ch. 642 the defendant was held to have broken his covenant. The defendant owned two adjoining pieces of land. He built on one and demised it to the plaintiff with whom he covenanted for quiet enjoyment. He then built on the other piece of land and put up buildings of such a height that they caused the chimneys of the plaintiffs' house to smoke badly. Buckley J. held the defendant had broken his covenant. Buckley J. referred to

Stirling J.'s comments in Aldin v. Latimer Clark, Muirhead & Co. /1894/ 2 Ch. 437. Stirling J. in that case considered the authorities and said :

> "..'The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection.' "

Romer and Cozens-Hardy L.J.J. in Davis v. Town Properties Investment Corporation Ltd. /1903/ 1 Ch. 797 doubted the correctness of Buckley J's decision in Tebb v. Cave. Romer L.J. at pp.804 and 805 said :

> ".....I only wish to add that, in the case of an alleged breach of the ordinary covenant for quiet enjoyment, where by the alleged breach neither the title to the land nor the possession of the land is affected, and what the lessee complains of is only an interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment. I doubt, therefore, whether Tebb v. Cave was rightly decided on the ground of breach of covenant, seeing that in that case the defendant was not directly interfering with the plaintiff's house."

In Brown v. Flower /1911/ 1 Ch. 219 Parker J. at pages 226 and 227 said :

> ".....It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all. A landowner may sell a piece of land for the purpose of building a house which when built may derive a great part of its value from advantages

> of prospect or privacy. It would, I think, be impossible to hold that because of this the vendor was precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, and to a great extent interfere with the comfortable enjoyment and diminish the value of the property sold by him. It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort."

Parker J. in Flower's case at p.228 also said :

> "....It appears to me that to constitute a breach of such covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough."

The plaintiffs rely on the case of Owen v. Gadd and Others /1956/ 2 A.E.R. 28 where it was held that there was a breach of the covenant for quiet enjoyment. The defendants soon after the lease was granted to the plaintiffs had repairs carried out to the upper part of the premises which they occupied. Scaffold poles were erected immediately in front of the windows and doors of the plaintiff's lockup shop in order to carry out the repairs. The judge at first instance found that the existence of the scaffolding constituted a breach of the covenant for quiet enjoyment and was not so trivial or transitory in character as to disentitle the plaintiff from maintaining a claim. The poles interfered with the access of the public to the shop windows and interfered with the plaintiff's trade. The poles were there for 11 days. He was awarded forty shillings damage.

The Court of Appeal upheld the judge's decision. The Court held the purpose of the demise being that the premises should be used as a shop for retail sale of particular articles the erection of the scaffolding constituted an interference sufficiently physical and direct to be a breach of the covenant for quiet enjoyment.

I need refer to only one other case before considering whether there has been any breach of the covenant by the defendants. That is the case of Matania v. The National Provincial Bank Ltd. and the Elevenist Syndicate Ltd. /1936/ 2 A.E.R. 633. This was a case where building operations were carried on at premises adjoining those demised to the plaintiff. An independent contractor was involved as in the instant case. The demise to the plaintiff by the Bank of part of the premises contained the usual covenant for quiet enjoyment. The Bank then demised part of the premises to the second defendant who wished to carry out extensive alterations. The Bank consented to those alterations subject to the second defendant obtaining the consent of all sub-lessees. The consent of the plaintiff was never obtained.

The plaintiff suffered damage by reason of the dust and noise caused by the building operations.

The Bank was not held liable because its qualified consent was held not to be a consent at all. The second defendant was, however, held to be l able for the nuisance caused by the independent contractor. The court considered the defence of independent contractor in nuisance and held that defence was not available where the operation to be performed clearly involves in its very nature the risk of damage being done to the plaintiff.

In my view the plaintiffs cannot complain that the building operations obscured their shops which could no longer be seen by the public from the intersection. Nor can it complain that one of the three means of obtaining

access to their shops was permanently blocked by the erection of the building complex.

The building works would inevitably have resulted in noise and dust.

The independent contractors did take precautions to cause as little trouble and annoyance to the plaintiff as was possible but in my view there was still interference with the plaintiffs business for some time after building operations commenced.

There was excavation work done on the vacant land which apparently lasted for about 5 days. After that work was done the contractors erected a wooden wall which from the photographs tendered was about 2 metres high. The wall covered 90% of the frontage of the shops and was erected about four feet from the shop. This wall was erected to screen the shop from dust but it also made access to the shop more difficult for anyone seeking to purchase goods from the shops.

The contractors also left a passageway for access at all times from Marks Street during construction works which lasted about 4 to 5 months. They also erected a large sign indicating where the shops were.

After completion of the building works, the plaintiffs had reasonable unimpeded access to the shops but their shops were no longer visible from any of the streets or the intersection.

Despite their complaints the plaintiffs did not vacate the shop when their lease expired or seek to terminate the Agreement for alleged breach. In fact they wanted a further lease which is an indication that they still considered their premises suitable for conducting their business therein notwithstanding that their shops were

within the complex and not visible from the streets.

Mr. D. Amratlal a director of the plaintiff company stated that the access from Nina Street was blocked by a concrete wall and that half the access from Stewart Street which was by a flight of steps was partially blocked during building operations. He said the contractors stored concrete blocks in the passageway which impeded access to their shops. I accept this evidence.

There can be no doubt, and I hold as a fact, that the business operations of the plaintiff company during building operations were for a while seriously affected by those operations. They could not conduct their business in a normal manner. In my view the defendants were in breach of its covenant for quiet enjoyment in not ensuing that their contractors so conducted their building operations as to reduce to a minimum the disturbance to and interference with the plaintiffs' business. There was for a time direct physical interference with the plaintiffs' business operations.

No witness was called by the defendants and there is only the evidence of the witnesses called by the plaintiffs to consider as regards the issue of damages.

Mr. Amratlal testified that a quantity of stock was damaged by cement dust as a result of the building operations. He admitted no steps were taken to prevent dust entering the shops. While it is appreciated that doors could not be closed while the shops were open for business, there were two ways the company could have reduced their alleged loss. One was to have only sample stock displayed and the rest in boxes or wrapped up or they could have moved their stock to another store they were operating at the time in Suva only a few yards away in Burns Philp (S.S.) Company building. Mr. Amratlal said this shop was a specialised one for sale of tourist goods but there appears

to be no reason why it could not have been used also to sell other goods while the building works were in progress.

The plaintiffs while claiming special damages did not specify or lay the basis for a claim to special damages in their statement of claim. It merely stated in their prayer for relief that they claimed $150 a day from 8th September, 1978, for alleged loss of profits.

The plaintiffs' evidence on the question of damages was far from satisfactory. They did not furnish their solicitors with particulars of their alleged loss which would seem to indicate that the company was more concerned at the time to obtain an injunction which would have prevented the defendant from erecting the new building.

The plaintiffs produced accounts and income tax returns for the years 1977, 1978 and 1979. The return for the year 1978 shows a profit of $8,397 or 376% increase on 1977 figures despite four months of 1978 when building operations were in progress.

Return for the year 1978 shows a profit of $10,649 or a 26% increase on the previous year's profit.

The plaintiffs called Mr. B. Parshottam, an accountant, who produced a list showing sales for months September to February in 1977/1978 and 1978/1979 periods taken from the plaintiffs' cash book. This was to establish that gross sales for the latter period fell by $20,877. The list had been amended by deleting the entries for August - the month before building operations commenced. For August 1978 there was a substantial drop in sales compared to August the year before.

The documentary evidence does not establish there was in fact any loss. The probability is that the

plaintiffs did in fact rely on its other shops in Suva or Nadi to sell stock which would otherwise have been sold in the Epworth House shops thus accounting for their increased profit. The plaintiffs did not put off any staff during building operations.

Mr. Amratlal stated that his company had to have sales to dispose of soiled stock. He stated damage to goods amounted to $20,000 to $25,000 but he produced no satisfactory evidence in support of the alleged loss. He kept no records to substantiate the alleged loss.

The plaintiffs have not established any special damages but they have established the breach of the covenant for quiet enjoyment and are entitled to nominal damages.

Although there is an alternative claim alleging nuisance, the plaintiffs conducted their case on the breach of contract. They are not therefore entitled to any punitive or exemplary damages.

In Kenny v. Preen /1962/ 3 All E.R. 814, the Court of Appeal in a similar case where there was no special damages proved reduced damages of £100 to £2.

I award the plaintiff $10 and the costs of this action.

(R.G. KERMODE)

J U D G E

S U V A,

10TH JANUARY, 1984.