

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0002 of 2019
[Court of Appeal No: ABU 26 of 2016]

BETWEEN: AUTO WORLD TRADING (FIJI) LIMITED

Petitioner

AND: TOTAL (FIJI) LIMITED

Respondent

Coram: Hon. Justice Kamal Kumar, Acting President of the Supreme Court
Hon. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel: Mr R K Newton and Mr S Singh for the Petitioner
Mr N S Gedye and Mr H Nagin for the Respondent

Date of Hearing: 18 October, 2019

Date of Judgment: 1 November, 2019

J U D G M E N T

Kumar, J

[1] I agree with the reasons and orders of Justice Chitrasiri.

Chandra, J

[2] I agree with the reasons, conclusions and proposed orders in the judgment of Chitrasiri J.

Chitrasiri, J

[[3] This appeal is filed seeking to have the judgment dated 30.11.2018 of the Court of Appeal set aside. By the said judgment, Court of Appeal reversed the judgment dated 30.03.2016 of the High Court; and entered judgment in favour of the Respondent namely Total (Fiji) Limited.

Brief note on facts

[4] Total (Fiji) Limited being the Plaintiff [Respondent in this appeal] filed Writ of Summons and a Statement of Claim moving for a declaration that it has a lease over the land in respect of which Certificates of Title Nos. 3157 and 3357 had been issued. Consequently, the Respondent in its Statement of Claim has sought to have an order declaring that the Notice to Quit dated 17.05.2007, sent by the Petitioner, Auto World Trading (Fiji) Limited be made invalid.

[5] Respondent company formerly known as Shell (Fiji) Limited, on 15th February 1984 entered into a lease agreement bearing No.209221, with Fiji Investment and Agency Company Limited (FIACL) in respect of the properties comprised in Certificates of Title Nos. 3157 and 3357 for a period of 20 years effective from 01.01.1980. Clause 10 of the said lease agreement had a provision containing an option for the lessee to have the said lease renewed for another period of 20 years. It reads as follows:

“The Lessor will upon the written request of the Lessee made not less than six months before the expiration of this renewed term and provided the Lessee during the term shall have duly and promptly paid the rent payable

during such term and observed and performed the covenants and conditions on the part of the Lessee in this Lease thereof (as the case shall require) contained or implied grant to the Lessee a Lease of the demised land for the further term of twenty years from the expiration of the term hereof reserving a rental to be assessed in accordance with the provisions of clause 12 hereof and containing the like covenants agreements and provisions as are contained in these presents excepting this present covenant for renewal” (emphasis added).

- [6] The aforesaid lease expired on 1st January 2000. No clear evidence is forthcoming to establish that a specific written request had been made referring to clause 10 above, to renew the lease for a further period of twenty years, exercising the option referred to in that clause. However, Respondent states that it had exercised the option through the correspondence it had with FIACL in order to renew the lease for a further period of 20 years. Respondent further states that it continued to occupy the property even after expiration of the lease period which ended on 31.12.1999 having paid the rates as well as the lease money due to FIACL in accordance with the terms in the lease agreement.
- [7] Seven years after the expiration of the first 20-year period of the lease, landlord FIACL transferred the property to the Petitioner on 2nd May 2007, having executed a sale & purchase agreement on 4th April 2007. Parties to the said sale agreement are FIACL and the Petitioner, Auto World Trading (Fiji) Limited. Having bought the land, Petitioner sent a Notice to Quit which is dated 17th May 2007 to the Respondent in order to evict the Respondent and to obtain possession of the property. It was sent on the basis that the Respondent is a tenant paying rent on monthly basis.
- [8] Soon after receiving the quit notice dated 17.05.2007, Respondent filed Writ of Summons on 31.05.2007, in the High Court for a declaration stating that the Respondent is holding the property under and in terms of the lease agreement dated 15th February 1984 which was supposed to have been extended for a further period of 20 years from 31.12.1999.
- [9] Accordingly, the issue before the High Court was whether the Respondent had correctly exercised the option referred to in clause 10 of the lease agreement in order to have the lease extended for a further period of 20 years from 13.12.1999.

Judgments in the Courts Below

- [10] Learned High Court Judge, having referred to many authorities, has considered the manner in which the "option" referred to in clause 10 of the lease, is to be interpreted. In that, he has stated that the authorities reinforce the case for the Petitioner that options for renewal must be exercised precisely in accordance with its terms. Having said that, he has concluded that the Respondent has failed to exercise the option to have the lease renewed, as required by clause 10 of the lease agreement. Accordingly, he dismissed the action of the Respondent.
- [11] Being aggrieved by the decision of the High Court, Respondent appealed to the Court of Appeal. In the appeal, their Lordships have carefully considered the relevant material to ascertain whether the Petitioner has exercised the option as required by clause 10 above. In doing so, they have considered the applicable authorities as well as the correspondence exchanged between the Respondent and FIACL, [the company with which the first lease was entered into] before the expiry of the first lease. Court of Appeal then held that the Respondent company has duly exercised the option referred to in clause 10 of the agreement.
- [12] His Lordships in the Court of Appeal have also addressed their minds to the provisions contained in the Land Transfer Act (Cap 131) and had concluded that the Petitioner had sufficient notice of the unregistered leasehold interest of the Respondent and therefore non registration of the lease No.209221 under the Land Transfer Act would not be a bar for the Respondent to claim rights under the lease agreement. Finally, the Court of Appeal decided the matter in favour of the Respondent and allowed the appeal.

Questions of Law

- [13] Being aggrieved by the judgment of the Court of Appeal, Petitioner filed this application on the following grounds of appeal.
- (a) That the Court of Appeal erred in Law and in fact in holding that the letter of 6 October, 1999 by Munro Leys constituted a request for a renewal of the expired lease.

- (b) That the Court of Appeal erred in Law and in fact in holding the renewal of the lease was done at the request of the Lessor, Fiji Investment and Agency Co. Ltd (FIACL).
- (c) That the Court of Appeal erred in Law and in fact in holding that the landlord (FIACL) reminded and persuaded the Respondent to use the option when no such evidence was either presented during the High Court trial or alleged as part of the Respondent's case during the hearing before the Fiji Court of Appeal.
- (d) That the Court of Appeal erred in Law and in fact in wrongly considering the conduct of the parties as if the option to renew the lease had been validly exercised by the Respondent making payment of rent and rates and acceptance of payment of rent for a period of 7 years by FIACL when there was evidence that the lease had not been renewed. The option to renew the lease had lapsed by 01 July 1999 and as a matter of law, the option ceased to exist and could not have waived by the conduct of the parties and/or agreement of the parties.
- (e) That the Court of Appeal erred in Law and in fact in holding that the Lessor (FIACL) had waived the six months requirement for providing a notice of renewal and wrongly held that the notice for renewal given by the Respondent on 12 October 1999 outside the lease was valid in that it was (incorrectly) made at the request of the Landlord (FIACL).
- (f) The Court of Appeal erred in Law and in fact in holding that there was no evidence of FIACL considering the Respondent as a monthly tenant despite the communications between Rolle, Munro Leys, Lateef & Lateef Solicitors and Sherani & Co in 2004. No option of a renewal was available to the Respondent as a matter of law given that the notice of 12 October 1999 was given when the option ceased to exist and if a new lease agreement had been entered into by the conduct suggested by the Respondent and the Fiji Court of Appeal, which is denied, then the Fiji Court of Appeal failed to consider and hold that any new Lease agreement

would have lacked the consent of the Minister of Lands as required by the Land Sales Act and would have been illegal, unenforceable and void ab initio.

- (g) That the Fiji Court of Appeal erred in Law and in fact in holding that the sale of the property to the Appellant being made subject to an expired Lease No. 209221 constituted an evidence of renewal of the Lease.
- (h) That the Fiji Court of Appeal erred in Law and in fact in holding that the Transfer of the property to the Appellant was made subject to an expired Lease No. 209221 when there was no Memorandum endorsed on the transfer of the property to the Appellant as being subject to the expired Lease No. 209221.
- (i) That the Fiji Court of Appeal erred in Law and in fact in giving undue weight to the letter from Munro Leys dated 19 April 2007 as sufficient evidence of renewal of the expired Lease and ignored communication from Munro Leys of 2004 and 30 April 2007 as evidence of expiry of Lease No. 209221.
- (j) That the Fiji Court of Appeal erred in Law and in fact in giving undue weight to the sale and purchase agreement terms and the letter from Munro Leys dated 19 April 2007 as sufficient evidence of renewal of the expired Lease and ignored settled law that the failure on part of the Respondent to exercise the option during the time period specified in the option resulted in the option lapsing completely.
- (k) That the Fiji Court of Appeal erred in Law and in fact in holding that there was no admissible evidence on any disagreement over rental and ignored clause 12 of the Lease Agreement which required any renewal to be made subject to an agreement over rental.
- (l) That the Fiji Court of Appeal erred in Law and in fact in holding that the Lease No. 209221 had been renewed in terms of the lease and incorrectly held that the Respondent was not a trespasser.

- (m) That the Fiji Court of Appeal erred in Law and in fact in holding that the Appellant had purchased the property subject to a valid Lease No. 209221 and wrongly held that the expired lease is secured by clauses 2, 4 and 5 of the sale and purchase agreement.
- (n) That the Fiji Court of Appeal erred in Law and fact in holding that clauses 2, 4 and 5 of the sale and purchase agreement and Transfer Deed was the evidence of renewal of the lease.
- (o) That the Court of Appeal's decision is unfair and unreasonable when taking into account all the circumstances of this case.

[14] All 15 grounds of appeal mentioned above, revolve around the exercise of the option referred to in the Lease Agreement executed on 15th February 1984. Although it is not found in the grounds of appeal, the Petitioner in its submissions has come up with the question of non-registering, the subsequent lease under the Land Transfer Act and also the question as to the Minister' consent that is necessary for a newly executed lease under Section 6(2) of the Land Sales Act.

[15] Therefore, basically the grounds of appeal revolve around, the Respondent, as the Lessee to the Lease Agreement, exercising its option to have the lease renewed for a further period of twenty years from 1st January, 2000; and the requirement as to the registration of the lease in terms of the aforesaid Land Transfer Act; and obtaining the consent of the Minister in charge of the subject under the Land Sales Act.

Petitioner's Arguments

[16] Learned Counsel for the Petitioner submitted that waiver by the Respondent company to extend the period of the lease; and the non-compliance of the provisions contained in the Land Transfer Act and the Land Sales Act involve important issues of law and therefore consideration of those by the Supreme Court becomes vital. He then submitted that such issues fall within the ambit of Section 7 of the Supreme Court Act for this Court to grant leave at the outset.

[17] He then submitted that the Court of Appeal erred in law and in fact:

- Holding that letter of 06.10.1999 by Munro Leys constituted a request for renewal of the expired lease.
- Holding the renewal of the lease was done at the request of the Lessor (FIACL)
- Not determining that the landlord (FIACL) reminded and persuaded the Respondent to use the option when no such evidence was either presented during the High Court trial or alleged as part of the Respondent's case during the hearing before the Fiji Court of Appeal.
- Wrongly considering the conduct of the parties as if the option to renew the lease had been validly exercised by the Respondent making payment of rent and rates and acceptance of payment of rent for a period of 7 years by FIACL when there was evidence that the lease had not been renewed.
- Holding that there was no evidence of FIACL considering the Respondent as a monthly tenant despite the communications between Rolle, Munro Leys, Lateef & Lateef Solicitors and Sherani & Co. between 2004 and 2005.

[18] Having submitted so, learned counsel emphasized that options for renewal must be exercised precisely in accordance with their terms. He also submitted that even though Section 54 (1) in the Land Transfer Act requires any land demised for a term exceeding one year to be executed and registered, no such registration had been effected in this instance. Therefore, his contention was that the respondent cannot claim rights under the lease agreement but it becomes a tenant paying rent on monthly basis.

Respondent's Arguments

[19] Respondent's position is that even though, no formal request had been made to have the lease renewed for a further period of 20 years from 01.01.2000, it had exchanged correspondence with the previous owner FIACL to have it extended. In order to establish this position, Respondent has relied on the letter dated 12.10.1999 written by Finance & Planning Manager of the respondent company conveying its willingness to have the lease renewed for a further period of 20 years from 01.01.2000. It had been written in reply to a letter sent by the previous owners of the premises who was the lessor in the lease agreement

at that point of time. Respondent has also stated that since then they have been in occupation of the premises without any hindrance until it received the quit notice.

- [20] Respondent also has relied upon clauses 2, 4 and 5 particularly clause 4, of the Sale and Purchase Agreement entered into between FIACL and the Petitioner, at the time the Petitioner purchased the property. In those clauses, possession by the Respondent of the premises had been acknowledged, even by the Petitioner in clear language, the respondent submitted. Finally, it was submitted that the Petitioner was well aware of the respondent's occupancy and interest as the lessee to the disputed premises and therefore it had been purchased by the Petitioner subject to the lease.
- [21] Therefore, the contention of the Respondent is that it has exercised the option referred to in clause 10 of the lease agreement to renew the lease for a further period of 20 years. Accordingly, Respondent has submitted that the Court of Appeal has correctly concluded the matter having decided the appeal in its favour.
- [22] Respondent, in its submissions has also stated that this case can readily be rejected because it concerns private contractual rights and therefore it is not a dispute involving any matter of substantial general interest in the administration of civil justice. It has further submitted that the lease put in suit is to expire shortly by the end of this year. Accordingly, the respondent has taken up the position that the matter in issue does not come within the purview of the Supreme Court and has moved that the Petition be rejected at the very outset without leave being granted.

Consideration of the Appeal

- [23] Petitioner is seeking leave from the Supreme Court pursuant to Section 98 (4) of the Constitution of Fiji and Section 7(3) (c) of the Supreme Court Act.
- [24] Section 7(3) of the Supreme Court Act 1998 provides in relation to civil matters that:

".. the Supreme Court must not grant special leave to appeal unless the case raises –

- (a) a far-reaching question of law;*
- (b) a matter of great general or public importance;*
- (c) a matter that is otherwise of substantial general interest to the administration of civil justice."*

- [25] I will now look at the manner in which the law referred to in the aforesaid provision had been applied in Fiji.
- [26] The criteria set out in Section 7(3) have been examined and applied in several decisions of the Supreme Court of Fiji such as Bulu v Housing Authority [2005] FJSC 1 CB V0011 of 2004S, Ganesh Chand v Fiji Times Limited CBV 0005 of 2009 (8th April March 2011), Praveena's BP Service Station Ltd v. Fiji Gas Ltd CBV 0018 of 2008 (8th March 2011), Suva City Council v. R. B. Patel Group Limited CBV 0006 of 2012 (17 April 2014) and it is clear from these decisions that special leave is not granted as a matter of course. For the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so, special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.
- [27] In a recent judgment delivered in the case of Vijendra Sharma v Atendra Sharma & Anor [2019] FJSC 20; CBV 0010 2018 at Para32, Supreme Court held thus:
- "The question of grant of leave to appeal has been the subject of consideration in Chand v. Fiji Times Ltd and Bulu v. Housing Authority. It is not necessary to repeat the views expressed by this Court in these two decisions. Suffice it to say that this Court considered the decision of the Privy Council in Daily Telegraph Newspaper Company Limited v. McLaughlin and Prince v. Gagnon which held that appeals would not be admitted "save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."*
- [28] Accordingly, I will now turn to consider whether the Petitioner has made out a case which falls within the ambit of the aforesaid section 7 of the Supreme Court Act having regard to the authorities concerned.
- [29] It is the contention of the Petitioner that the Respondent has failed to exercise the option referred to in clause 10 in the aforesaid lease agreement entered into between the

Respondent and FIACL executed on 15th February 1984. Undoubtedly, exercising the option by the Respondent envisaged by clause 10 becomes a mandatory requirement for the renewal of the lease for a further period of 20 years commencing from 01.01.2000.

[30] Learned counsel for the Petitioner has contended that a lessee who wishes to exercise the right of renewal must proceed in conformity with the conditions in the renewal clause in the lease and must indicate clearly and unequivocally his or her intention to exercise that right.

[31] In support of his contention, he has referred to **United Scientific Holdings Limited v Burnley Borough Council** [1978] AC 904 at 929. In that decision Lord Diplock declared that:

"..it is well established that a stipulation as to the time at which notice to exercise the option must be given is of the essence of the option to renew."

[32] Counsel has also referred to the judgment in **United Dominions Trust (Commercial) Limited v Eagle Aircraft Services Limited** [1968] 1 W L R 74 at 81. In that Lord Denning MR has stated thus:

"In order to exercise the option, the lessee must give notice in the specific time.... In order to be turned into a binding contract the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer."

[33] Relying upon those authorities, learned counsel submits that the reply dated 12.10.1999 by the Respondent to a letter by FIACL, is insufficient to have the lease renewed.

[34] The said letter dated 12.10.1999 of the Respondent is a reply to a letter written by the lessor FIACL in relation to the renewal of the lease. By this letter of the Respondent, it has accepted the offer made by FIACL to extend the lease and in that letter the Respondent has specifically requested the lessor to consider it as its intention to exercise the option to renew the lease. I will be considering the contents of this letter in detail at a later stage in this judgment. However, the contention of the learned counsel for the Petitioner is that the contents of this letter will not amount to acceptance of the offer to renew the lease.

- [35] Learned Counsel has also referred to the cases of Traywinds v Cooper [1989] 1 Qd R 222 and Duncan Properties Limited v Hunter [1991] 1 Qd R 101 to show the manner in which the courts have dealt with when applying the principle of “waiver” since nothing is found to establish that the Respondent has exercised its option to have the lease extended, 6 months before the expiry of the lease which requirement is a condition in clause 10 of the agreement.
- [36] Finally, learned counsel for the Petitioner has contended that the Court of Appeal has failed to consider that a person cannot waive rights which he does not have or which do not exist. Accordingly, he has advanced the argument that in the case of a non-exercised option, the result is properly characterized as a lapsed offer or conditional contract which has lapsed through non fulfillment of the condition.
- [37] As mentioned hereinbefore, the principle issue is whether the “option” mentioned in clause 10 of the lease agreement was exercised by the Respondent as required by law in order to have the lease under which it enjoyed the property till 31.12.1999, extended. Authorities show that such an option must be exercised precisely in accordance with the terms and conditions found in a lease agreement.
- [38] In accordance with clause 10 of the agreement, it is a requirement for the lessee to make a request in writing which should be made not less than six months before 31.12.1999, it being the date of expiry of the lease, in order to have the lease extended for a further period of 20 years. On 12.10.1999, MUNRO LEYS, on behalf of the lessor, namely FIACL had written to the Respondent company requesting for a reply to the matters contained in that letter referring to an earlier conversation they had with the Respondent. On the same day, Finance & Planning Manager of the respondent company has replied to that letter of MUNRO LEYS in the following manner;

*“Please accept this letter as our formal notification to exercise our option under the lease to renew for a further twenty (20) years from the 1st January 2000.
Please don't hesitate to call me on 313 933, if you would like to discuss any aspect of this further.”*

- [39] The issue now arises is whether or not the above writing is sufficient evidence to establish that the lessee has exercised the option to renew the lease. There is no doubt that it is in writing. It clearly speaks as to the extension of the period of lease and in that the word "option", referred to in the agreement also is found. Therefore, any reasonable person would understand that it is a communication sent to the lessor to have the period of the lease extended for a further period of 20 years in terms of the agreement that the parties have entered into.
- [40] Furthermore, since then both parties namely, the lessor and the lessee have acted having accepted the position that the lessee has exercised its option in accordance with clause 10 of the agreement. Accordingly, conduct of the parties establish that the lessee has exercised precisely, the option to have the lease extended.
- [41] Learned counsel for the Petitioner also submits that the notice of renewal had to be served by the Respondent on FIACL on or before 01 July 1999 and the aforesaid letters have been written on a date after 01.07.1999. Accordingly, he has argued that the letters written outside the stipulated period would amount to the petitioner having waived the option given to it.
- [42] Fact remains that the Respondent company has continued to be in occupation of the premises up to now without any disturbance. It had paid the rental to FIACL without any default and also, in return they have accepted those without a query being made. Such conduct of the parties clearly show that the lessor has not waived exercising the option given to the Respondent. No evidence is forthcoming to establish that the lessor has disputed such a position as well. Lessor or any other person on its behalf has not given evidence to negate the same.
- [43] In such a backdrop, it is crystal clear that the intention of the parties to the agreement was that the Respondent has exercised the option as necessitated by clause 10 of the agreement. It is my opinion that the intention of the parties to a contract must be the main criteria when interpreting terms of a contract, if the agreement is to be productive of legal results. The

reasons set out above, clearly show that both the Respondent being the lessee and FIACL being the lessor intended to renew the lease period till 31.12.2019 and thereafter the lessee continued to occupy the premises having paid the lease rental and rates without any interruption till the Petitioner purchased the property in the year 2007.

- [44] Moreover, the Sale and Purchase agreement by which the Petitioner purchased this property indicates that the respondent's leasehold rights over the property were within the knowledge of the petitioner. In clause 4 of that agreement it states that:

"the Purchaser acknowledges vacant possession will not be given because Shell Fiji Ltd is presently occupying under Lease No.209221."

- [45] Clause 2 and 5 of the said agreement also confirm the existence and continuation of the Lease. Therefore, it is seen that the Petitioner was well aware of the Respondent's occupancy as a lessee to the property in issue. Moreover, Certificates of Title Nos.3157 and 3357 had been issued upon purchasing the property by the Petitioner subject to the Respondent's lease.

- [46] Accordingly, it is my considered view that the Respondent has exercised its option to renew the lease as required by clause 10 of the agreement.

- [47] Learned counsel for the Petitioner, referring to Section 54(1) of the Land Transfer Act, pointed out that the parties to the lease have failed to comply with the requirement of registration in terms of the land Transfer Act. Even though, there is no specific Ground of Appeal raised in this regard, counsel when making submissions under appeal grounds (k) and (i) has raised this question. Under the said section, it requires any land demised for a term exceeding one year to be executed and registered in accordance with the provisions of this Act.

- [48] However, Sections 38, 39 and 40 of the Land Transfer Act are the provisions applicable to this issue. Those provisions ensure that even if no proper registration is effected, purchaser acquires paramount title in the absence of fraud. In this instance, no fraud is pleaded. Hence, the title of the Petitioner to the land in dispute is not being affected. Accordingly,

Orders of Court

The orders of the Court are:

1. Petition for leave to appeal is refused
2. The Petitioner to pay the Respondent costs assessed at \$5,000.00



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Hon. Justice Kamal Kumar
Acting President of the Supreme Court



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Hon. Justice Suresh Chandra
Judge of the Supreme Court



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Hon. Justice Kankani Chitrasiri
Judge of the Supreme Court