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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 74 of 1981

Between:

FIJI BIOMARINE LIMITED

Appellant

and

SUVA CITY COUNCIL

Respondent

P.I. Knight for the Appellant

A.B. Ali for the Respondent

Date of Hearing: 24th November, 1982

Delivery of Judgment: 30th November, 1982

JUDGMENT OF THE COURT

Gould V.P.

This is an appeal from a judgment of the Supreme Court of Fiji dated the 17th August, 1981, declining to make certain declarations which the appellant (as plaintiff) had claimed in proceedings by way of Originating Summons.

The appellant is the lessee under an agreement to lease dated the 16th August, 1979, and granted by the respondent as lessor, of premises in Suva called in the proceedings "the Old Town Hall" for the term of twenty years from the 1st August, 1979. The agreement is a sublease of land comprised in Crown Lease No. A/71 to which the provisions of the Crown Lands Act (Cap. 132 - Ed. 1978) apply; and by virtue of which the Director of Lands is the lessor and the respondent Council is the lessee.

For completeness we set out section 13(1) of the Act which was relevant to an aspect of the proceedings in the Supreme Court, though less so to the issues remaining on the appeal. It reads :

"13.-(1) Whenever in any lease under this Act there has been inserted the following clause :

'This lease is a protected lease under the provisions of the Crown Lands Act'

(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 written 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."

Crown Lease A/71 is a protected lease under the section and, as will be mentioned again, the Director gave his consent to the sublease, and also to the bringing of the action.

The dispute between the appellant and the respondent concerned the wish of the appellant to obtain the consent of the respondent to a use of the premises not authorised by the sublease and the refusal of the respondent to give that consent. The relevant portion of the Originating Summons reads :

"By this summons the Plaintiff company claims against the Defendant for a declaration that the Defendant has already given its approval for the use of the first floor of the Old Town Hall Building, Victoria Parade, Suva as contained in Crown Lease A/71 as a private

function room and restaurant or alternatively for a declaration that the Defendant is unreasonably withholding its approval for the use of the first floor of the said Old Town Hall Building as a private function room and restaurant. "

Both declarations (claimed in the alternative) having been refused by the Supreme Court, this appeal is limited to the second of them, namely, "that the Defendant is unreasonably withholding its approval"

The three recitals with which the sublease opens are relevant: they read :

"WHEREAS

- (1) The Lessor is the lessee of land comprised in Crown Lease A/71 and situated in Victoria Parade Suva on which is erected a wood iron and masonry two storey building presently occupied by the Lessor and used as a hall and offices.
- (2) The Lessee is desirous of leasing the said land and building and of using the said building as an aquarium and for purposes ancillary thereto.
- (3) The Lessor has agreed to the Lessee converting the said building into an aquarium, has approved of the alterations necessary for such conversion subject to there being no alteration to the external fabric of the said building and has agreed to lease to the Lessee the said land and building (more particularly described in the schedule hereto) for the terms at a rental and on the conditions hereinafter referred to. "

Though the main purpose of the parties appears from the recitals to have been to use the premises as an aquarium (a purpose which has been carried out) Clause 5(a) of the sublease permitted the use of portions of the premises for other purposes. It is headed "Use of the Demised Premises" and reads :

"5(a) 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. "

The purposes shown on the plans included the aquarium, a souvenir shop, a snack bar with kitchen and on the first floor a conference room for 50 people.

The sublease was in fact signed for and on behalf of the Suva City Council, as lessor by Mr. W.G. Crivickshank who had been appointed Administrator thereof, but he vacated his office on the 23rd October, 1979. The learned Judge in the Supreme Court stated in his judgment that plans submitted to the respondent for approval and which were approved on the date last mentioned were the same as those annexed to the sublease. The learned Judge rejected a submission by the appellant that they had been amended to include a "conference centre, restaurant or shop" and we need not concern ourselves on the appeal with that aspect of the matter.

By letter of the 8th January, 1981, the appellant applied to the respondent for permission to extend the user of the premises as follows :

"It was the impression of the writer that permission was granted for the use of the premises to be either conference centre restaurant or shops by virtue of the stamped approved drawings. If this is not the case we herewith formally apply for the permission for the lessor to use the first floor premises for private functions and restaurant.

You will appreciate the difficulty in these times of depression of being restricted to any one activity. It is our responsibility to try and run a profitable operation in order for us to survive as a company. This information will be submitted to you in the next few days.

Yours faithfully,
FIJI BIO MARINE LIMITED
M.G. BRAIN

"

That letter was written to the City Engineer and it was followed next day with a letter to the Town Clerk as follows :

"The Town Clerk
Suva City Council,
Suva.

9th January, 1981

re: Crystal Palace Old Town Hall

Dear Sir,

Further to our meeting today between Messrs M. Brain and A. Parmar, and our letter to the City Engineer dated 8th January, 1981. We hereby apply for lessors permission to use the first floor of The Old Town Hall for the following purpose "Private Function Room and Restaurant" in accordance with our revised drawing submitted with building application on the 9th January, 1981.

Your early reply would be appreciated.

Yours faithfully,
Fiji Bio-Marine Limited

Malcolm G. Brain
Director "

The Town Clerk replied on the 7th February, 1981, as follows :

"2 February, 1981

The Director,
Fiji Bio-Marine Limited,
P.O. Box 1124,
SUVA.

Dear Sir,

Re: CRYSTAL PALACE - OLD TOWN HALL

I am directed to refer to your letter dated 9 January, 1981, and to inform you that the Suva City Council has refused consent to your application for permission to use the first floor of the Old Town Hall premises for the purpose of 'Private Function Room and Restaurant' for, inter alia, the reason it is against any further additional usages of the premises other than that permitted under the original lease conditions.

The Council has noted that the proposed 'Restaurant' will be operated as fully 'licensed' restaurant under the provisions of the Liquor Ordinance. The Council considers such proposed development completely contrary and against the intents of the terms of the existing lease conditions.

Yours faithfully,

(V. Chand) jp
TOWN CLERK

An affidavit of Mr. M.G. Brain, managing director of the appellant, disclosed that the conference room area had been used as a private functions room under the name Chrystal Palace from about July, 1980; an application to the Liquor Tribunal for a restaurant licence was opposed by the respondent but was nevertheless granted.

The matter was then placed in solicitors' hands and on 9th February, 1981, Messrs Cromptons sent to the Town Clerk a letter containing the following two paragraphs :

"Leaving aside the question of whether the Council's approval has in fact been obtained, we are of the opinion that the Council in now purporting to withhold its approval is doing so unreasonably. When the lease was signed the parties clearly anticipated that there may be a change in use in part or all of the building.

The difference between a conference room and a restaurant is not all that great. The only reason proffered for refusing approval is that the use of the area as a restaurant is 'contrary and against the intents of the term of the existing lease conditions'. We do not understand how this conclusion is reached but it is clear to us that the purported refusal is unreasonable. "

The reply, from Messrs Parmanandam, Ali & Company, on behalf of the respondent, brought an abrupt termination to the correspondence. It read :

"17th February, 1981.

Messrs Cromptons,
Barristers & Solicitors,
S U V A.

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Dear Sirs,

Re: SUVA CITY COUNCIL
YOUR CLIENT FIJI BIO-MARINE LTD.

We act for the SUV CITY COUNCIL in the matter herein.

Having perused your letter of 9th February and having taken instructions we are of the opinion that your clients tenancy is void illegal and unenforceable.

In the circumstances we deem it unnecessary or superfluous to reply to each point you raise.

Yours faithfully,
PARMANANDAM, ALI & CO.

Per: V. Parmanandam

"

It would appear that the appellant took an opportunity to raise the question direct with the Director, as the following letter (mentioned in the judgment) indicates :

"Messrs Cromptons, 27th May, 1981
Barristers & Solicitors,
G.P.O. Box 300,
SUVA.

Dear Sirs,

re: Suva City Council -
Fiji Biomarine Limited

I refer to your letter of 11.5.81 ref. PK/gf/862 and to advise as follows.

In regard to your request for my consent to take legal action against the Suva City Council in relation to Crown Lease A/71, my consent is granted.

As for whether I approve the use of the top floor of the Old Town Hall as a restaurant, I regret that it would not be proper for me to consider your request since the matter is between the parties, Biomarine Ltd and the Suva City Council to sort out before an approach is made to me for my consent in accordance with the terms of the Crown Lease A/71 to the Suva City Council.

Yours faithfully,

(T.T. Rupeni)
Acting Director of Lands
& Surveyor General

"

It is expedient to refer to the Crown Lease A/71 in relation to this transaction. It is for a term of 99 years commencing on the 2nd January, 1905 and the original lessee was the Town Board of Suva; the rental was one shilling per year. Condition 1 imported an implied condition against transfer or subletting and Condition 6 was as follows :

"6. The lessee will not use the premises or suffer them to be used except for such purposes as a Town Hall is ordinarily used for. "

By a formal variation signed in February, 1980, Conditions 1 and 6 were deleted and replaced by the following :

"(1) The lessee shall not transfer, sublet, mortgage, assign or part with the possession of the demised land or any part thereof without the written consent of the lessor first had and obtained.

(6) The lessee shall not without the prior written consent of the lessor use the premises or suffer them to be used except for such purposes as a Town Hall is ordinarily used for. "

An additional Condition 9 was introduced as follows :

"(9) The rent shall be One Thousand dollars (\$1,000.00) per annum with effect from 1st February, 1980 to 31st January, 1982 and thereafter, at One thousand seven hundred fifty dollars (\$1,750.00) per annum to 31st January, 1990 with further reassessment to be made on 1st February, 1990. "

These changes were stipulated for in a letter dated the 1st June, 1979, to Mr. Cruickshank, who, as we have mentioned, was at the time Administrator of the Council, from the Director of Lands and Surveyor General. The letter referred to a meeting on the 23rd May, 1979, between the Minister of Lands, Mr. Cruickshank (presumably)

and the City Engineer. The letter states :

" The Minister has asked me to advise you that there is no objection to the use of the old town hall for the proposed aquarium, subject to the following: "

Then followed the conditions for the replacement of Conditions 1 and 6 and the re-assessment of rent.

Submission of the sublease agreement was called for "for formal consent"; as we have indicated, these matters were all finalised.

In his judgment the learned Judge in the Supreme Court first disposed of the claim for a declaration that the respondent had already given its approval to the change of user.

He then turned to the issue whether the refusal of the respondent to approve such a change was reasonable. His expressed views may be summarised as follows :

- (a) The approval by the Director of the sublease with the restriction on use contained in the sublease, included any change in use provided it was a use to which a town hall is put. That fell within clause 6 of the Crown Lease as varied;
- (b) Any such change would however need the consent of the respondent;
- (c) The use of part of the town hall as a restaurant, whether licensed or not, is not a purpose for which a town hall is ordinarily used;
- (d) The respondent could not grant permission for such a use without obtaining the Director's consent as that would be a breach of the Crown lease;

- (e) The Director might seek an increased rental for such a consent. It was debatable whether the respondent could make an increase in rent a condition precedent in relation to the sublease;
- (f) Nothing in the sublease obliges the respondent to seek the Director's approval to the proposed change;
- (g) Refusal by the respondent to permit change of user for purposes "ancilliary to use as an aquarium" could be held unreasonable but the consent of the Director would still be required. The words "ancilliary to use as an aquarium" are used in one of the recitals contained in the sublease;
- (h) Rental of premises is usually based on the use to which premises are put. That is the case here so far as the Crown Lease is concerned but there is no machinery for it in the sublease. The financial implications of the proposed use are substantial;
- (i) The Director is not contractually or legally bound to consent and could terminate the Crown Lease for breach if the appellants changed the user without the Director's consent. We understand this to mean also, even if the Court were to declare the withholding of consent by the respondent unreasonable;
- (j) The learned Judge did not regard the question of possible breach of the Suva (Drinking in Public Places) By Laws as a matter of concern. If the By-Laws applied, the Council could prohibit drinking on the premises.

The learned Judge expressed his views in summary form in the following passage :

"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 grounds of appeal relied upon in this Court were expressed in the notice :

- "1. That the Judge was in error in declining to make the declaration sought for the reason that the approval of the Director of Lands as head lessor to the proposed use of the first floor of the said Old Town Hall as a private function room and restaurant had not been obtained, more particularly so when the Suva City Council had not put forward as a reason for refusing its approval to the said proposed use that the approval of the Director of Lands to such proposed use had not been obtained.
2. That the Judge was in error in deciding that he was not empowered to make the declaration sought for the reason that the approval of the Director of Lands to the proposed use of the first floor of the said Old Town Hall as a private function room and restaurant had not been obtained. "

It was Mr. Knight's argument that the implication to be taken from the judgment is that the failure to obtain the consent of the Director to the proposed use, was the sole reason for the learned Judge's refusing the declaration. Certainly it was an important factor though it included by implication, we think, the learned Judge's view that financial adjustments would have been necessary or appropriate, both in the Crown lease and the sublease.

Such reasons for the respondent's refusal as can be seen in the record of evidence, are firstly in their letter of the 2nd February, 1981. There they objected to a fully "licensed" restaurant. Secondly, there is an affidavit by Mr. Vishnu Chand, the Town Clerk, of the 14th April, 1981, in which paragraph 8(4) states that the additional use was contrary to the principles of the running of premises owned by a Local Government and paragraph 8(5) states that the rental assessed was at a discount in view of the user of the premises for the purposes of an aquarium. Thirdly, in evidence Mr. Chand also stated that, while it was difficult for him to give any definite answer as to why the respondent refused its consent, it had leased the premises for a specific use and the matter came under the purview of the National Trust; that the Council considered the proposed change a significant one; a licensed restaurant in a civic zone was a major commercial enterprise. He agreed that private functions had been held there for some twelve months.

The learned Judge, as we have indicated above, dealt with the matter of liquor but he regarded the rental factor as important. In distinguishing the case of Vienit Ltd. v. Williams & Son (Bread St.) Ltd. [1957]

3 All E.R. 621 the learned Judge said :

"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. "

Thus in relation to the matters put forward, the learned Judge's opinion was (a) that any difficulties over liquor could be overcome (b) he expressed no view on the objection concerning the principles of running premises owned by Local Government; there was in fact no evidence either on this subject, or any relating to a National Trust, (c) he agreed with the respondent that the proposed change was a substantial one and (d) he agreed that the reason (given at least by implication) that changes of user of this nature were generally accompanied by adjustment of rent.

Mr. Knight's argument included the claim that the absence of the consent of the Director, upon which the learned Judge put so much, was not a point taken by the respondent in argument. We think that the position as between the Director, the respondent and the appellant, the necessity for making changes in the Crown Lease both as to conditions and as to rental, and the special purpose for which these changes were made, namely to enable the appellant to establish and operate an aquarium, were so basic to the whole transaction that the learned Judge had to take cognizance of the position. In fact this aspect of the matter was mentioned by Mr. Chand in paragraphs 8(2) and (3) of his affidavit (supra). It was the educational aspect of an aquarium which induced the

respondent to approach the Director for the purpose and the appellant would not have been given the sublease otherwise. Though in our view this is a case in which the issues could with advantage have been defined by pleadings in an action in the normal way we cannot say that the learned Judge was wrong in considering this aspect of the matter.

As to the interpretation placed upon the contractual relations of the parties by the learned Judge we would agree with his views subject to one qualification to which we refer below. In our opinion the fact that the Crown Lease was a "protected" lease does not enter into this aspect of the matter (except to the extent that it indicates that the lease is one to which the Director might extend special scrutiny); we agree with the learned Judge that the issue depends on clause 6 of the lease (as substituted by the Variation) and clause 5(a) of the sublease, both of which are set out above. There is no provision in clause 6 (though there is in clause 5(a)) that the consent may not be unreasonably withheld, and we have not been referred to any provision in Fiji legislation which would have that effect (compare the English Landlord and Tenant Act, 1927, s. 19(1) though that refers to assignment). The power or discretion in the Director to withhold his consent is therefore unqualified, unlike that of the respondent under clause 5(a) of the sublease.

The qualification we mentioned above to what the learned Judge said about the parties' contractual relations refers to the passage in which he says that the Council is not contractually bound to seek the Director's consent to a use which would require his consent. It is true of course that there is no such provision in the sublease, but if the appellant applied under the sublease for a change of use which the respondent could not reasonably refuse neither could it reasonably refuse to pass the application to the Director for his decision. Such a term would, we think, be implied.

Mr. Knight asks this Court to find that the learned Judge should have treated the matter of the consent of the Director as something separate and confined himself to the consent of the respondent. He asks this Court to devise some means of similarly confining itself. To attempt to accede to that request would be to disregard the learned Judge's "short answer", that refusal to approve a use which would be in breach of the Crown lease cannot be considered unreasonable. Mr. Knight's answer to that is that there would be no breach until and unless the Director refused his consent and the change of user was put into effect. This is not quite accurate, as the respondent by consenting, would "suffer" the premises to be used, contrary to clause 6.

We have given this matter long and careful consideration, and have come to the conclusion that the difficulties in the way of making some sort of suspensory or conditional declaration to enable the Director (who has refused a direct approach and we are not criticising him) to be approached again, are prohibitive. The legal basis for such an approach would be a firm finding by the court below that, leaving aside the question of the Director's consent, the refusal by the respondent was itself unreasonable. There was no such finding. There was no refutation either in the evidence or in argument, of the validity or otherwise of the reasons concerning local government policy, or the desirability to depart from the basic use, which the learned Judge accepted, to straight out commercial use. The learned Judge accepted that it was a major change of use, and that the re-adjustment of a lease had been fixed with the educational aspect in mind. It is not unreasonable to be concerned in a major change of use. Finding a refusal of a consent of this nature to be unreasonable is upon the lessee, though if a lessor gives no reason, he may transfer the onus to himself -


Woodfall: Landlord and Tenant (28th Edn) Vol. 1 para. 1-1180.

The present case cannot be said to fall within the last

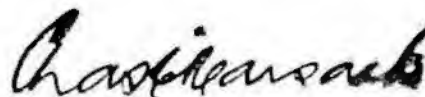
mentioned category. We do not consider that the fact that the learned Judge expressed himself by way of a "short answer" implied that he considered the respondent's refusal unreasonable having regard to the other grounds advanced. Neither is this the type of case in which this Court, on appeal, would be at liberty to consider the matter de novo.

We find therefore, that there is no material available to us upon which we could base, as suggested, a declaration in some conditional or suspensory form. Neither do we find any other ground which would justify us in allowing the appeal. It is therefore dismissed with costs.

We share the learned Judge's regret if there is a risk that Suva may lose an attractive and valuable asset. Such a consideration would of course be particularly present to the mind of the respondent. We also share the learned Judge's view that a meeting between the parties to the action and the Director might offer an avenue of possible progress which so far may have been overlooked.



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Vice President



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Judge of Appeal



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Judge of Appeal