IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 080 of 2020
[High Court Civil Case No. HBC 111 of 2019]

BETWEEN : ARVIN KUMAR

PRIYA NARAYAN

APPELLANTS

AND : THE ATTORNEY GENERAL OF FIJI

RESPONDENT

Coram : Basnayake, JA
Lecamwasam, JA
Jameel, JA

Counsel : Mr A. K. Narayan with Mr A. K. Narayan (Jnr) for the Appellants
: Mr J. Mainavolau & Ms M. Faktaufon for the Respondents

Date of Hearing : 13 February 2023

Date of Judgment : 24 February 2023

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusion of Lecamwasam JA.

Lecamwasam, JA

[2] This is an Appeal filed by the Plaintiff-Appellant against the judgment of the High Court at Lautoka dated 14th August 2020 on the following grounds of appeal:

1. *The Learned Judge erred in law and in fact in dismissing the second declaration sought by the Appellants in their Amended Originating Summons by holding that the relief is "in the field of public law" and that they "ought to proceed by way of application for judicial review under Order 53 of the High Court Rules" when:*
   - *[i] the relief sough and/or cause of action was one which was based on a contract between the Appellants and the Director of Lands in the field of private law; and/or*
   - *[ii] no objections were taken by the Respondent during the hearing of the Appellants Amended Originating Summons that the action ought to have proceeded by way of Judicial Review under Order 53 of the High Court Rules and who otherwise appeared to accept the form of proceedings.*

2. *The Learned Judge erred in law and in fact by failing to consider at all, the alternative declaration under the Amended Originating Summons purportedly on the basis that the action ought to have been one brought by way of a Judicial Review under Order 53 of the High Court Rules when:*
   - *[i] the relevant declaration was specifically in relation to a clause under a contract (being clause 23 of State Lease No. 20700) between the Appellants and the Director of Lands, and/or*
   - *[ii] the relief sought by the Appellants was a declaration that a clause under a contract (being clause 23 of State Lease No. 20700) was uncertain and unenforceable, which are challenges and/or rights and/or relief based on, and available to, a party to a contract under private law.*

[3] A brief exposition of the facts is: the Plaintiff-Appellants [herein after to be referred to as the Appellants) by way of originating summons filed this action on the 2nd May 2019 against the Attorney General for and on behalf of the Director of Lands. The Appellants were the registered lessees of State Lease No. 20700 being Lot 28 of NAVAKI FORESHORE RECLAMATION (part of) which they had acquires from Juxta Beach Fiji Ltd on 7th August 2017. This land is located in the tourism development area of Fantasy Island, Nadi.

[4] On 19th November 2017, the Appellants received an offer from Mr. Mahendra Deo and his wife to purchase the land for $650,000.00, prompted the parties to enter into a Sale and Purchase Agreement on 19th November 2018. As consent of the Director of Lands is a pre-requisite under Section 13 of the State Land Act. On 20th November 2018 the parties filed an application for consent.

[5] Pursuant to the exchange of numerous emails and an inspection of the land in January 2019, the Director of Lands on 19th February 2019 had granted consent subject to the payment of a penal rent of $59,625.60. This penal rent was ordered on the basis that the Appellants had not complied with condition 3 of the Lease Agreement which reads thus:

> "*The Lessee shall, within twelve months from the date of commencement of this lease erect on the demised land, to the satisfaction of the lessor, a building for residential purposes in accordance with the provisions of the Public Health Regulations or any By Laws made under the provisions of the Local Government Act 1972 and such building shall be designed and used as a single dwelling unit unless the lessor's consent is obtained and then only upon such conditions as the Lessor shall stipulate.*"

[6] The Appellants did not dispute non-development as they had failed to erect a building for residential purposes within the stipulated time as required by the lease. However, they

had paid the penal rent under protest and later claimed it from the Director of Lands. As the claim was unsuccessful, the Appellants had filed the original Originating Summons against the Director of Lands claiming the following:

1. *A declaration that the Director of Lands is not entitled to demand the payment of $59,625.60 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the Plaintiffs to Mahendra Deo and Shireen Lata Singh;*
2. *A declaration that the demand by the Director of Lands for the payment of a penal rental of $59,625.00 or any sum in the form of penal rental as a condition or term of the grant of consent to transfer State Lease No. 20700 from the Plaintiffs to Mahendra Deo and Shireen Lata Singh is unjustified and unlawful;*
3. *An order that the Director of Lands do forthwith and in any event not later than 7 days endorse consent on the transfer to be submitted to the Director of Lands; and*
4. *An award for damages to be assessed;*
5. *An order that the Director of Lands pay the Plaintiffs' costs of these proceedings on a solicitor/client full indemnity basis or on a gross sum award to be assessed.*

[7] Having heard the case, the learned High Court Judge in his judgment dated 14th August 2020 made the following orders:

1. *I decline the declarations sought.*
2. *Judgment for the defendant.*
3. *The defendant is entitled to costs on this application which I summarily assessed at $2,000.00 which is to be paid within (07) days from the date of the judgment.*

[8] The main contention of the Appellants pivots on the premise that the imposition of the penal rent of $59,625.60 is arbitrary, unreasonable, unconstitutional, unjustified and/or

unlawful. As per the lease agreement (at p.27 of HCR), it is clear that the amount of rental per annum is $1200.00. However, the penal rent imposed by the Director of Lands is $59,625.60. The Appellants take up the position that the amount imposed by the Director of Lands is arbitrary. They also contend that even in the absence of guidelines in the relevant legislation as to the penalty that could be imposed, the penalty ought to be reasonable.

[9] On the above issue, The Respondent correctly argues that there is provision for the imposition of a penal rent under clause 23 of the Lease Agreement which reads thus;

> "*Default by the lessee in the fulfilment of any covenant or condition expressed or implied herein shall render this lease liable to cancellation by re-entry and possession by the lessor or to the imposition of a penal rent.*"

I do not doubt, nor do the Appellants dispute, that the Director of Lands was well within his statutory powers to impose a penal rent for default of the conditions of the lease. However, the question that needs to be asked is whether the penalty imposed was reasonable and proportionate to the default of which it seeks to mitigate the impact. I find that a simple mathematical comparison between the penal rent of $59,625.60 against the annual rent of $1200.00 suffices to decide that the former is disproportionate. I refrain from embarking on an unnecessary theoretical expedition of the constituent elements of unreasonableness as I find such an exercise redundant in the face of obvious injustice. The penal rent imposed is approximately 50 times that of the annual rent, which leads to the natural conclusion that the Director of Lands has acted unreasonably in imposing such a harsh penalty.

[10] The learned High Court Judge by his order refused any of the reliefs sought and found that relief sought by the Appellants ought to have been sought by way of an application for Judicial Review. At paragraph 24 of his judgment the learned High Court Judge declared thus: *"The plaintiffs cannot question the reasonableness, lawfulness and the*

constitutionality of the demand of the Director of Lands without an application for judicial review filed in Court under Order 53".

[11] In view of the declaration already granted, it is not necessary for the Court to consider the alternate declaration sought by the Appellant that Clause 23 of the State Lease 20700 is void for uncertainty.

[12] The order of the learned Judge is not incorrect as the instant application is an application by Originated Summons. However, a distinction has to be drawn between challenging the decision of the Director of Lands and an application for the mere variation of the penal rent ordered by the Director on grounds of proportionality. The former requires interpretation of legislation by way of judicial review whereas the latter only requires an assessment of the quantum of the penalty imposed. In other words, the latter is for the limited purpose of challenging the excessive penal rent, for which the Appellants can come by way of originating summons, because there was no factual dispute.

[13] Accordingly, I find that the learned High Court judge has erred in arriving at his conclusion. Therefore, I set aside the judgment of the learned High Court Judge and enter judgment in favour of the Appellants. I grant the first declaration sought by the Appellants in their favour, and allow ground 1 of the grounds of appeal declined.

[14] There is no provision in the Lease Agreement that the grant of consent by the Director of Lands for the Lessor to transfer the lease, is concomitant or dependent upon the Lessee having complied with all the conditions of the lease. As stated previously, the Director of Lands has the statutory power to impose the penal rental. However the absence of guidelines or Regulations, it is required to impose a penal rent that is commensurate with the annual rent. Therefore the penal rent imposed as a condition to consent for transfer is

unjustified and unlawful. The penal rent imposed on the Appellants by the Director of Lands may have thus been influenced to a significant extent by the purchase price contained in the Sale and Purchase Agreement dated 19th November 2018 to which the Director of Lands was privy.

[15] On the strength of the foregoing, I conclude that the penal rental was not a condition precedent to the granting of consent, the learned counsel for the Respondent conceded that there are no regulations or guidelines for the imposition of penal rent, in the LTA. Thus, the Director of Lands is expected to exercise his powers with due regard to the term of the contract, and the intention of the parties at the time the contract was executed.

[16] The grounds of appeal except the second declaration are answered in favour of the Appellants. I also order $5,000.00 as costs against the Respondent.

[17] These findings are to be construed without prejudice to the power of the Director of Lands under Section 23 of the Act to impose a reasonable penal rent against the Appellants.

[18] **<u>Jameel, JA</u>**

I agree with the conclusion of Lecamwasam JA.

[19] **<u>Orders of the Court</u>**

1. *Appeal partly allowed.*
2. *Respondent to pay F$5000.00 to the Appellants.*
3. *Director of Lands is directed to return the penal rent of $59,625.60 paid by the Plaintiff within 30 days of this order.*

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Hon. Justice E. Basnayake

JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam

JUSTICE OF APPEAL

....

Hon. Justice F. Jameel

JUSTICE OF APPEAL

Solicitors:

Mr A. K. Narayan with Mr A. K. Narayan (Jnr) for the Appellants

Mr J. Mainavolau & Ms M. Faktaufon for the Respondents