

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 32 of 2012

BETWEEN : **JAMES L PETERS & JIMME PETERS** presently of Portland Oregon, United States of America but previously residing at Seashell Cove Resort, Savusavu, Nadi.

Plaintiffs

AND : **SEASHELL @ MOMI LIMITED** a limited liability company having its registered office at 142 Toorak Road, Suva and owner/proprietor at Seashell @ Momi Limited previously known as Seashell Cove Resort and situated at Momi, Savusavu, Nadi.

Defendant

DIRECTIONS

INTRODUCTION

[1]. I am making these directions in order to have the benefit of full argument by counsel, before I make any further orders. On 04 April 2013, I did grant some interim injunctive orders *ex-parte* on the application of the late Mr Suresh Maharaj, who was counsel then on record for the plaintiffs. Mr Maharaj passed away shortly after he appeared before me for the Orders.

[2]. The Orders granted were:

1. That the Plaintiff pay into this Honourable Court the sum of F\$7,500-00 into Court being part payment of the lease rental monies to maintain the status quo in the matter.
2. That the defendant by its servants, agents, bailiffs, shareholders and directors, solicitors be restrained by Injunctive Orders of this Honourable Court from evicting the Plaintiffs and or removing the Plaintiff's chattels, furniture and fittings contained in Bure 2A on Certificate of Title No. 39613 formally known as Certificate Title No. Folio 4343 under Register Volume 44 until the final determination of this action.
3. That the copies of the documents and order be served on the Solicitor for the Defendant Messrs Vasantika Patel by 4.30pm on 04/04/2013.
4. That this matter is set down for Mention on 15th day of April, 2013.

[3]. Mr. Maharaj's client has since paid the said sum of \$7,500 into court. On 15 April 2013, the first call-over date after the Orders, Mr. Sudhakar appeared for Suresh Maharaj & Associates and Ms V. Patel for the defendant. I granted 14 days on that occasion to Ms Patel to file and serve an affidavit in opposition and 14 days thereafter to Mr. Maharaj to file and

serve an affidavit in reply. I then adjourned the case to 13 May 2013 for hearing at 11.00 a.m.

13 MAY 2013 HEARING

- [4]. On 13 May 2013, the date for hearing, there was no appearance by Mr. Maharaj. He, of course, had passed away sometime between late April and early May 2013. His funeral, in fact, had just happened a few days earlier.
- [5]. Ms. V. Patel appeared for the defendants and insisted on being heard on her submissions to dissolve the injunction.
- [6]. I did hear Ms Patel if only to give her a chance to convince me that the issues are simple and can be determined without hearing the other side. However, upon reviewing the file and affidavits and pleadings filed, I am of the view that the issues are much broader than what the submissions canvassed. Without the benefit of argument on the plaintiff's side, there is a grave risk of injustice if the issues are not determined upon full argument. I say this, bearing in mind that the onus is still on the plaintiffs at first *inter-partes* hearing to convince this Court that the injunction granted *ex-parte* in their favour should continue as an interim injunction¹.
- [7]. The absence of any representation for and on behalf of the plaintiffs on 13 May 2013 is understandable. Mr. Maharaj's practice was then, not under any form of supervision whatsoever because a Receiver was yet to be appointed.
- [8]. I see that Patel & Sharma Nadi were appointed to act for the plaintiffs in July 2014. I will have to adjourn this case to another date for argument.

BACKGROUND

- [9]. Meanwhile, the background and the issues as I understand them, and which I would like counsel to address this court on, are as follows. Seashell Cove Resort ("**the resort**") sits on Certificate of Title Folio 4343 Register Volume 44. The current proprietor of this land is Seashell @ Momi Limited ("**SML**"). SML is also the current operator of the resort.

¹ The Fiji Court of Appeal in Westpac Banking Corporation v Prasad [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999):
When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.

SML purchased and acquired both the land and the resort in 2005 from Seashell Cove Resort Limited (“SCRL”).

- [10]. The plaintiffs have travelled to Fiji regularly over the years. Apparently, they have been frequent guests at the resort during these visits and fell so much in love with it (the resort) that, on 28 October 2002, the first plaintiff entered into what he calls a “Lease Agreement” (see below) with SCRL (then still the owner of the land and the resort) over a particular accommodation unit.
- [11]. The term of that agreement was 4 years which means that it lapsed in October 2006.

THE AGREEMENT

- [12]. The agreement between the plaintiffs and the defendant’s predecessor in title is annexed to the affidavit of James L. Peters sworn on 28 March 2013 and filed herein. The said agreement states as follows (underlining and bolding is all mine).

AGREEMENT BETWEEN SEASHELL COVE RESORT AND MR.
JIM AND MS. JIMMIE PETERS FOR THE EXCLUSIVE LEASE OF
BURE 2 A FOR A MINIMUM PERIOD OF 4 YEARS

This Agreement is for 365 days per year, with a minimum of four years beginning November 1st, 2002 and is automatically renewable thereafter annually. The cost for this lease is US10,000 for the first year and \$F12,500 each year thereafter, payable on November first of each year. This agreement will be **renewed after four years providing both parties agree to any change in lease payments**.

This agreement is for Bure 2A and its garden and view and includes Water for the bure. Electricity, Sewer connection and one parking space somewhere out of the way.

If for some reason the resort was closed or there was a labour dispute, Seashell Cove Resort would do everything in their power to gain Jim Peters’ access to Bure 2A. Expansion of Bure 2A is authorised with limits that do not exceed the frontage of other bures and in agreement with the Sigatoka Health Department. Colour Scheme to remain the same as the rest of the resort theme.

The cost of the expansion is all born by Peters. Any expenses that are funded by Seashell – i.e. Labour or Materials, will be settled by Peters’ at the true cost. Interior changes to be completed by Peters’ include rewiring, plumbing and all necessary works that are required for a complete interior remodel. Furnishings that are currently in 2A are the property of Seashell with the exception of the closet in the bedroom and the valances on the windows.

The Furnishings provided by Jim Peters will remain the property of Mr Peters.

The external remodel will be completed well before the resorts’ Christmas season. During the construction, Peters will reside in Bure 2B and in return Peters will “Tighten” that unit also.

Mr Peter will have the same rights as other guests – use of the Bars, Restaurant, Swimming Pool and Dive Facilities. Any extended Credit by Seashell will be settled weekly.

The Unit 2A will at all times remain appropriate and look appropriate and in accordance with the rest of the resort.

Mr Peters will be available for consulting and/or a Director on Seashell 's board of Directors.

TERM

- [13]. As stated above, the term of the agreement is 4 years from 01 November 2002 which means that the agreement would have lapsed on 31 October 2006. There is provision that it (i.e. the agreement) **“will be renewed after four years providing both parties agree to any change in lease payments”** (see above).

IMPROVEMENTS

- [14]. The agreement in question expressly provides that Peters is to carry out all improvements on Bure 2A at his own expense.

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The external remodel will be completed well before the resorts' Christmas season. During the construction, Peters will reside in Bure 2B and in return Peters will “Tighten” that unit also.

- [15]. According to the plaintiffs, after the agreement was signed, they carried out major improvements on the particular accommodation unit in question and actually expended more than \$90,000 in the process. The defendant does not appear to refute the alleged improvements. Did the agreement actually encourage the plaintiff to carry out improvements and if so, does that “improve” and shore up the nature of any interest that the plaintiffs might have over Bure 2A?

SALE OF RESORT TO SML

[16]. On 08 April 2005, some three years or so after the said agreement, SCRL sold the resort to SML (the defendants).

RENTAL NEGOTIATIONS

[17]. Clearly, the parties are not able to “agree to any change in lease payment”. According to the plaintiffs, immediately after SML took over ownership of the resort, SML demanded of the plaintiffs a 100% increase in rental. The plaintiffs plead at paragraph 8 of the statement of claim that whilst SML was demanding a 100% rental increase, they (plaintiffs) were trying to settle at a 10% rental increase.

NOTICE TO VACATE

[18]. Whilst the plaintiffs and the defendant were negotiating, the defendant through its solicitors sent the plaintiff a letter dated 27 October 2006 which was in effect, a Notice to Vacate by 31 October 2006.

IS SML BOUND BY THE AGREEMENT BETWEEN PLAINTIFFS & SML'S PREDECESSOR IN TITLE?

[19]. What the plaintiffs are trying to do in this case is to tie down the defendant to the agreement in question. At paragraph 7 of the Statement of Defence, the defendant pleads that because it was not privy to that arrangement, it is not bound by it:

7. THAT as to the allegations contained in paragraph 7 of the Statement of Claim, the Defendant says as follows:

- (a) that it purchased the freehold property comprised in Certificate of Title No. Folio 4343 Register Volume 44 from the previous owners Seashell Cove Resort Limited on or about 02nd day of June 2005 for valuable consideration.
- (b) that it was aware that Bure 2A was rented out to one Jim Peters at a rental of \$12,000-00 per annum and that the term of the tenancy expired on 31st October 2006.
- (c) the Defendant denies that it was bound by the contract to renew the Plaintiff's tenancy on the same terms and conditions as alleged as there was no privity of contract between the parties. The said agreement was made between the Plaintiffs and the Defendant's predecessor in title.
- (d) save as aforesaid the Defendant denies each and every allegation contained in paragraph 7 of the Statement of Claim.

- [20]. As a general rule, the privity of agreement between the plaintiff and the original owner (SCRL) will not bind the defendant (SML). There are, of course, exceptions to that general rule.
- [21]. The questions that I would like counsel to address me on are:
- (i) is this a case where an exception will apply?
 - (ii) what is the nature of the plaintiffs interest in Bure 2A? Is it a leasehold interest or is it just a licence or whether it is some other interest?
 - (iii) whether the nature of the plaintiffs' interest confers upon them a proprietary interest (whether legal proprietary or equitable proprietary) or is it just a personal interest?
 - (iv) did the defendants have notice of the plaintiffs' interest on Bure 2A and if so, whether that is a material consideration in the circumstances of this case?

OBSERVATIONS

- [22]. Both parties assume that the agreement entailed a lease agreement. In **Daydream Island v Vuki**, Madam Justice Phillips defined a lease as follows:

A lease has been defined as an interest in land given by a landowner to another for a fixed duration such that the lessee has the right to exclusive possession of the land or premises leased.

- [23]. Butt, **Land Law 5th edition** Law Book Company at paragraph [1503] clarifies (though, for lawyers, this often goes without saying) that the term of the leasehold must be less than the term for which the landlord holds the land otherwise it could amount to an assignment of the landlord's interest.

A leasehold interest is created, and the relationship of landlord and tenant arises, whenever one person (the "landlord" or "lessor") gives another (the "tenant" or "lessee"):

- (i) the legal right to exclusive possession of land,
- (ii) for a period ("term") that is certain (or capable of being rendered certain) and that is less than the term for which the landlord holds the land.

(my emphasis)

Exclusive Possession

- [24]. Whether the plaintiffs were granted exclusive possession² is not clear from the document itself. What happens when the plaintiffs are not in occupation and are out of Fiji, did the defendant's predecessor in title then let out Bure 2A to other guests³?

Transferability of that Interest

- [25]. A right to exclusive possession is transferrable. If the right granted is of its nature, not transferable or is otherwise personal to the grantee it will, as such, not be a leasehold interest because a leasehold interest is – by its nature – transferable (see **Richardson v Landecker (1950) 50 SR (NSW) 250 at 255; 67 WN 149 at 151**). Whatever the interest conferred to the plaintiff by the agreement, is it transferable? Why is the second plaintiff included in this action.

Contingent Clause?

- [26]. In addition to the above, I observe that the arrangement between the plaintiffs and the defendant's predecessor in title clearly had an initial term of 4 years which has now lapsed. What remains is the provision in the document that the agreement “**will be renewed after four years providing both parties agree to any change in lease payments**”. What we are essentially concerned with here is whether or not the above words confer upon the plaintiffs a right of renewal and if so, whether that is binding upon the defendants as successor in title.
- [27]. The question I ask is: since rent (or lease payment) would be an essential term of a lease, and the agreement for further renewal is conditional upon

² Exclusive possession is the lessee's right to exclude others including the lessor, subject to specific entry provisions in the document. Without the right to exclusive possession of the premises, the plaintiffs' right to use Bure 2A may in fact (and in law) be some lesser right such as a licence or an easement.

³ In **Lewis v Bell** [1985] NSWLR 731, the Supreme Court of New South Wales applied the *exclusive possession test* to decide whether or not the document in question was a lease or a mere license. If the document uses words which are ordinarily understood to confer such a right, then a prima facie grant of exclusive possession will be inferred (as per Mahoney JA's views at 734 and 735 of **Lewis v Bell**). If the document is unclear as to what exactly is being granted such as where the grant is expressed not in terms of possession but as a **right to occupy** premises or a **right to carry on business** on premises or a **right to use** the premises either generally or in a specific way - the Australian approach is to determine by construction whether what is being granted is possession or exclusive possession. This is done by looking at both the nature of right granted and also the intention of parties. At the end of the day, the process of construction is essentially a process of implication. In England, what is often emphasised is the intention of the parties. There, exclusive possession is relevant but not decisive (see Halsbury's Laws of England, 4th ed, vol 27, pars 6-7 at 13-15, and the cases there referred to).

the parties agreeing to it, are the parties contractually bound not to impede the occurrence of that condition? Are the parties contractually obliged to use reasonable efforts to renew the lease/agree to a rent? And will a failure to use such efforts constitute a breach? Does it mean that either party is free to withdraw from the agreement before the condition precedent occurs, if assuming there is a contract at all?.

Certainty of Term

[28]. The term under the agreement in question was 4 years with provision that the agreement:

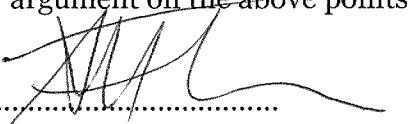
“will be renewed after four years providing both parties agree to any change in lease payments”.

[29]. On the face of it, one might say that the provision for renewal after four years is not guaranteed because it is contingent upon the parties agreeing to any change in “*lease payments*”. It is also not clear to me exactly what the term for further renewal is: is it for a further 4-year term or is it for just one year⁴? Is that clause, void for uncertainty?

DIRECTIONS

[30]. This case is adjourned to **Wednesday 12 November 2014 at 10.30am** for mention to fix a date for argument on the above points.





Anare Tuilevuka
JUDGE
05 November 2014

⁴ In *Say v Smith* ((1563) 1 Plowden 269, 75 E.R. 410) one of the questions was as to the validity of an agreement under which a tenant was to have a right (subject to paying the rent at the end of each ten year term) to a perpetual series of ten year leases. The court decided that this was not valid since there was no certainty of term:

‘[E]very contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it and in the end of it: so that all ought to be known at the commencement of the lease, and words in a lease which don’t make this appear are but babble ... And these three are in effect but one matter, shewing the certainty of the time for which the lessee shall have a land, and if any of these fail, it is not a good lease for then there wants certainty.’

The arrangement was invalid since the understanding that the renewals would continue in perpetuity meant that there was no certainty of term.