IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 183 of 2009

BETWEEN : **ARUN LAL SETH** of 57 Seabrook Avenue, New Lynu, Auckland, New Zealand, Self – Employed.

Plaintiff

AND : **KAMAL CHAND SETH** of Vaileka, Rakiraki.

1st Defendant

AND : **THE DIRECTOR OF LANDS**

2nd Defendant

AND : **THE ATTORNEY GENERAL OF FIJI**

3rd Defendant

Counsel : M. Degei for the Plaintiff
Anil J. Singh for the 1st Defendant
J. Lewaravu for the 2nd & 3rd Defendants

RULING

INTRODUCTION

[1]. In this introduction, I set out the facts as pleaded by the plaintiff and which I assume are proved for the purpose of the applications before me now. The plaintiff and the defendant are brothers. They are fighting over a certain piece of Crown Commercial Lease in Vaileka in Rakiraki. The said Crown Lease is described as Crown Lease No. 8269 Lot 5 on Plan R21128. On this lease, is constructed a commercial building (**"crown lease"**). The said crown lease was owned by one Raj Pati (deceased) who was the mother of the plaintiff and the defendant.

[2]. On 03 February 1983, Raj Pati made her Last Will and Testament in which she bequeathed the crown lease to the brothers in equal shares. Almost two weeks after making the said Will, Raj Pati passed away on 15 February 1983. Probate over the Raj Pati estate was

granted to one Ramesh of Nausori. By Transmission By Death, Ramesh then transferred the crown lease to himself. Later, Ramesh would hand over the management of the said lease to the defendant.

[3]. According to the plaintiff, the defendant has been receiving all rental income from the crown lease since the death of Raj Pati and has refused to his (plaintiff's) demand to account for the same.

[4]. The plaintiff alleges that the Director of Lands had assured the plaintiff at some point in time which is not stated in the Statement of Claim that the crown lease would be renewed to the estate, has changed tune and would renew the said lease personally the 1st defendant only.

[5]. The plaintiff is concerned that he might loose his inheritance.

[6]. Before me are two applications to strike out the statement of claim. Both applications are filed pursuant to Order 18 Rule (1)(a) and (b). The first application is filed by the Office of the Attorney-General. The second is filed by the first defendant, Kamal Chand Seth dated 07 March 2012.

ORDER 18 RULE 18(1)(a) & (b)

[7]. **Order 18 Rule 18(1)(a) and (b)** state as follows:

> 18 (1). The Court may at any stage of the proceedings order to be struck out or amended any pleading or indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) It discloses no reasonable cause of action or defence, as the case may be
> (b) It is scandalous, frivolous or vexatious

AFFIDAVIT FILED IN SUPPORT OF THE A-G's APPLICATION

[8]. The application is supported by an affidavit sworn by one Walmik, a Senior Surveyor at the Divisional Surveyor Western's Office in

Lautoka. In his affidavit, Walmik confirmed all that is pleaded in the Statement of Claim but adds the following:

6. That the said Crown Lease No. 8269 expired on its legal termination date on 1st April, 1998.
7. That the trustee of the Estate made an application to transfer the said Crown Lease to the beneficiaries on the 24th of May, 2001 by way of administration and transmission by death. The application was never processed as Crown Lease No. 8269 had expired on its legal termination date.
8. That the 1st Defendant applied for the subject Crown Land described as Lot 5 of Plan RR 1128, Parts of Naqalau, Vatumami & Nadevu in the Province of Ra on the Island of Viti Levu on the 25th of September, 2008 and the application was granted by the Defendant.
9. That the Defendant has granted a commercial lease to the 1st Defendant for a period of 99 years with effect from 1st April, 1998.
10. That the lease documents were signed by the parties on the 25th of August, 2009 and that Crown Lease No. 17823 was registered by the Registrar of Titles on the 2nd of September, 2009.
11. **WHEREFORE** the Defendant pray for orders in terms of the summons file herein.

AFFIDAVIT IN SUPPORT OF 1ST DEFENDANT'S APPLICATION

[9]. The first defendant, Kamal Chand Seth has also filed an affidavit in support of the application to strike out. Seth deposes as follows :

3. That I seek leave of this Honourable Court to refer to the Affidavit of Walmik sworn on the 14th day of December, 2011 and filed in the action herein (hereinafter referred to as "the Affidavit").
4. That the matters contained in the Affidavit is of the same vein as my defence filed in the matter.
5. That I paid all the arrears of rent in regards to Crown Lease No. 8269. The Director of Lands granted me the Crown Lease No. 17823 after Crown Lease No. 8269 had expired.
6. That Crown Lease No. 17823 was only granted after I paid substantial arrears of land rental which the Administrator of the Estate of Raj Pati failed to do.
7. That my brother the Plaintiff who migrated to New Zealand did not pay any of the arrears and did not show any interest in the said property.
8. That my application for a new lease being Crown Lease No. 8269 was granted and my brother the Plaintiff has no claims to the new lease and his action does not disclose any reasonable cause of action and should be dismissed.

THE LAW

[10]. The general rule about striking out pleadings under **Order 18 Rule 18(1)(a)** is that the Court will not strike out a pleading as disclosing

no reasonable cause of action unless, on the pleaded facts, the plaintiff could not succeed as a matter of law, or, where the cause of action is so clearly untenable that it cannot possibly succeed.

[11]. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend – the courts will not strike out the claim (Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005** summarises the applicable principles succinctly[1]).

[12]. As for **Order 18 Rule 18(1) (b)**, a pleading is scandalous if it imputes things or is abusive of the other party and, in addition, if the imputations and abuse are irrelevant to the issues of the case. For example, an allegation of indecent or offensive words or misconduct about/against the other party will be scandalous if they are unnecessary or not relevant to the case. A pleading is frivolous and vexatitious if it is not made in good faith (lacks *bona fides*), or, if it is hopeless, oppressive and tending to cause unnecessary expenses and anxiety on the other party. A case can be said to be frivolous

[1] 1. it is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided.

2. to secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ....or is advancing a claim that is clearly frivolous or vexatious...

3. an opinion of the Court that a case appears weak and such that it is unlikely to succeed is not, alone, sufficient to warrant summary termination.....Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. summary relief of the kind provided for by O 26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer..... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. if, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleading .....A question has arisen as to whether O 26 r 18 applies to part only of a pleading

6. The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

when it is a waste of the court's time and everybody else's time and when it is not capable of sustaining a reasonable argument in court.

[13]. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

> Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (**Everett v Prythergch** (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in **Millington v Loring** (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (**Blake v Albion Assurance Society** (1876) 45 L.J.C.P. 663).
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> The sole question is whether the matter alleged to scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in **Christie v Christie** (1873) L.R. 8 Ch. App 499, p. 503; and see **Cahsin v Craddock** (1877) 3 Ch. D. 376;**Whitney v Moignard** (1890) 24 Q.B.D 630). In **Brooking v Maudslay** (1886) 55 L.T 343, plaintiff made allegations in statement of claim of dishonest conduct against defendant, but he stated in his reply that he sought no relief on that ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing. So in an action on marine policies, a paragraph which purported to state what took place at an official inquiry held by the Wreck Commissioners was struck out as an attempt to discredit the plaintiffs and to prejudice the fair trial of the action (**Smith v The British Insurance Co.** [1883] W.N. 232; **Lumb v Beaumont** (1884) 49 L.T. 772).....
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> .....If any unnecessary matter in a pleading contains an imputation on the opponent, or makes any charge of misconduct or bad faith against him or anyone else, it will be struck out, for it then becomes scandalous (**Lumb v Beaumont** (1884) 49 L.T. 772; **Brooking v Maudslay** (1886) 55 L.T. 343. In **Murray v Epsom Local Board** [1897] 1Ch. 35, an imputation that one member of the Board was opposing the plaintiff's claim, not on public grounds, but for his own private interest, was struck out.
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> When considering whether a particular passage in a pleading is embarrassing regard must be had to the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but cannot (it is submitted) be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in **Addis v Gramophone Co. Ltd** [1909] A.C. 488, p. 495.

[14]. In **Bullen, Leake and Jacobs: Pleadings and Precedents** 12th edn at page 145, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of reasoned argument. A pleading is vexatious when it is lacking in bona fides, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

ANALYSIS

[15]. All counsel agree that there is nothing in the State Lands Act that entitles a proprietor of a commercial crown lease such as the one in question in this case to an extension at the expiry of its term. It would appear from this that the Director of Lands is therefore under no legal obligation under the Act to consider the interests of the estate in this case in extending the lease.

[16]. However, the plaintiff's case is not premised on any provision of the Act. He pleads in his statement of claim that he was assured by the Director of Lands that the lease would be extended in favour of the estate.

[17]. Walmik deposes for the Director of Lands as follows:

> 6. That the said Crown Lease No. 8269 expired on its legal termination date on 1st April, 1998.
> 7. That the trustee of the Estate made an application to transfer the said Crown Lease to the beneficiaries on the 24th of May, 2001 by way of administration and transmission by death. The application was never processed as Crown Lease No. 8269 had expired on its legal termination date.

[18]. Is the Director of Lands bound by estoppel to that alleged promise in the particular circumstances of this case - assuming it is proved that he did really promise the plaintiff that the lease would be extended in favour of the estate? And, assuming the promise was made, did the plaintiff rely on it and if so, was his reliance on it reasonable in the circumstances of this case?

[19]. I caution myself that traditionally, the Crown or State was held to be not bound by estoppel out of concern that, to invoke estoppel unreservedly against the state, would undermine the rule of law and public interest and would render government agencies ineffective. However, in some jurisdictions, a promise by government officials

based on some government policy may be enough to invoke an estoppel (see for example **Motilal Padampat Sugar Mills v. State of Uttar Pradesh & Ors.** 1979 SCR (2) 641[2]).

[20]. The argument was advanced in favour of the plaintiff that the Director of Lands, as a matter of policy, has always renewed such commercial leases to a lessee particularly where substantial improvements have been made on and to the property by the said lessee. If so, does this then give rise to a cause of action based on some legal ground and in some principle of equity.

[21]. As against the first defendant, even if the lease has been transferred to him personally, and assuming that the plaintiff is unable to prove his claim against the Director of Lands in the final, the first defendant is still accountable to the plaintiff for rental proceeds from the property. In addition to that, the circumstances in which he applied out of time for renewal of the lease to the beneficiaries is questionable. Did he deliberately sabotage the interest of the estate, by not applying on time, so he can gain the lease personally? If so, was this a breach of his duty as trustee and can he be held to be holding half interest in the lease in favour of the plaintiff.

[22]. In my view, the above are all arguable and should be tested at trial with the benefit of research and better and clearer evidence.

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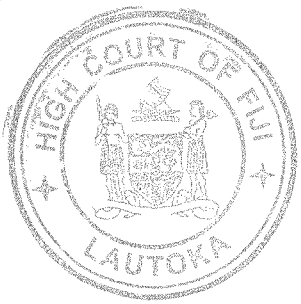
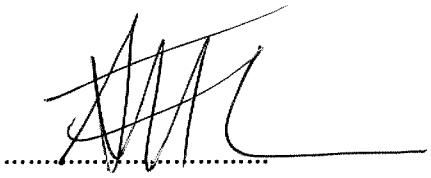
[2] the Uttar Pradesh government announced a policy to exempt all new industrial units of the state from sales tax for three years. Attracted by this, the plaintiff went to the Director of Industries to confirm this. The Director reiterated the policy of the government. The Chief Secretary of Government also assured the plaintiff of the same. Relying on this, the plaintiff went ahead and borrowed money, bought a plant and machinery, and then set up a new plant in the state of Uttar Pradesh. However, the government went back upon its policy. Its revised policy was to give partial concession only. This, the plaintiff agreed to. He then went ahead and started production. Once again, however, the government revised its policy and went back even on this promise denying any concession altogether. The plaintiff sued the government on account of promissory estoppel. The court opined that the plaintiff need not show he has suffered detriment if he can show that he has altered his position.

CONCLUSION

[23]. Although the plaintiffs case seems rather weak and badly pleaded, I am of the view that he has a reasonable cause of action against both defendants. Both applications dismissed. Both defendants to pay the plaintiff each the sum of $300-00 (three hundred dollars each)

[24]. Case adjourned to **Wednesday 15 April 2015** for mention. As a postscript, I would urge the plaintiff to revisit and apply to amend his pleadings with greater particularity.





Anare Tuilevuka
JUDGE
Lautoka High Court

05 March 2015