

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 97 of 2018

BETWEEN : **MANJULA aka Kiran Pala aka Kiran, Jai Bai**
AND : **ATTORNEY GENERAL OF FIJI**

Plaintiff
Defendant

Appearances : Mr. Padarath for the Plaintiff
Mr. Mainavolau for the for the Defendant

Date of Hearing : 04 July 2018
Date of Judgement : 26 October 2018

JUDGEMENT

BACKGROUND

1. The late Mr. Deo Chand was the registered lessee of Lot 2, Section 8, Ba township, formerly CT 6246, comprised in Lease No. 62931. He died on 12 May 2012. The land, thereupon hid death, became vested in the personal representative of his estate. The plaintiffs are the executors and trustees of the Deo Chand estate. On 10 January 2017, in their capacity as executors/trustees, the plaintiffs entered into an Agreement with one Hitesh Kumar Kantilal Raniga for the sale and purchase of the said property. In preparation for the above transaction, Pala, who holds Power of Attorney for the plaintiffs, lodged an application to the Director of Lands on 22 February 2017 for consent to the above dealing. Vide a letter dated 08 June 2017, the Director of Lands wrote to Messrs S.K. Ram setting out a condition to her consent. The condition is that the beneficiaries sign a Deed of Renunciation. Alternatively, that a clause be added to the sale and purchase agreement to confirm that the beneficiaries have agreed to the sale of the estate property and if necessary, that they be compensated.
2. The Director of Lands is of the view that the condition would safeguard the interest of the State in that **“any estate land must be free of any beneficiaries claim”**¹.

¹ The said letter is reproduced below:
Dear Sir/Madam

Re: Application for Consent to Transfer State Lease 62931, Lot 2 Section 8 Ba Township

Reference is made to your application received on 22/02/2017.

3. On 08 August 2017, Messrs S.K. Ram responded vide the following letter to the Divisional Surveyor Western:

We refer to your letter dated 8th June 2017 and received by our office on 20th June 2017. You have given us two options before consent is granted:-

1. To provide a deed of renunciation of all the beneficiaries; or
2. To add a clause in the agreement stating that the beneficiaries have agreed to the sale and that they would be compensated.

Both these options show a fundamental misunderstanding and ignorance of Estate law and Contract law.

You say in your letter that you intend to safeguard the interest of the State. The overall effect of your demand will have the opposite effect. In relation to the first option, you are saying that unless the beneficiaries renounce their shares in the Estate you will not consent to the transfer. In other words, you are using undue pressure to require beneficiaries to renounce their shares in favour of a trustee. This opens the State to litigation. Any renunciation that follows very clearly will be done because of the duress and undue pressure placed upon the beneficiaries by you. You will be liable in a court action because of this demand.

Your second option requires a Purchaser (a stranger to the trust) to agree that the beneficiaries will be compensated. Why would the purchaser agree to anything of that nature? The Purchaser is agreeing to purchase the property. The issue with the beneficiaries is a separate issue.

The document which protects the beneficiaries is the Probate granted by the High Court (Probate Jurisdiction). The estate and the State are both protected by this document. It has the authority of the court and legislation backing it. It is much stronger than any renunciation or clause in a contract (both of which options are unlawfully in any event).

Your response obviously is not done upon legal advice. We suggest you get proper legal advice before you make such representations because you are opening up the Ministry and the State to litigation.

Unless consent is granted within the next 14 days, we will commence legal proceedings for declarations that the position taken by you is unlawful and that your department ought to pay our client costs and damages for the delay.

Please give this letter your urgent attention.

Yours faithfully

SAMUEL K RAM

(my emphasis)

Please be advised that a Deed of Renunciation be provided or a clause be added in the Sale & Purchase Agreement stating that the beneficiaries have agreed to the Sale and if necessary that they are compensated.

Furthermore, the above is required as it ensure the interest of the State is safeguarded in that any estate land must be free of any beneficiaries claim.

Yours faithfully

Ateca Cagilevu (Mrs)

For Divisional Land manager West

(my emphasis)

4. On 12 September 2017, the Ministry of Lands and Mineral Resources replied as follows:

Dear Sir/Madam

Re: Consent to Transfer – CL 62931

Reference is made to your letter dated 8th August, 2017.

We have been advised by Solicitor General's Office that a deed of renunciation is required before the Lands Department can give its consent.

Your client wishes to sell off estate property that has beneficiaries. Moreover, your client is acting on a Power of Attorney No. 57686.

Since the subject property is vested under the Director of Lands, it is necessary that the beneficiaries surrender their shares in lieu of the sale. Therefore, as per our policy, a Deed of Renunciation is mandatory.

The Director of Lands cannot have any lingering proprietary interests attached to a state land is subject for sale. It is important that the beneficiaries are informed of what is happening to their state owned property. If their leased property is being alienated, their consent must be literally given in writing. The most formal authority for this is a Deed of Renunciation.

You will appreciate that it would be rather irresponsible for Lands Department to consent to transfer without the beneficiaries surrendering their shares.

Incidentally, it is rather peculiar that your client is quite anxious about compelling the State to consent to transfer in spite of the knowledge that beneficiaries exist under the property.

In that regard it would seem that your office that is misinformed about the law regarding the estate and in particular, the position of the Director of Lands in relation to estate vested state property. In any event, if one is a beneficiary in a property that is being sold off by the trustee, would it not be fair to have the beneficiary's say on the sale? Would it not be important for the beneficiary to give his consent to the sale? After all, the beneficiary has proprietary interests on the property too.

As we have articulated to you in our earlier correspondence, the State must ensure that it is shielded from any legal resource when dealing with the sale of state land. Put simply, what if one of the beneficiaries following the sale in the present matter were to come back to our office in the future and complain that he was unaware and had not consented to the sale? To preserve that scenario, our office has evoked said requirement of renunciation deed as a mean of diffusing the threat of rogue beneficiaries in this regard.

Unless your client and the purchaser have agreed that the beneficiaries will retain their shares after the purchase, we cannot and will not consent without a deed of renunciation.

Your threat of legal action is kindly noted. As per the advice of our solicitors, your client is at liberty to pursue that endeavour if he deems it fit. However, should that eventually arise be rest assured that our Office will vigorously defend its cause.

We hope the above clarifies our position in the matter.

Yours faithfully,

A. Cagilevu (Ms)
For Assistant Director of Lands

5. On 10 May 2018, the plaintiff filed an Originating Summons seeking the following:

(1) A determination of the following issues:-

- a) whether the defendant can withhold consent and demand that a beneficiary renounces his or her share in a estate prior to the sale and/or transfer of estate property under a trust formed by the provisions of the Succession, Probate and Administration Act.
- b) whether a beneficiary's consent is necessary prior to a sale of an estate property which is part of a trust formed under the provision of Succession, Probate and Administration Act.
- c) whether the defendant is unreasonable in withholding consent?

(2) For the following Orders:-

- a) a declaration that a beneficiaries consent is not required prior to a sale of an estate property which is part of a trust formed under the provision of Succession, Probate and Administration Act.
- b) a declaration that the defendant has no authority to demand and/or put a condition that a beneficiary is required to renounce his/her share in a trust formed under the provisions of the Succession, Probate and Administration Act.
- c) a declaration that the defendant is unreasonably withholding consent.

6. The Originating Summons is supported by an affidavit sworn on 19 April 2018 by one Narendra Pala ("**Pala**"). The Office of the Attorney General has filed an Affidavit of one Laisenia Kidianaceva sworn on 10 August 2018 in reply to Pala's Affidavit.

DISCUSSION

7. At first glance, it would seem that the condition in question is being insisted upon by the Director with a view to defending the interests of the beneficiaries, to safeguarding the security of the trust property, and to ensuring that there is no impropriety in the execution of the trust.

8. In Court however, Mr. Mainavolau said that it was out of careful forethought that the Director is insisting on the condition. He submitted that the condition is being imposed with a view to minimising the Department's exposure, in light of some *obita* observations of Master Nanayakarra (as he then was) in the 2015 case of **Prabha Wati v Satya Wati & Anor & The Director of Lands & A-G** – Civil Action No. HBC 144 of 2014.

The first Defendant was granted letter of Administration on 01st April 2008. A copy of last Will and Testament of Shiv Charan Singh is annexed to the letter of Administration. It indicates that the First Defendant is entitled to half Share, in the estate of "Shiv Charan Singh" and the other half share should go to Vijay Singh (late husband of the Plaintiff). The first Defendant as a Sole Administratrix was only a 50% beneficiary. On or about 29 January 2003, the Plaintiff's late husband as attorney of Shiv Charan Singh, paid the third Defendant a sum of \$7,521.25 as rent in respect to the subject land. Therefore, the 3rd Defendant was well aware of the other beneficiary. Therefore, the third Defendant cannot deny knowledge of any proprietary interest of the other beneficiary namely the Plaintiff. Suffice it to say that the third Defendant's suspicions were aroused when the first Defendant applied for consent to transfer the property to Sigatoka Valley Spares Limited in consideration of \$280,000.00, without sighting a deed of renunciation from the other beneficiary namely the Plaintiff. The third Defendant was well aware that the estimated value of the land is \$720,000.00, since on a subsequent day, they consented to a mortgage to Sigatoka Valley Spares Ltd in consideration of \$720,000.00. The third Defendant abstained from making inquiries in relation to the Deed of renunciation of the other beneficiary namely the Plaintiff. I am curious as to why the third Defendant consented to sell the property without a deed of renunciation from the Plaintiff. To make matters worse, the 3rd Defendant chose not to respond when the Plaintiff wrote to him seeking information regarding the lease. Therefore, I interpose the view that, true situation had not emerged and that a full hearing is required to ascertain what had occurred between the parties.

9. I will not comment on the aptness of the above observations. What I am prepared to say however, in the most general terms, is that a beneficiary who stands to inherit any real property under a Will or under the laws of intestacy, has an equitable beneficial proprietary entitlement to the said property. It is the personal representative of the estate who is the legal "benefactor" of that interest. As personal representative, an executor/trustee is legally obligated to manage the estate property for the benefit of the estate beneficiaries. There is nothing in the statutes, as far as I am aware, that vests in the Director of Lands a duty to protect the interests of the beneficiaries or of the estate or to ensure that there is no impropriety in the manner in which the estate assets are applied.
10. The issue raised is a simple one. Under section 13 of the State Lands Act in its relevant part, the consent of the Director of Lands must be first had and obtained before any lessee can alienate or deal with any state land by sale and that any sale effected without such consent shall be null and void.

11. I accept the submission that the Director of Lands has a discretion to give or refuse consent. However, that discretion must be exercised lawfully. To exercise that discretion lawfully, the Director must not take into account irrelevant matters.
12. In **Sargeant v Macepark (Whittlebury) Limited** 2004] EWHC 1333 (Ch), the English High Court Chancery Division referred to some cases which say that a landlord is not entitled to refuse consent on grounds which have nothing to do with the relationship of landlord and tenant:

Legal principles

The question whether consent to alterations has been unreasonably withheld must be considered under two heads: the common law and s. 19 (2) of the Landlord and Tenant Act 1927.

The law on reasonableness has been most extensively developed in relation to covenants against alienation. In **International Drilling Fluids Ltd v. Louisville Investments (Uxbridge) Ltd** [1986] Ch 513 the Court of Appeal distilled a number of principles from the authorities. Of these principles, Lord Bingham of Cornhill selected three as worthy of special emphasis in **Ashworth Frazer v. Gloucester City Council** [2001] 1 WLR 2180 at 2182:

*"3 When a difference is to be resolved between landlord and tenant following the imposition of a condition (an event which need not be separately considered) or a withholding of consent, effect must be given to three overriding principles. The first, as expressed by Balcombe LJ in **International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd** [1986] Ch 513, 520 is that:*

"a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease ..."

The same principle was earlier expressed by Sargant LJ in **Houlder Bros & Co Ltd v Gibbs** [1925] Ch 575, 587:

"in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and ... it must not be something wholly extraneous and completely dissociated from the subject matter of the contract."

While difficult borderline questions are bound to arise, the principle to be applied is clear.

13. The court also stressed that whether or not a landlord's conduct was reasonable or unreasonable is a question of fact and that care must be taken not to elevate a decision made on facts into a principle of law.

4 Secondly, in any case where the requirements of the first principle are met, the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases. In some the landlord's withholding of consent has been held to be reasonable (as, for example, in **Pimms Ltd v Tallow Chandlers Company** [1964] 2 QB 547 and **Bickel v Duke of Westminster** [1977] QB

517), in others unreasonable (as, for example, in Bates v Donaldson [1896] 2 QB 241, Houlder Bros [1925] Ch 575 and International Drilling [1986] Ch 513). These cases are of illustrative value. But in each the decision rested on the facts of the particular case and care must be taken not to elevate a decision made on the facts of a particular case into a principle of law. The correct approach was very clearly laid down by Lord Denning MR in Bickel v Duke of Westminster [1977] QB 517, 524.

14. Notably, as the Court stressed, the landlord's duty is to show that his conduct was reasonable. This is not to say that his conduct was right or was justifiable.

5 Thirdly, the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in Pimms Ltd v Tallow Chandlers Company [1964] 2 QB 547, 564: "it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances ..." Subject always to the first principle outlined above, I would respectfully endorse the observation of Viscount Dunedin in Viscount Tredegar v Harwood [1929] AC 72, 78 that one "should read reasonableness in the general sense". There are few expressions more routinely used by British lawyers than "reasonable", and the expression should be given a broad, common sense meaning in this context as in others."

15. Although none of the above cases deal with a state authority as landlord whose powers are set out in a statute, I am of the view that some useful guidance might be derived from them.

16. In Mani v Director of Lands [2004] FJHC 537; HBC0124J.2001L (20 August 2004), Mr. Justice Gates (as he then was) made some observations and cited some authorities which I think sets the broad parameters of what is relevant in the exercise of the section 13 discretion:

[33] The purpose of the provision for consent is "in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee..." per A.L. Smith LJ in Bates v Donaldson [1896] 2 QB 241 at p.247. In Re Gibbs and Houlder Brothers and Company Ltd's Lease [1925] 1 Ch.575 Warrington LJ considered the objection must be founded either in the personality of the intended assignee or in the user (at p.585). For instance in Bickel v Duke of Westminster [1976] 3 All ER 801 the Court of Appeal found the withholding of consent so as to prevent the lessees achieving enfranchisement of the leaseholds to be reasonable and to be clearly related to the property the subject matter of the lease. Enfranchisement would have meant the landlord would have lost the freeholds, and hence his remaining interest in the properties.

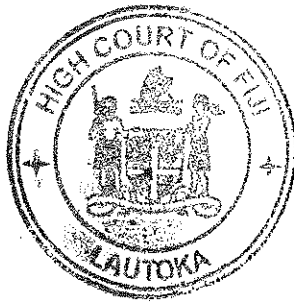
[34] In Re Gibbs (supra at p.583) Pollock MR thought that the fact that the reason was extraneous to the relationship of landlord and tenant was another factor making refusal unreasonable. The transfer of the lease to Florence here is not connected to any possible enforcement proceedings for arrears of rent from the estate of Chinsamy.

17. I am of the view that whilst the Director is entitled to be concerned about her office's exposure, and to impose conditions to give her some comfort in managing that perceived exposure, the conditions imposed in this case have gone overboard. That is all I am prepared to say in this case.

RESULT

18. I make the following declarations and Orders :

- (i) the Director of Lands is not entitled to withhold consent and demand that a beneficiary renounces his or her share in a estate prior to the sale and/or transfer of estate property under a trust formed by the provisions of the Succession, Probate and Administration Act.
- (ii) that the consent of a beneficiary is not necessary prior to a sale of an estate property which is part of a trust formed under the provision of Succession, Probate and Administration Act.
- (iii) that the Director of Lands has unreasonably withheld his consent.
- (iv) Costs to the plaintiff which I summarily assess at \$500-00 (five hundred dollars only).



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Anare Tuilevuka
JUDGE

26 October 2018