

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

HBC 37 of 2017

BETWEEN : **THE TRUSTEES OF VANUALEVU MUSLIM LEAGUE**

1ST PLAINTIFF

AND : **BASHIR KHAN**

2ND PLAINTIFF

AND : **LABASA TOWN COUNCIL**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. S. Valenitabua with Mr. V. Rokodreu for the plaintiffs**

: **Mr. S. Sharma with Mr. S. Ravusoni for the defendant**

Date of Hearing : **12 to 16 March 2020**

Date of Judgment : **13 February 2024**

JUDGMENT

DAMAGES

Declaration – Completion certificate – Rear service lane –

Inadequate provision of drainage – Damage to property

1. The plaintiffs filed action in 2017, and subsequently amended their statement of claim. Their claim was for a declaration that the defendant immediately provides a completion certificate and a rear service lane as passed by the full council meeting on 29 December 1993 and for damages.
2. The plaintiffs pleaded that the defendant approved the building plan to erect a building with three floors on crown lease number 17786 comprising lot 13 and 13A described in plan number M1644 containing a land of 11,102sqm. Lot 13 is a native lease, while lot 13A is crown land. On 11 July 1991, the Labasa Town Council granted a building permit to the plaintiff who thereafter commenced erecting its building according to the approved plan from the defendant. The plaintiff states that the defendant's agents supervised or inspected every stage of construction, foundation to completion.
3. The plaintiffs' state that based on the assurance given by the defendant, they erected the building to allow storm water to the rear of the building. The plaintiffs state that the defendant gave an assurance that it would allow loading and unloading for its tenants in front of the building until the rear service land is approved. The defendant approved provision for 15 small cars to be parked inside the building.
4. The plaintiffs state that the building was completed on 24 May 2001 and that all required documents were provided to the defendant by 4 February 2016. The plaintiffs say that the defendant neglected in providing a completion certificate within reasonable time although all requested documents were provided. The plaintiff applied for the completion certificate in the year 2001, 2002, 2012 and 2013. They say that despite the assurance, a loading bay was not provided. The defendant also failed to provide a rear service lane as agreed on 15 March 1994.

The plaintiffs states it has completed construction, and pays rates to the defendant as well as land rent.

5. The plaintiffs state that on 29 August 2011 the civil contractor of Viti Vanua Holding Ltd blocked two culverts that were placed by the defendant to allow storm water to flow off Jaduram Street to the Labasa river, and that this was done with the consent of the defendant. They say this has resulted in a diversion of storm waters flowing off Jaduram Street towards the culvert at the back of the plaintiffs building. They state that the defendant has a duty of care to the plaintiff to see that storm waters from the surrounding areas do not flood their building. The plaintiffs say that heavy rains caused flooding in their property, and that this was due to the defendant's failure to provide a proper drainage system for the water to flow to the river. The plaintiffs estimate that flooding within his building resulted in aggregate losses of \$220,000.00.
6. By its amended statement of defence and counterclaim dated 25 September 2018, the defendant denied the plaintiffs' claims and asked that the statement of claim be struck out on a solicitor client indemnity basis. The defendant sought an order for the plaintiffs to demolish the unauthorised structure constructed by them, for costs of demolition and damages.
7. The defendant states that the plaintiffs contravened the approved building plan and that on 4 June 1993, a former building surveyor of the plaintiff issued the plaintiffs a stop work notice. However, the plaintiffs continued with the construction. The defendant says that the construction was classified as Commercial B as the building included a mosque, which falls within the meaning of community development. The plaintiff was, therefore, advised to write to the director of Town and Country Planning seeking exemption for the construction of a community service centre on a commercial zone and to submit an amended building plan for approval. The plaintiffs were advised on 4 June 1993, 11 November 1994 and on other occasions to stop construction and to construct according to the approved plan. In regard to the plaintiff's claim concerning the culverts, the defendant states that it has no authority to allow the plaintiffs to send storm and drainage water through culverts over the land

known as Jaycees Park. The defendant says it has advised the plaintiffs to use the common drainage system adjacent to the plaintiffs' property.

8. The defendant says it has informed the plaintiffs by letter dated 4 January 2016 that conditions imposed by the director of Town and Country Planning must be complied with in order to issue the completion certificate, but the plaintiffs have not complied with those conditions. As a result, the defendant did not issue a completion certificate to the plaintiffs. The defendant denied giving an assurance to the plaintiffs to provide a loading/ unloading bay, and says that the land at the rear of the building is owned by the director of lands.
9. The defendant states that Jaduram Street has two common drainage systems and that the plaintiffs did not construct a proper drainage system to allow rain water to be diverted to the common drainage system. The defendant states that the plaintiffs' allegation that water from the land of Viti Corp is diverted to the plaintiffs' building was decided by the judgment of Wati, J in civil action No. 32 of 2011, and that, therefore, the issue is *res judicata*.
10. In its counterclaim, the defendant states that the plaintiffs carried out an unlawful development on their property, and that this remains to be demolished. The defendant states that it has issued notices to the plaintiffs to demolish the building. The defendant states that an entity called Viti Corp was granted a lease by the iTaukei Land Trust Board on 9 October 2012. The defendant states that the plaintiffs' obtained injunctive orders restraining Viti Corp from carrying out a tourism based project, and thereby prevented the defendant from earning a revenue of \$37,846.35.
11. The plaintiffs filed a reply to defence and defence to counterclaim on 12 October 2018. They denied receiving a notice to stop work. They stated that an application was made through the defendant's office for exemption for construction of a community service centre. The plaintiffs admitted receiving letter dated 4 February 2016 and state that they complied with the conditions laid down by the director of Town and Country Planning, and paid fees to obtain the required approval. The plaintiffs denied that their claim is *res judicata*, but say

that the defendant's second counter claim is *res judicata* in view of the decisions in HBC 32 of 2011 and HBC 22 of 2012. The defendant replied the defence to the counterclaim.

12. There is no dispute on the following facts. The first plaintiff is the owner of the subject property. The second plaintiff is the trustee and president of the first plaintiff. On 13 April 1993, the defendant gave approval to erect a building of three stories. On 11 July 1991, the defendant granted the plaintiffs a building permit, and construction commenced. The plaintiffs carried out construction so as to allow storm water to fall to the rear of the building. Construction of the building was completed on 24 May 2001. The plaintiffs provided the defendant the following documents:
 - a. Engineers "Practical Completion Certificate" dated 24 May 2001.
 - b. Certificate that structure is safe for occupation.
 - c. Engineers' Structural report of existing three storeys for Vanualevu Muslim League at lot 13, Jaduram Street, Labasa
 - d. National Fire Authority's certificate of compliance
 - e. Minister of Labour, Industrial Relationship & Employment's certificate of prior approval for health and safety at work.
13. The plaintiff states that the defendant did not issue the completion certificate to the plaintiffs. They say the property behind the plaintiffs building is crown land that was surrendered to the iTaukei Land Trust Board, which leased it to Viti Corp. The plaintiff says that on 4 February 2016, the director of Town & Country Planning granted its consent to regularize the existing use of a mosque.
14. The parties raised the following issues:
 - i. "Whether the plaintiff constructed the building in accordance with the approved building plan?
 - ii. Whether the plaintiffs complied with the requirements laid down by the Director of Town and Country Planning as stated in defendant's letter dated 4th day of February 2016 issued by the defendant?

- iii. Whether the defendant was negligence in not issuing completion certificate to the plaintiff's building within reasonable time?
- iv. Whether the defendant have a duty to provide service lane to the plaintiff and other tenants?
- v. Whether the defendant was aware that the plaintiff's storm water flows to the back of the building and is not possible to divert to the common "V Drain" beside Savilla house?
- vi. Whether the defendant have a duty to provide loading and unloading to plaintiff and its tenants?
- vii. Whether defendant erected 4 culverts at the back of the plaintiff's building on the crown land and I Taukei Land to allow flow of water off Jaduram Street to Labasa river?
- viii. Did the defendant hire Viti Vanua civil contractors who blocked the culverts laid down by the defendant to allow storm water to move to Labasa River?
- ix. Whether the defendant had foreseen the damages that would be sustained when it surrendered the crown land to iTaukei Land Trust Board?
- x. Whether the defendant was aware that the storm water from Vinod Patel (2 properties), Satish Variety, New World suited on the right side of the plaintiff's building flows towards the plaintiff's building into the culvert behind the plaintiff's building?
- xi. Whether the storm water through the knowledge or consent of the defendant is being diverted to a "V" drain erected by Viti Vanua Holding Limited towards the plaintiff's property that flooded the plaintiff's property and damaged plaintiff's properties inside their building?
- xii. Whether the plaintiff's second cause of action is *res judicata* if not whether the plaintiff is entitled for special damages in the sum of \$222000.00?
- xiii. Whether the plaintiff has carried out unauthorized or unlawful development which is in breach of the Town Country Planning Act if so whether it had been demolished?

xiv. Whether the defendant's 2nd counter claim is *res judicata* and if not whether defendant is entitled for special damages in the sum of \$37846.35."

The plaintiffs' evidence

15. Ten witnesses gave evidence on behalf of the plaintiffs. The first witness for the plaintiffs was Vinod Lal, a businessman based at 14, Jaduram Street. His business, Janta Store, commenced in 1984. Parking space for vehicles was his main concern. He said the area previously used as a parking zone has been converted to a taxi zone. He said that though several other business establishments have a rear service lane for the purpose of loading and unloading the defendant's building did not have such a facility.
16. Satish Kumar is the managing director for Satish Motormart Ltd. He was president of the Labasa Chamber of Commerce and chairman of the Crime Prevention Committee. A branch of Satish Motormart is based at Jaduram Street, a commercial zone. He said the street did not have a loading and unloading zone, which, he described as a big problem. He said that all of the streets in Labasa had a rear service land except for Jaduram Street, and that this impeded development of the lands on the side of the street. The problem was compounded, he said, after the taxi stands were set up. Mr. Kumar said his building was the second next building to the Vanuvalevu Muslim League building. His evidence was mostly in regard to storm water drainage from his land, which he said was a problem.
17. Nur Allam gave evidence on behalf of the plaintiffs concerning the flooding of the Vanuvalevu Muslim League building. He worked for the second plaintiff at one stage. Due to heavy rain, water overflowed into the plaintiffs' building as the chamber was blocked and there was no drain at the back of the building. The chamber blockage was a result of water not flowing out from the back of the building as there was no drain. He found the building filled with water, the carpets were wet and water had gone into the office and the cabinets. He said he received \$5,000.00 to clean and paint the premises.
18. Lui Raqitawa, an accounts officer based at the Labasa office of the Water Authority of Fiji said its customers did not have parking outside the building.

The office also did not have unloading facilities, which were necessary in obtaining water meters and office materials such as books and registers. He informed the plaintiffs of the lack of parking facilities by letter dated 4 March 2013.

19. Dinesh Kumar, the branch manager of Sharma Music Centre at Wailevu in Labasa gave the second plaintiff a quotation for a sound system for the mosque at the Vanualevu Muslim League building as the existing system was damaged due to flooding. The quotation was for \$10,100.00, but the sale did not proceed. Atonio Maitiro Semi Batisaresare, a salesperson at Court's departmental store in Labasa gave a quotation for the replacement of rugs at the mosque. The quote, dated 5 March 2018, was prepared by the manager of Carpets International, a division of Courts in Suva. The quotation for a new carpet was \$73,350.54. He said that the existing wet rug could not be used, especially because of the bad smell that emanated. The witness also gave the second plaintiff a quotation for a sound system, which was purchased for \$4,500.00.
20. Bashir Khan, the second plaintiff, said the first plaintiff is a statutory body that was registered in 1984. He is the president and trustee of the first plaintiff. The land was purchased in February 1994. The property is classified in the commercial zone category. The plans for the Vanualevu Muslim League building was drawn up by an architect named Waqainabete. Construction of the building was completed in 2002. He said that there was a drain at the back of the building when it was constructed, and storm water from the property was discharged to this drain. He says that the drain that existed at the time the trustees purchased the property is currently in existence. He has been paying rates to the Labasa Town Council since 1991. The plaintiffs' main issue is that the defendant did not give the building a certificate of completion. His second complaint is that the defendant has allowed a taxi stand at the loading and unloading zone. The third issue concerned the flow of rain water. Fourthly, he said, the council has informed him that his building is not within the plan. He said he has requested a completion certificate since 2002. The witness said he did not receive any letter concerning drainage until February 2016. Mr. Khan said a lane existed at the back of the property when construction commenced and still exists. The lane could

not be used as the land at the back of the building was given to another party, Viti Corp.

21. When questioned about the withdrawal of the easement by the Lands Department, the second plaintiff said he did not know about it. He said that according to the lease, water from his land was to flow to the river. He said it was the defendant that gave him approval to build two water chambers outside the building and let the water pass through the drain to the adjoining land, which was being developed. He said he filed action asking that the defendant be ordered to reverse the surrender of the lease, and for an injunction against Viti Corp. The action was dismissed by the High Court. The matter was appealed to the Court of Appeal and then to the Supreme Court. The present case, he says, is about a different drainage issue. He says that if water cannot flow out of the chamber when it rains, there can be a reverse flow and eventually the building would be damaged. He said that the drain near Satish Motormart was blocked and water from that property came to the plaintiffs' drain. He said the drainage problem arose as a result of soil being dumped on the drain.
22. Mr. Khan explained that this case concerned the certificate of completion, the absence of facilities to load and unload, the absence of a rear service lane and the damage caused by flooding. Therefore, he said, the present action was different from the previous cases. He said that the defendant approved the plan before he commenced development of the land in 1991 or 1992. He said the chambers were constructed and the pipes were laid and on the advice of the plaintiffs' engineer, Mr. Waqainabete. The rain water system was completed in 2002. He says that since the plaintiffs have completed the building according to the approved building plan, the defendant should issue the completion certificate. The building plan was certified by the engineer. He says that the Town and Country Planning has also approved the building. The building was completed in 2002. The council's letter asking him to revise the drainage system was sent on 4 February 2016. The witness said he could not revise the drainage system as the building was completed in 1991. He says he complied with all other requirements.

Evidence of the defendant

23. Mohammed Faiz Ali, health inspector and building surveyor of the Labasa Town Council was the first witness. He has been with the council since 1994. He receives and processes building applications in consultation with the council, Town and Country Planning, iTLTB and the director of lands. He was acting chief executive officer of the council from April 2016 to January 2020. In 1991, the council received a building plan application from the second plaintiff for a proposed showroom with office space, onsite car park at the rear of the building and a loading and unloading bay. That was for a two storey building. He said that there were deviations with the approved building plan, and the former building surveyor, Vinod Chand Gupta, issued a notice to stop construction immediately. The former surveyor's notice required the applicant to obtain a building permit in writing, and intimation dated 9 February 1993 was served on the second plaintiff. In 2016, the applicant submitted an application to regularise the deviations from the approved building plan. The application was approved subject to conditions imposed by the Department of Town and Country Planning (DTCP). The council wrote to the developer to regularise the existing structure by letter dated 4 February 2016. The letter required the verification of boundary pegs by a registered surveyor in order to issue the completion certificate. He said the plaintiffs have not furnished a survey report. The most important condition was the removal of the temporary extension, which encroaches on the rear boundary wall. The structure is made out of corrugated iron, and has a concrete floor and walls made of timber.
24. He said that a community development proposal does not receive outright approval in a commercial zone. The application to amend the building plan was lodged on 3 February 1994. The building permit was to be read in conjunction with the approval granted on 13 April 1993. The witness said that the existing drainage system runs from Jaduram Street to the outlet near Savilla House, and to the river. There is an easement at the back of the plaintiffs' building. Viti Corp, in their development proposal, was to provide a connecting drainage system with all drains having outlets into their property. The drainage system was also to collect water from Satish Motormart and Vinod Patel's properties. The drain is

to be connected to the river. This did not happen as court orders prevented further development.

25. He said that Jessy's park was surrendered in 2010 or 2011 to iTLTB, and the council does not own the property anymore. He said there is no documentation to say that the council constructed the culvert behind the plaintiffs' building. The plaintiffs were required to submit a surveyor's report to check whether they have encroached into another land or reserve, as reports were received that the plaintiffs' building has encroached into the property leased to New World by about 0.08 meters. He said that a certification by a registered surveyor, A. Dayal, shows an encroachment. He said the plaintiffs did not meet the requirement for an internal car park, and that where there is a failure to provide 15 car parks, the property developer must enter into a bond to pay for the council's car park. He said the inclusion of a mosque in a commercial zone, made it a community development, requiring the approval of the Town and Country Planning department. He said the completion certificate will be issued upon meeting the imposed conditions.
26. Mr. Ali said that currently, it is impossible to have a rear access lane as called for by the plaintiffs and members of the Labasa Ratepayers Association. He said properties, which were recently developed, have onsite loading and unloading facilities and car parks as they were aware that a rear service land is not available. If a rear service lane is to eventuate, the property owners must surrender part of their properties. He said the plaintiffs' initial plans made provision for parking and loading/ unloading onsite.
27. The witness said the question regarding the drain was heard by the High Court. The case was filed in 2011 and decided on 11 May 2017. He said Viti Corp submitted an outline proposal, which is a lucrative integrated commercial development proposal. The development was not carried out because of court proceedings filed by the plaintiffs. The value of the development was about \$2.4 million. Lost building is estimated at \$5,493.60, based on the value of the project. Over a five year period, the council lost on rates of \$17,983.75, business licensing fees of \$13,625.00 and garbage fees of \$744.00.

28. The witness said his understanding is that the building is incomplete because of the number of deviations from the approved plan. In cross examination, it was pointed out to the witness that according to the agreed facts, the plaintiffs' building was completed and the plaintiffs provided the council with the engineer's structural report, a practical completion certificate and a certificate that the structure is safe. The witness was asked why it took more than 14 years to raise issue with the plaintiff concerning non-compliance of conditions. He replied that there were several deviations by the plaintiffs, and when the second plaintiff regularised the development, it was contrary to the town planning scheme. He said there was a series of exchanges between the parties on non-compliance. It was pointed out in cross examination that there is nothing in writing from the defendant to show non-compliance. The witness said those documents could be produced if permitted. He said the completion certificate could not be given as the council would be in breach of its own Public Health Act and Town Planning Act. He said that although the plaintiffs complied with several requirements and submitted the engineers report, they failed to meet other requirements. The witness was, however, not able to say which provisions of these Acts have not been complied with by the plaintiffs. He was also uncertain whether the defendant wrote to the plaintiffs concerning their failure to comply with requirements to obtain the completion certificate.

Evaluation of the Evidence

29. The plaintiffs' case is mainly about not getting the completion certificate of the building, construction of which began in 2002. The evidence shows that the plaintiffs have complied with most requirements imposed by the defendant. The most recent of these were issued in February 2016, long after the building was constructed. Why this was not done earlier is not clear. The defendant's contention is that including a mosque in a commercial zone made it a community development project, requiring the approval of the director of Town & Country Planning and that this did not materialise. It is only fair that the plaintiffs are able to take the building to a proper conclusion by obtaining a certificate of completion. Orders will be made directing the defendant to issue a completion certificate subject to the plaintiffs demolishing the unauthorised structure at the

back of the building and obtaining the approval of the director of town and country planning.

30. The evidence concerning the defendant's purported decision on 29 December 1993 to provide a rear service lane is not conclusive. The plaintiffs say they have depended on this decision and other representations made by the defendant in deciding to construct a three storeyed building. The plaintiffs are aggrieved by the defendant's failure to provide a rear service lane. The need for the facility was highlighted by some prominent businessmen and tenants of the building who gave evidence on behalf of the plaintiffs. Ultimately, the decision is one to be taken by the council by weighing different factors. The defendant must consider whether a rear service lane can be provided in light of its past decisions.
31. By an amendment of the statement of claim, the plaintiffs asked for special damages in the sum of \$220,000.00 for losses caused as a result of flooding of their building. The plaintiffs gave extensive evidence of the damages as a result of flooding. Their evidence is not discredited and court accepts the evidence of financial losses. What has not been clearly established is the defendant's negligence and causation of those losses. The plaintiffs' witnesses went into detail regarding the blocked drain at the back of the back of the plaintiff's building, the effect of development on the adjoining land on flooding, the unavailability of an easement enjoyed over a long period and the losses resulting from flooding. The factors contributing to flooding must be considered along with the change of ownership of the Jessy Park land, in which the defendant says it has had no involvement. There have been other court proceedings concerning the land at the back of the plaintiffs' building. The defendant's witness said the land adjoining is to be developed as a lucrative project, with provisioning made for drainage that would ease flooding in the general area. He said the project was delayed as a result of court proceedings against the developer of the adjoining land. The council's liability for the financial losses has not been established.
32. The defendant says there is an unauthorised structure at the back of the plaintiffs building. In its counterclaim it has asked for an order to demolish the structure. The defendant is vested with powers to be exercised in respect of unauthorised

structures by following the required procedure. The counterclaim on this matter need not be granted. However, it is in the plaintiffs' interest to demolish the unauthorised structure. Failure to do so can invite legal proceedings, and delay the completion certificate.

33. The defendant also says it has lost revenue as a result of delays in developing the adjoining land. In asking for economic loss, the defendant has not shown any damage to its property. Those losses are due to a complex set of facts, involving several parties and other proceedings.
34. While relief for financial compensation has been declined, orders will be made to grant the completion certificate subject to conditions.

ORDER

- A. The defendant is directed to grant a completion certificate subject to the plaintiffs demolishing the unauthorised structure at the back of the building and obtaining the approval of the director of town and country planning.
- B. The defendant must determine and communicate within 60 days whether it can provide the plaintiffs a rear service lane.
- C. Parties will bear their respective costs.

Delivered at **Suva** on this 13th day of **February, 2024**.



M. Javed Mansoor
Judge