IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0004.2016
(On Appeal From Court of Appeal No: ABU 0076.2015)

BETWEEN : **NEW WORLD LTD**

Petitioner

AND : **VANUALEVU HARDWARE (FIJI) LTD**

1st Respondent

AND : **BASHIR KHAN**

2nd Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : **Mr. A. K. Narayan for the Petitioner**
Mr. F. Haniff for the Respondents

Date of Hearing: **5 April 2017**

Date of Judgment: **21 April 2017**

JUDGMENT

Marsoof, J

[1] In this application, the Petitioner seeks special leave to appeal from the judgment of the Court of Appeal [Basnayake JA, Guneratne JA., and Alfred JA] dated 27th May 2016 which affirmed, subject to the setting aside of the order for indemnity cost, the decision

of the High Court at Labasa [Mutunayagam J] dated on 21st October 2015, wherein the High Court held that-

(a) the purported agreement of 25th January 2014 described in paragraphs 4 and 5 of the Statement of Claim is null and void in terms of Section 13 of the State Lands Act (Cap 132) for want of written consent of the Director of Lands; and

(b) That the Plaintiff shall pay the defendants indemnity costs, to be assessed by the master, if not agreed upon by the parties.

[2] It may be useful to set out at the outset, the salient facts that gave rise to the dispute between the Petitioner and the Respondents that is now before Court.

The Salient Facts

[3] The 1st Respondent is a limited liability company that is in the business of running a retail hardware outlet of which the 2nd Respondent is a Director. It is common ground that the 1st Respondent holds Crown Leases No.718687, 91929 and 713833 which are protected leases within the meaning of section 13(1) of the State Lands Act, cap 132.

[4] The Petitioner, which is also a limited liability company, has been in occupation of the land comprising the aforesaid three leases since 1991 on the basis of 4 separate lease agreements entered into between the Petitioner and the Respondents, by way of sub-lease. The Petitioner is no more in occupation of the said land, having been evicted there from in 2016.

[5] After three lease Agreements were entered into between the Petitioner and the Respondents, which were with the consent of the Director of Lands as required by section 13(1) of the State Lands Act, they entered into another lease agreement on 10th August 2009 for a period of three years from 1st September 2006 to 31s August 2009 with a

renewal term of five years. The full term of the agreement was for eight years, expiring on 31st August 2014 and had the consent of the Director of Lands under section 13(1) of the State Lands Act.

[6] The Petitioner filed proceedings in the High Court seeking a declaration that the Petitioner was a tenant of the Respondents for a period of 10 years with effect from 1 January 2014 and for an order that the Respondents specifically perform an agreement that had allegedly been entered into between the parties on 25th January 2014 which it claimed were on the same terms as before except for the rental and a right of renewal.

[7] The so called "agreement" alleged to have been entered into between the Petitioner and the Respondents consisted of one paragraph and was unsigned. Furthermore, it had not been consented to by the Director of Lands, but the Petitioner remained in possession.

[8] The Respondents' filed an application in the High Court to determine whether the agreement purportedly entered into on 25th January 2014 was null and void for want of consent of the Director of Lands, as a preliminary issue.

[9] While the matter was pending in the High Court, the Respondents had, through their lawyers, served on the Petitioner a Notice to Quit dated 29th July 2014 requiring the Petitioner to vacate the premises on or before 31st August 2014. The Petitioner did not comply with the said notice to quit.

[10] The High Court ordered trial of the preliminary point, and judgment was pronounced by the High Court on 14th May 2015 in favour of the Respondents on the basis that the purported agreement of 25th January 2014 was null and void since the written consent of the Director of Lands was not obtained as required by section 13 of the Crown Lands Act.

[11] The Petitioner appealed to the Court of Appeal by way of Notice and Grounds of Appeal dated 22nd October 2015, and filed in the High Court summons for stay and injunctive relief on 26th October 2015. The High Court refused stay and injunctive relief.

[12] Having heard the appeal filed by the Petitioner against the judgment of the High Court dated 14th March 2015, the Court of Appeal by its impugned judgment pronounced on 27th May 2016, affirmed the judgment of the High Court, subject to the setting aside of the order for indemnity cost.

[13] The Petitioner filed an application dated 28th May 2016 received in the Registry of the Supreme Court on 31st May 2016, seeking special leave to appeal against the impugned judgment of the Court of Appeal.

[14] The Petitioner also filed a Notice of Motion for stay and/or injunction pending determination of its petition for special leave to appeal pursuant to Sections 11 and 14 of the Supreme Court Act, 1998, but the said application was refused by a Single Judge of this Court (Chandra J) by his Ruling dated 4th August 2016.

[15] It is common ground that consequent upon the refusal by this Court to grant a stay of execution or injunctive relief as prayed for by the Petitioner, it was evicted from the land comprising the three leases referred to in paragraph 3 of this judgment.

Application for Special Leave to Appeal

[16] The application for special leave to appeal filed by the Petitioner dated 28th May 2016 contains 9 grounds of appeal, which I would summarise as follows:-

(a) The Court of Appeal erred in law in holding that as the agreement of 25th January, 2014 was an independent transaction, overlooking the fact that the

same parties involved and there were indefinite holding over provisions in the previous agreements.

(b) The Court of Appeal erred in law in accepting submissions of Counsel for Respondents that the earlier decisions of the Court of Appeal in *Subarmani v Public Rental Board* (1981) FCA 70 and *Nagar Bhai Kewal v Manikam Reddy* [1982] FCA 30 did not accept the notion of 'implied consent', when in the latter case the Court of Appeal indicated that each case may depend on its own circumstances.

(c) The Court of Appeal erred in law in holding that in accepting the implied consent in the circumstances would be judicial legislation and obnoxious to the applicable Constitutional doctrine of separation of powers, ignoring that the interpretation of legislation and giving meanings not specifically provided for was the function of the Courts.

(d) The Court of Appeal erred in law in affirming the decision of the Labasa High Court dated 21st October, 2015 that held the purported agreement of 25th January 2014 described in paragraphs 4 and 5 of the Statement of Claim is null and void in terms of Section 13 of the State Lands Act, (Cap 132) for want of written consent of the Director of Lands when the evidence before the Court demonstrated that historically the Director of Lands had expressly and in writing consented to dealings by way of tenancies to the Petitioner and/or its related predecessors such that no further consents were required under the said section for the same or similar dealings with the same or related parties.

(e) The Court of Appeal erred in law and in fact in wrongly affirming the decision of the Labasa High Court dated 21st October, 2015 that held that the purported agreement of 25th January 2014 described in paragraphs 4 and 5 of the Statement of Claims is null and void in terms of Section 13 of the State Lands

Act, (Cap 132) for want of written consent of the Director of Lands, when such consent could be implied or treated as general consent by virtue of the circumstances pertaining to the dealings between the Petitioner and / or its predecessor and the Respondents.

(f) The Court of Appeal failed to properly consider and/or apply the relevant principles of law as enunciated in *Prasad v Chand* [2001] 1 FLR 164, *Nagar Bhai Kewal v Manikam Reddy, supra* and *Chaganlal v Jaswant Kumari* (Action no.238 of 1984) and / or failed to give any or sufficient weight to the principles of implied or general consent alluded to in those decisions.

(g) The Court of Appeal erred in law in affirming the decisions of the Labasa High Court dated 21st October, 2015 and not holding that the consent of the Director of Lands endorsed on the Agreements entered between the Petitioner, its predecessors and the Respondents from 1991 acted as a general consent to the Appellant as opposed to any third party to any dealings by subletting or by virtue of the holding over clause in all the agreements.

(h) The Court of Appeal erred in law and in fact in affirming the decision of the Labasa High Court dated 21st October, 2015 and failing to properly interpret and apply the holding over clause..

[17] However, at the commencement of the hearing before this Court, learned Counsel for the Petitioner indicated that he would rely only on a single ground for the purposes of seeking special leave to appeal against the impugned judgment of the Court of Appeal, which he formulated as follows:-

"Whether the Court of Appeal was correct upon the interpretation of Section 13 of the State Lands Act to reject dealing based on implied/general consent in writing given to the same parties in the course of their previous dealings and the terms of

the prior written consent previously given including an indefinite holding over provision."

[18] Since the learned Counsel for the Respondent had no objection to this application being considered for special leave to appeal on the basis of the said single ground of appeal, I shall deal with this ground only in deciding whether this case is a fit and proper case for the grant of special leave to appeal.

[19] Section 98(3)(b) of the Constitution of the Republic of Fiji, confers on the Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal. However, as provided in Section 98(4) of the Constitution, no appeal may be brought to the Supreme Court from a final judgment of the Court of Appeal "unless the Supreme Court grants leave to appeal."

[20] Section 7(3) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal. It is provided in section 7(3) that-

> "In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
>
> (a) a far reaching question of law;
>
> (b) a matter of great general or public importance;
>
> (c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[21] The above threshold criteria that must be met for the grant of special leave to appeal echo the sentiments expressed by Lord Macnaghten in *Daily Telegraph Newspaper Company Limited v McLaughlin* [1904] AC 776, which was the first case involving an application for special leave to appeal from a decision of the High Court of Australia to be decided

by the Privy Council. Lord Macnaghten, at page 779 of his judgment, after observing that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of *Prince v Gagnon* [1882 – 83] 8 AC 103, in which it was stated that appeals would not be admitted-

> "save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

[22] Criteria set out in section 7(3) of the Supreme Court Act have been examined and applied by this Court in decisions such as *Bulu v Housing Authority* [2005] FJSC 1, CBV0011.2004S (8 April 2005), *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.,* CAV0001 OF 2011 *(*6th April 2011), *Dr. Ganesh Chand v Fiji Times Ltd.,* [2011] FJSC 2; CBV0005.2009 (8th April 2011), *Native Land Trust Board v. Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012), *Suva City Council v R B Patel Group Ltd* [2014] FJSC 7; CBV0006.2012 (17 April 2014), *Shanaya & Jayesh Holdings Ltd v BP South West Pacific Ltd* [2015] FJSC 10; CBV0007.2014 (24 April 2015) and *Chaudhry v Chief Registrar* [2016] FJSC 3; CBV0001.2015 (20 April 2016)

[23] It is clear from these decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.

[24] The question formulated by the learned Counsel for the Petitioner for consideration for the grant of special leave to appeal in this case, has to be examined in the light of the criteria

set out in section 7(3) of the Supreme Court Act. Does the question "whether the Court of Appeal was correct upon the interpretation of Section 13 of the State Lands Act to reject dealing based on implied / general consent in writing given to the same parties in the course of their previous dealings and the terms of the prior written consent previously given including an indefinite holding over provision" satisfy the threshold criteria laid down in section 7(3) of the Supreme Court Act?

[25] Learned Counsel for the Petitioner has stressed that the lower courts have erred in their interpretation of section 13 of the State Lands Act with respect to two matters, namely-

(a) dealings based on implied / general consent in writing given to the same parties in the course of their previous dealings; and
(b) the terms of the prior written consent previously given including an indefinite holding over provision

Implied / General Consent

[26] It is clear from the judgment of the High Court dated 21st October 2015 and the impugned judgment of the Court of Appeal dated 27th May 2016, that the question whether implied or general consent of the Director of Lands, given to the parties in previous dealings relating to the same land, would suffice to satisfy the requirements of section 13 of the State Lands Act, has been taken up by the Petitioner in both these courts with no success. Once again, the same point was taken up before a Single Judge of this Court who too considered the matter carefully in his Ruling dated 4th August 2016, and again the submissions advanced on behalf of the Petitioner on this question were rejected.

[27] Section 13(1) of the State Lands Act provides as follows:

"13 (1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease), it shall not be lawful for the lessee thereof to *alienate or deal with* the land comprised, in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, *without the written consent of the Director of Lands first had and obtained*, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void." (*Emphasis added*)

[28] It is common ground that the 1st Respondent holds the land which constitute the subject matter of this application for special leave to appeal under the three Crown Leases referred to in paragraph 3 of this judgment, and that the Petitioner has been in occupation of the said land since 1991 on the basis of 4 separate lease agreements entered into between the Petitioner and the Respondents, by way of sub-lease.

[29] It is a common feature of all the 4 lease agreements that they were formal documents, executed under the corporate seals of the Petitioner and the 1st Respondent, which were both limited liability companies, and the consent of the Director of Lands has been duly endorsed on the said lease agreements.

[30] It is not in dispute that the so called "agreement" that had allegedly been entered into between the parties on 25th January 2014 was not a formal document similar to any of the previous leases, consisted of merely one paragraph, and was not entered into under the corporate seals of the Petitioner and the 1st Respondent or even signed for and on

behalf of these parties. It is not even claimed by the Petitioner that the "agreement" alleged to have been entered on 25th January 2014 was on the same terms as the previous 4 leases agreements, as admittedly the rental and provision for renewal were not the same. If at all, it was a transaction *independent* from the previous transactions.

[31] In this back drop, it is not surprising that Almeida Guneratne JA in paragraph 14 of the impugned judgment of the Court of Appeal posed the question-

> "14.....The law looks forward not back. The agreement of January 25th, 2014 was an independent transaction. *How can one look into the past dealings between the parties and infer any "implied consent" when the Statute requires "written consent" by the Director of Lands*?"(*Emphasis added*)

[32] David Alfred JA, who concurred with Guneratne JA, observed as follows in paragraphs 20 and 21 of the impugned judgment of the Court of Appeal:-

> "20. It is not open to Counsel for the Appellant to approbate and reprobate. *He cannot say that consents were applied for and granted in the past, but it is not necessary for the lease in question.*
>
> 21. This is because *there cannot be any implied consent of any sort when the wording of section 13(1) of the State Land Act (Cap 132) is crystal clear as to its import.* This section states that it shall not be lawful for the lessee to, inter alia, sublease the land "without the written consent of the Director of Lands first had and obtained." *This means the Director's consent is needed, before the lease, and it has to be in writing.*"(*Emphasis added*)

[33] I have examined the case law adverted to by learned Counsel for the Petitioner, most of which have been examined with great care in the decisions of the lower courts, and I do not find them of any help to the Petitioner. Protected leases of State Land require

continuous supervision, and for this purpose section 13(5) expressly provides that "for the purposes of this section "lease" includes a "sublease" and "lessee" includes a "sub-lessee." Amongst the salutary provisions of the State Land Act is a mechanism of administrative appeals intended for the protection of lessees and sub-lessees in section 13(3) of the Act which provides that-

> "Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands."

[34] Section 13(3) will come into play only in cases where the parties have successfully negotiated a sub-lease or some other "deal" pertaining to State Land, entered into an agreement and find that the consent of the Director of Lands has been refused. The instant case does not appear to be a case that will attract section 13(3), as it is manifest that the negotiations between the parties have failed to produce an agreement which will require the sanction of the Director of Lands, and in any event, there is no evidence that the consent of the Director was sought, or if it was refused, any appeal has been lodged as contemplated by that section. In the circumstances of this case, the fact that the Director of Lands had in the past consented to formal agreements entered into between the parties can be of no relevance, as in the first place, there does not seem to be any agreement for the Director of Lands to consent to.

[35] I am of the opinion that the Court of Appeal did not err in rejecting the arguments presented on behalf of the Petitioner based on the theory of "implied or general consent" when section 13 of the State Lands Act requires "the *written consent* of the Director of Lands *first had and obtained*" for every transaction relating to State land to be valid in law. Under section 13 of the Act, the Director of Lands can only consent to *particular dealings or transactions* relating to State lands, and has no authority to give *general consent*.

The Holding-over Provision

[36] Learned Counsel for the Petitioner has contended before this Court that the "holding-over provision" in the Agreement entered on 10th August 2009 (effective from 1st September 2006) permitted the Petitioner to continue in occupation of the land in dispute for an indefinite period. This submission too has been taken up on behalf of the Petitioner in the lower courts without success.

[37] I quote below the so called "holding over" provision, which is clause 6.1 of the said Agreement:

> "In the event of the Lessee holding over after the expiration or sooner determination of the term granted by the Lease or any extension or renewal thereof *with the consent of the Lessor* the Lessee shall become a monthly tenant only of the Lessor at the monthly rent then payable immediately prior to such expiration or sooner determination of the term hereunder and otherwise on the same terms and conditions [mutatis mutandis] as those herein contained so far as applicable thereto" (*Emphasis added*)

[38] Obviously, in the absence of evidence that the Respondent had consented to the grant of a monthly tenancy, the said overholding provision will be of no avail to the Petitioner. In any event, the clause will not help the Petitioner to contend, without loss of face, that the prior written consent of the Director of Lands can be dispensed with by reference to such a provision. Nor can the existence of such a provision in Agreements approved by the Director of Lands in the past in dealings between the same parties or their predecessors in title can be construed as implied or general consent to hold on to the land to eternity.

Conclusions

[39] For all these reasons, I am of the opinion that there is no basis for the grant of special leave to appeal against the impugned judgment of the Court of Appeal. The application for special leave to appeal must therefore be dismissed with costs. I propose that the Petitioner be required to pay to each of the Respondents as costs of this appeal, a sum of $ 2,500 as costs.

Aluwihare, J

[40] I have had the advantage of reading in draft the judgment of Marsoof J, and I agree with his reasoning and conclusions.

Jayawardena, J

[41] I have perusing the judgment of Marsoof J in draft, and I entirely agree with his reasoning and conclusions.

Orders of Court

(1) Application for special leave to appeal is refused and the application is dismissed.
(2) The Petitioner shall pay as costs of this appeal a sum of $ 2,500 each to the 1st and 2nd Respondents.

.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Mr. Justice Aluwihare Buwaneka

Judge of the Supreme Court

.....

Hon. Mr. Justice Priyantha Jayawardena

Judge of the Supreme Court

Solicitors

TL. Lawyers for the Petitioner

Haniff Tuitoga for the Respondent