IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0002 of 2019
[Court of Appeal No. ABU 26 of 2016]

BETWEEN : **AUTOWORLD TRADING (FIJI) LIMITED**

Petitioner

AND : **TOTAL FIJI LIMITED**

Respondent

Coram : **The Hon. Mr. Justice Brian Keith**
Judge of the Supreme Court

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Counsel : **Mr S. Singh for the Petitioner**

Mr H. Nagin for the Respondent

Date of Hearing : **6 October 2022**

Date of Judgment : **28 October 2022**

JUDGMENT

Keith J

Introduction

[1] I have read a draft of the judgment of Jayawardena J in this case. I regret that I have come to a different conclusion about what the outcome of this appeal should be. It is necessary for me to explain why, though I begin by explaining some of the terms which I shall be using in this judgment.

[2] The case concerns the lease of a service station in Victoria Parade which many of us pass by regularly. The original lessor was Fiji Investment and Agency Ltd ("the original lessor"). In April 2007, the land to which the lease related was acquired by the Petitioner, Auto World Trading (Fiji) Ltd, which was the Defendant in the High Court. The Petitioner became the lessor under the lease, and for convenience I shall refer to the Petitioner in this judgment as the lessor, even though many of the relevant events occurred before the Petitioner came onto the scene. The original lessee was Shell (Fiji) Ltd ("the original lessee"), but the Respondent, Total (Fiji) Ltd, which was the Plaintiff in the High Court, became the lessee in 2006 when Shell's business in Fiji was acquired by Total. Again for convenience I shall refer to the Respondent in this judgment as the lessee, even though it came onto the scene well after many of the relevant events had taken place.

A review of a review

[3] A preliminary question arose in this case. In addition to the review of the decision of the Supreme Court of 1 November 2019 sought by the lessor, we had to consider a summons issued by the lessee seeking a review of the decision of the Supreme Court of 29 April 2022 permitting a review of the decision of the Supreme Court of 1 November 2019. In other words, the lessee was seeking a review of the review.

[4] The power of the Supreme Court to review an earlier decision of the Supreme Court is to be found in section 98(7) of the Constitution of Fiji, which provides:

> "The Supreme Court may review any judgment, pronouncement or order made by it."

The later decision of the Supreme Court of 29 April 2022 ("the later decision") granting a review of its earlier decision of 1 November 2019 ("the earlier decision") was a

pronouncement or order made by it. The later decision is therefore, in theory at least, one which itself may be reviewed. But from a practical point of view there is no need whatever for the later decision to be reviewed. At any hearing of a review of the later decision, all the arguments both for upholding or overturning the earlier decision would have to be deployed. That is exactly what would happen at the hearing of the review of the earlier decision. So you might as well proceed immediately with the hearing of the review of the earlier decision without the enormous waste of time and expense involved in dealing with satellite litigation over whether the later decision should be reviewed. At the end of the day, the question is whether the earlier decision should be upheld or overturned. You do not need a review of the later decision for that to be considered. For my part, I cannot envisage any circumstances in which a decision by the Supreme Court to grant a review of an earlier decision of it should itself be the subject of review by the Supreme Court. That is why I am entirely satisfied that the lessee's summons for a review of the later decision should be dismissed.

The review of the earlier decision

[5] Since the Supreme Court has already decided by the later decision that the earlier decision should be reviewed, the circumstances in which the Supreme Court should review an earlier decision of it need not be addressed. But since the later decision has been heavily criticized by Mr Nagin for the lessee, I should, I think, say something about when it is appropriate for the Supreme Court to order such a review. I am acutely aware that the power of the Supreme Court to review an earlier decision of it is a truly exceptional one. As I said in *Dromudole v The State* [2015] at para 13, an application for a review

> " … will always present an applicant with difficulties. It has been said that a decision of a final appellate court is one of great sanctity. It should not be disturbed save in exceptional circumstances."

The reason for that is that there has to be an end to litigation. You are always going to have litigants who are dissatisfied with the outcome of litigation. Every case has its winners and losers. But you cannot keep on re-arguing cases indefinitely. It has to stop at some stage. That is why the courts have consistently said that the power to reopen a case after a final appeal – assuming the power exists (as it does in Fiji) – has to be exercised with great caution.

[6] But this does not mean that the power can never be exercised. If the power exists, it can be exercised in an appropriate case. However, as I said in *Dromudole* also at para 13:

> " … only compelling reasons will justify taking that course."

And what might those compelling reasons be? A number of formulae have been articulated. For example, in *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, Mason CJ in the High Court of Australia said at page 303:

> "What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and this … cannot be attributed solely to the neglect of the party seeking the rehearing."

And closer to home, in *Silatolu v The State* [2008] FJSC 28, the Supreme Court of Fiji said at para 7:

> "A court of final appeal has power in truly exceptional cases to recall its orders even after they have been entered in order to avoid irremediable injustice".

Indeed, the rubric which the Supreme Court uses when it refuses an application for a review tracks the language used in *Silatolu*. I had these principles very much in mind when I was a party to the later decision. I imagine that applies too to Aluwihare and Dep JJ who were also parties to the later decision.

[7] It is necessary to add a couple of things to that. This exceptional power of the Supreme Court to review an earlier judgment should not be treated by the litigants as a second bite at the cherry. It should never be used to disguise what would in truth be a further appeal on the merits. Nor should it be used to challenge a decision in which the Court preferred one of two reasonable outcomes. The power exists to enable the Court to put right mistakes which should never have been made. The mistake need not be obvious on a first reading of the earlier judgment, but it must be self-evident once the earlier judgment has been properly analysed.

The correct legal analysis

[8] The outcome of the case turns on the correct legal analysis of the undisputed facts. Jayawardena J has helpfully set out in his judgment the terms of the three critical documents in the case – clause 10 of the lease between the original lessor and the

original lessee and the letters of 6 and 12 October 1999 – as well as the material facts of the case, so it is unnecessary for me to repeat them here. The important feature of them is that

- the lessee had an option to renew the lease for a further 20 years provided that it exercised that option in accordance with the terms of the lease
- the lessee had to do that in writing at least six months before the end of the lease
- the lessee did not do that.

The consequence of that was that the lessee had lost the right to exercise the option to renew the lease. That was the effect of the authorities previously cited to the courts – in particular the judgment of Lord Denning MR in *United Dominions Trust (Commercial Ltd) v Eagle Aircraft Services Ltd* [1968] 1 All E R 104 at page 107C-F and the speech of Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at page 929C-G. I did not understand the lessee's legal team to disagree with that proposition.

[9] The next question, then, is whether the lessee's right to exercise the option to renew the lease was resurrected by the lessor's letter of 6 October 1999. Both the Court of Appeal and the Supreme Court thought that by that letter the lessor had waived the lessee's need to exercise the option to renew the lease within the time stipulated in the lease, and had thereby reinstated the lessee's right to exercise the option, which the lessee did by its letter of 12 October 1999. This is where I respectfully but profoundly disagree with the Court of Appeal and the Supreme Court, both (a) in their reading of the letter of 6 October 1999, and (b) in their view that the lapse of the option to renew could be waived.

[10] I address (a) first. In that connection, I analyse the letter of 6 October 1999 as follows:

- Although the lessee had lost the right to exercise the option, the lessor still had the right to grant the lessee a new lease on the same terms as before if it chose to do so.
- By the letter of 6 October 1999, the lessor was merely inquiring of the lessee whether the lessee wanted to have a new lease. That was what the trial judge, Brito-Mutunayagam J, found in para 11 of his judgment, and I agree with him. The letter was not resurrecting the lessee's right to exercise its option to renew the lease which had already lapsed. Even if the lessee replied purporting to exercise the option to renew the lease (which the lessee did by its letter of 12 October 1999), that letter was of no effect as it had already lost the right to exercise the option. The letter of

12 October 1999, therefore, had to be treated as a request by the lessee for a new lease. The lessor was not obliged to agree to that. The lessor could, for example, agree to grant the lessee a new lease for a shorter period and only at an increased rent.

[11] I turn to (b), the purely legal issue whether it was open to the lessor to waive the lessee's need to exercise its option to renew the lease within the time stipulated in the lease. It is here important to understand the juridical basis of the principle that an option to renew a lease lapses when it is not exercised in the time stipulated for its exercise. In the *Burnley Council* case, Lord Salmon said at page 951A-B:

> "Options to determine or to renew are not agreements to determine or renew. They are no more than irrevocable offers (kept open for good consideration) to do so providing the tenant complied with certain conditions usually before a certain date. If the tenant complies with the conditions in time he thereby accepts the offer. The offer plus the acceptance constitutes a fresh agreement determining or renewing the lease as the case may be."

But what if the tenant does not comply with those conditions? The answer is: the offer lapses completely. That was what de Jersey J (as he then was) in the Supreme Court of Queensland said in *Duncan Properties Pty Ltd v Hunter* [1989] 1 Qd R 101 at page 103, lines 29-37:

> "The due exercise of the option of renewal … depended on exact compliance with its notice requirement. In my opinion, when notice was not given by [the date when it should have been given], the option lapsed completely."

The Court said that that was the effect of both the *United Scientific* case and the *Burnley Council* case, as well as the decision of the Full Court of New South Wales in *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122 at pages 123-124.

[12] Crucially for present purposes, the Court went on to say whether an option to renew which had lapsed could be waived. It said it could not. At page 103, lines 48-52, de Jersey J said:

> "In terms of legal theory, the reliance by the plaintiff on the doctrine of waiver, contending that it had effectively, although out of time, waived the need for compliance with the time-requirement …, was misconceived (cf *Gilbert J McCaul* at 124)."

As de Jersey J said, this analysis was based on the *Gilbert J McCaul* case, in which the fallacy of calling what happened in the present case a waiver was exposed. At pages 123-124, the Court said:

> "In the present case the lessor irrevocably offered to grant a lease. Its offer prescribed the time and manner for acceptance. Only by performing the conditions prescribed could it be accepted and result in an agreement for a lease. A purported acceptance without performance of the prescribed conditions would not and could not be an acceptance of the offer. It would in reality be a counter offer by the original offeree requiring acceptance by the original offeror if an agreement were to result. If a conditional offer is made and the offeree without performing the condition purports to accept it, that is to say makes a counter offer and that counter offer is accepted, it is a loose though not uncommon use of language to say that the original offeror has waived performance of the condition which was prescribed by his offer as being the manner of accepting it. *In contemplation of law the original offeror has done no such thing.* What he has done is to accept a counter-offer and in the result an agreement is made but it is not an agreement consisting of the original offer and an acceptance of that offer." (Emphasis supplied)

In the present case, the counter-offer contained in the lessee's letter of 12 October 1999 was never accepted.

[13] This analysis was expressly approved by Mullins J in the Supreme Court of Queensland in *JV Pub Group Pty Ltd v Red Carpet Real Estate Pty Ltd and others* [2014] QSC 232 at para 20:

> "An option for renewal may be accepted only where the lessee performs the conditions prescribed for acceptance: *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122,123-124. The effect of the failure of the applicant to exercise the option during the time period specified in [the relevant clause] of the lease resulted in the option lapsing completely *with the consequence that there was no room for the operation of the doctrine of waiver*: *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd 101, 103." (Emphasis supplied)

These statements about the doctrine of waiver having no application once the time for exercising the option has expired are, in my opinion, plainly correct: it is the inevitable consequence of the lapsing of the irrevocable offer which the option represents.

[14] It is right to say that a different view of the law was taken by the Full Court of Queensland in *Traywinds Pty Ltd v Cooper* [1989] 1 Qd R 222. Relying in part on the

decision of the English Court of Appeal in *Hill v Hill* [1947] 1 Ch 231, Kelly SPJ said at page 226, lines 44-48:

> " … there is, as I would see it, no apparent reason why in accordance with ordinary principles a stipulation for the benefit of one party, in this case a stipulation as to the time for the giving of notice, could not be waived by that party or, alternatively, varied by requiring some lesser period of notice than that originally stipulated."

To the extent that Kelly SPJ was saying that a failure to exercise an option to renew a lease within the time stipulated for its exercise could be waived, I cannot, with respect, agree with him. Since the option was no more than an irrevocable offer to renew the lease if the option was exercised in time, the failure to exercise it in time meant that the offer had lapsed. I do not see how once it has lapsed it can be revived by the lessor seeking to waive the fact that it was out of time. It is just too late for the offer to be revived. In any event, the real reason why the lessee in *Traywinds* was held still to be the lessee was not so much because there had been a waiver of its failure to exercise the option to renew the lease in time, but rather because the lessor had accepted the lessee's request for a new lease by preparing a deed of extension for the lease and sending it to the lessee's solicitors. In other words, it was not so much a case of the lease having been renewed, but more a case of a new lease having been granted. That is to be distinguished, of course, from the present case because on the facts a new lease had not been granted.

[15] Once it is appreciated that the option to renew the lease had lapsed *and could not be revived*, the outcome of the case depends on whether the lessor did in fact agree to grant a new 20 year lease to the lessee. The lessee relies on the facts that it remained in occupation of the site for many years later, and continued to pay the same rent. However, there was no express agreement under which a new lease was granted to the lessee. Indeed, we know that a new lease was not agreed because there had not been any agreement about what the new rent should be. In these circumstances, the only conclusion can be that the lessee held over as a periodic tenant on the existing terms of the lease pending any agreement about what the terms of the new lease should be and that such an agreement was never reached. Section 89(2) of the Property Law Act 1971 provides, so far as is material:

> "In the absence of express agreement between the parties, a tenancy of no fixed duration … may be terminated by either party giving to the other written notice … (b) … for a period at least as equal to one period under the tenancy …"

Although the rent was expressed as yearly in the lease, it was payable monthly. Accordingly, the lessor was entitled to terminate this periodic tenancy by one month's notice to quit, which it did. The lessee was therefore not entitled to the relief which the Court of Appeal and the Supreme Court in its earlier decision gave – namely declarations that the notice to quit was invalid and that the lessee had a valid lease until it expired on 31 December 2019.

The reasoning of the other courts

[16] *The reasoning of the Court of Appeal*. This analysis makes it necessary to look with care at how the other courts construed the letter of 6 October 1999. The leading judgment in the Court of Appeal was given by Basnayake JA. The other members of the Court agreed with it. Their view was that by its letter of 6 October 1999 the lessor had waived the lessee's need to exercise the option to renew the lease within the time stipulated in the lease. As Basnayake JA put it in para 47 of his judgment, the lessor had "reminded" the lessee about the lessee's option to renew the lease, and had "persuaded" the lessee to exercise the option. Both parties had thereafter conducted themselves as if the option had been exercised: the lessee had continued to pay the rent and the lessor had continued to accept it.

[17] I have to say that, with great respect, I cannot agree with that approach. Landlords need to know whether a tenant will be moving out at the end of the term, so that they can decide what their next move is. If the tenant is going to move out, the landlord will want to decide what to do with the site: find another tenant or do something else with the site. That is why, as here, there was a clause in the lease requiring the lessee to let the lessor know in good time whether it would be exercising its option to renew the lease.

[18] With that in mind, I have read the letter of 6 October a number of times. At no stage did the lessor "remind" the lessee about the option to renew the lease. Indeed, far from "persuading" the lessee to exercise the option, the letter did not refer to the option at all! However one reads that letter, it was doing no more than asking the lessor whether

it would be vacating the site at the end of the term or whether it wished to remain in occupation of the site – exactly the sort of information which a landlord needs to know. So when the lessor wrote on that date to the lessee inquiring what its intentions were, it was doing no more than any prudent landlord would have done in similar circumstances. As I have said, that was how the trial judge construed the letter, and the Court of Appeal did not even refer to his finding that the lessor was merely inquiring of the lessee whether the lessee wanted to have a new lease, let alone engage with it.

[19] I turn to how the Court of Appeal addressed the question whether the lessor had waived the lessee's need to exercise the option to renew the lease within the time stipulated in the lease. The Court of Appeal was alive to the lessor's argument that once the time for exercising the option had expired, there was no room for the doctrine of waiver to operate. It correctly summarized the lessor's case on this topic in paras 36 and 50 of Basnayake JA's judgment, and referred to the three cases which had been cited in support of the proposition – the *Gilbert J McCaul*, *J V Pub Group* and *Duncan Properties* cases. The Court of Appeal was also alive to the arguments to the contrary, because it cited in paras 48 and 49 of Basnayake JA's judgment the *Traywinds* and *Hill* cases. The Court of Appeal must be regarded as having followed the *Traywinds* and *Hill* line of cases, but I have been unable to discern from Basnayake JA's judgment why that was. For my part, I have explained why, in my respectful opinion, that line of authorities should not be followed.

[20] Once the Court of Appeal had found that the lessor had waived the lessee's need to exercise the option to renew the lease within the time stipulated in the lease, the Court of Appeal concluded that the lessee had indeed exercised its option by the letter of 12 October 1999. I agree with the Court of Appeal that that was what the letter of 12 October 1999 purported to do, but I do not agree that it achieved what it was intended to achieve. The flaw in the Court of Appeal's reasoning is that it was based on an incorrect premise, namely that the lessee was still entitled to exercise its option to renew the lease. That premise was incorrect, as I have endeavoured to explain, because

- on the facts, the lessor had not, by the letter of 6 October, informed the lessee that it was still open to the lessee to exercise the option even though the time for doing so had expired, and

- on the law, because once the lessee's time for exercising its option to renew had expired, there was no room for the operation of any legal mechanism which enabled the lessor to resurrect the lessee's option.

[21] I turn, then, to the other reasons which persuaded the Court of Appeal that the lease had been renewed. First, the Court of Appeal thought that the payment and acceptance of rent for many years thereafter supported that view. With respect, I do not agree. The fact of the matter was that the lessee had remained on the site after the expiry of the lease for many years. They had to pay for being there. The question is: what were the payments for? The rent under the renewed lease? The rent under a new lease? Or the rent under a periodic tenancy because neither a new lease had been granted and the original lease had not been renewed? The Court of Appeal simply assumed that the rent had been paid and accepted because the original lease had been renewed. It did not say why, but it must have been because it thought – wrongly – that the lessor had "reminded" the lessee about the option and had "persuaded" the lessee to exercise it. Once you take out of the equation the possibility that

- the rent had been paid and accepted because the original lease had been renewed (as you must because the premises on which that was based – that the letter of 6 October 1999 had invited the lessee to exercise its option to renew the lease and that the law permitted the lessor to waive the lessee's need to exercise its option to renew the lease within the time stipulated in the lease – were flawed), and
- the rent had been paid under a new lease (as you must because a new lease was never agreed, let alone drawn up, as there never was any agreement about what the new rent should be)

you are inevitably left with the only other possibility, namely that rent had been paid and accepted under a periodic tenancy. That is because the lessee's continued occupation of the site could not have taken place in a legal vacuum. That periodic tenancy had to be a monthly tenancy because the rent was payable monthly under the original lease. The notice to quit was valid because periodic tenancies are brought to an end by a notice to quit, and it was never suggested that, if this was indeed a monthly tenancy, the terms of the notice to quit rendered it invalid.

[22] Having said that, there was an issue as to whether there had been an agreement about what the rent should be under a new lease. The trial judge found that no agreement about

the rent had ever been reached. In para 55 of his judgment, Basnayake JA thought that there was no admissible evidence to support that finding. The lessor contended otherwise, pointing to correspondence in 2004 when the original lessor was thinking of selling the site. The real estate agents instructed by them, Rolle Associates, wrote to the original lessee on 24 March 2004 informing them that a new lease had never been agreed "due to disagreements over the lease amount". The lessee contended that the trial judge should not have relied on that letter because it was hearsay. The lessor's case was that it is not open to the lessee to argue that the letter was inadmissible as hearsay, because it was the lessee who had produced the letter as an exhibit. I regard the argument about whether the letter was admissible as completely irrelevant. It was never disputed that a new rent had not been agreed. That was because the original lessee's case was that there had been no need to do that as the original lease had been renewed on the same terms as before.

[23] I have not overlooked the point made by Jayawardena J in his judgment about the arbitration clause in the lease. As he correctly points out, the parties were required to refer disputes over the rent to arbitration. But the only dispute about rent which had to be referred to arbitration was such rent as was subject to "reassessment of rent under clause 12". Once the lease had expired, the rent which had to be reassessed under clause 12 was the rent for "each succeeding ten-year period of any ***renewal*** of the said term" (emphasis supplied). Since on my analysis the lease was never renewed, it follows that the obligation to refer the issue of rent to arbitration did not arise. In other words, Jayawardena J's reliance on the arbitration clause is, with great respect to him, to put the cart before the horse: it presupposes that the lease was renewed, when that is the very issue which the case raises.

[24] There was another reason why the Court of Appeal concluded that the option to renew the lease had been exercised. Clauses 2 and 5 of the sale and purchase agreement between the original lessor and the lessor provided that the land was being sold free of all encumbrances except for the lease between the original lessor and the original lessee. Moreover, clause 4 provided that vacant possession could not be given on completion as the site was presently occupied by the original lessee under that lease. How could the lessor deny that the lease continued after its expiry in the light of those provisions? Again, with great respect to the Court of Appeal, I do not agree. The focus of the original lessor's solicitors at that stage was to incorporate into the sale and purchase agreement

the recognition that the site was not unencumbered and that there was a sitting tenant. They would not have been addressing the nature of the sitting tenant's tenancy. In any event, even if they thought that the lease had been renewed for a further 20 years, it is not what the original lessor's solicitors thought the true legal position was that matters. It is what the court thinks the true legal position was which counts. For the reasons I have endeavoured to give, I have no doubt that the lessee's status after the expiration of the lease was as a periodic tenant.

[25] *The reasoning of the earlier decision of the Supreme Court*. The leading judgment in the Supreme Court was given by Chitrasiri J. The other members of the Court agreed with it. Their approach was the same as that of the Court of Appeal. In para 34 of his judgment Chitrasiri J described the letter of 6 October 1999 as having been an "offer" by the lessor "to extend the lease". That offer was accepted by the lessee by its letter of 12 October 1999. Chitrasiri J countered the argument that it had by then been too late to exercise the option to renew the lease by saying in para 40 of the judgment that since then both the lessor and the lessee had acted as if the lessee had exercised its option to renew the lease. Para 42 of the judgment identified what that conduct had been: the rent had continued to be paid by the lessee and continued to be accepted by the lessor. Finally in paras 42 and 44 of the judgment, Chitrasiri J relied on clauses 2, 4 and 5 of sale and purchase agreement between the lessor and the original lessor in exactly the same way as the Court of Appeal had done. For precisely the same reasons as I have endeavoured to give when analyzing the approach of the Court of Appeal, the approach of the Supreme Court, with great respect, was just as flawed. Like the Court of Appeal, the Supreme Court did not even refer to the trial judge's finding that in the letter of 6 October 1999 the lessor was merely inquiring of the lessee whether the lessee wanted to have a new lease, let alone engage with it.

[26] Nor did the Supreme Court address the point that the option to renew the lease was incapable of being revived after it had lapsed, whatever the conduct of the parties had subsequently been. In the course of summarizing the arguments which the parties had advanced, Chitrasiri J referred in para 35 of his judgment to the ***Duncan*** case on which the lessor had relied and the ***Traywinds*** case on which the lessee had relied. But when it came to the analysis of the parties arguments in paras 37-46 of his judgment, he did not say which line of authorities he preferred, let alone explain why. The issue was simply not addressed.

[27] The lessee's legal team has sought to rely on two other reasons for asserting that the lessor waived its right to treat the lessee's option to renew the lease as having expired. First, after the lessee had purported by its letter of 12 October 1999 to exercise its option to renew the lease, the lessor did not say that it was too late for the lessee to do that. That is true, but it gets the lessee nowhere. Since it was too late by then for the lessee to exercise its option to renew the lease, the letter has to be treated as a request by the lessee for the lessor either (a) to waive the lessee's need to exercise its option to renew the lease within the time stipulated in the lease or (b) to grant it a new tenancy. The fact that the lessor did not reply to that letter cannot take the matter further. A failure to respond to a request to take a particular course of action cannot begin to mean that the request has been accepted and a binding agreement has been created. The fact is that the matter was left in the air. No agreement was ever reached, which is why the status of the lessee's continued occupation of the site had to be something which did not depend on any agreement. That is why the only possible consequence of the undisputed facts is that the lessee held over on a periodic tenancy which was capable of being terminated by a notice to quit.

[28] Secondly, not only did the lessee pay rent for many years, but it also paid city rates. Again, that gets the lessee nowhere. Paying city rates was just as consistent with the lessee holding over as a periodic tenant as having been granted a new lease or its original lease having been renewed.

The effect of this analysis

[29] If we had a completely free hand in the matter, the effect of my analysis would have been to grant the lessor leave to appeal, and to set aside the earlier decision of the Supreme Court on the basis set out in this judgment. But this has not been the hearing of an appeal from a decision of the Court of Appeal. It has been a rehearing of the application for leave to appeal to the Supreme Court pursuant to a successful application for the Supreme Court to review its earlier decision.

[30] I am, of course, alive to the high threshold which section 7(3) of the Supreme Court Act requires a petitioner for leave to appeal to cross before leave to appeal to the Supreme Court can be granted. However, I do not accept that the lessor's petition in this case does not cross that threshold. It has raised a far-reaching question of law. I am not referring to the proper construction of the letter of 6 October 1999. As Chitrasiri J rightly

said, the proper construction of a document which did not involving anyone in the public sector and which had no impact on anyone other than the parties to the litigation could not possibly cross the threshold. I am referring to the question of law whether, when an option to renew has lapsed because it was not exercised in time, the option is still capable of being revived – whether by the party who granted the option waiving the need for it to be exercised in time, or by some other mechanism. The Court of Appeal and the Supreme Court said that it was capable of being revived, despite the authorities to the contrary.

[31] But should this question of law justify the Supreme Court now ruling on it in this review? Mr Nagin strongly argued that the only possible answer to that question should be No. It would never be right to allow a litigant to have a second run on the merits when nothing new has emerged, and the argument is that the Supreme Court simply erred in its approach. Mr Nagin gave examples of the sort of cases which might justify a review: the discovery that the victim is alive following the defendant's conviction for his murder, new DNA evidence, fraud (such as the concealment of evidence) or ignorance of some binding statutory provision.

[32] I do not agree that a review can only take place when something new has emerged. Reviews of an earlier decision of the Supreme Court are not limited to such cases. Let me give a couple of examples. First, in ***Dromudole*** the application for a review was granted because the Supreme Court had failed to address a particular ground of appeal, namely that the refusal by the trial judge to grant the petitioner an adjournment has resulted in him being denied a fair trial. I said at para 15 that the fact that this ground of appeal had not been addressed by the Supreme Court was "a sufficiently compelling reason to justify the Supreme Court now taking the exceptional course of reviewing its previous judgment, limited, of course, to [that ground]". The two other members of the Court (Dep and Calanchini JJ) agreed. The Court went on to grant leave to appeal, and to allow the appeal, with the result the Dromudole was retried.

[33] Secondly, the case of ***Korovusere v The State*** [2013] FJSC 2 was to similar effect. In that case the application for a review was granted because the Supreme Court had not considered the consequence of the trial judge's failure, both in his summing-up to the assessors and in his own judgment, to give any direction about the circumstances in which a defendant could be said to have withdrawn from a joint enterprise. In neither

of these cases did something new emerge. What had happened was that the Supreme Court had failed to engage with a particular ground of appeal (*Dromudole*) or a possible defence (*Korovusere*).

[34] In the present case

- the Supreme Court failed to engage with or address the trial judge's finding that in the letter of 6 October 1999 the lessor was merely inquiring of the lessee whether the lessee wished to have a new lease. By that I mean that it did not mention that finding in its judgment, let alone say in its judgment why the trial judge's reading of the letter was wrong. The Supreme Court then went on to express a view about the meaning of the letter which was, with great respect, obviously and demonstrably wrong. That was because it found that the letter "offered" to extend the lease, whereas the existence of the option to renew the lease, let alone the exercise of that option, had not even been mentioned in the letter, and the language of the letter permitted only one construction, namely that which the trial judge adopted
- the Supreme Court failed to engage with or address the lessor's argument that as a matter of law once the lessee's time for exercising the option to renew had expired, there was no legal mechanism by which it could be revived, and that the only way in which the lessee could remain in possession of the site was by the grant of a new lease which never happened.

This amounted, in the words of Mason CJ in *Autodesk*, to a "misapprehension" of both the facts and the law, and it was not, of course, something for which the lessor was responsible. And if the earlier decision of the Supreme Court stands, the lessor will have been the victim, in the words of the Supreme Court in *Silatolu*, of an irremediable injustice: it will have been denied the damages which would otherwise have been awarded to it. There was no question in this case of the lessor seeking by this review merely to re-argue grounds on which it had previously lost. This was a case in which by this review it was asking the Supreme Court to consider arguments which the Court in its earlier decision neither engaged with nor addressed.

Conclusion

[35] For these reasons, I would set aside the orders made on the earlier decision of the Supreme Court and I would grant the lessor leave to appeal against the decision of the

Court of Appeal. I would treat the hearing of the review as the hearing of that appeal, I would allow the appeal, I would set aside the orders made by the Court of Appeal, and I would restore the judge's dismissal of the lessee's claim. But what orders should be made on the lessor's counterclaim, which fell away when the Court of Appeal found in favour of the lessee? In normal circumstances, you would simply order that the trial's judge's order on the counterclaim be restored, but parts of his order are not appropriate now that so much time has passed since the trial. For example, he ordered the lessee to give up vacant possession of the site within three months of the date of the judgment, ie by 30 June 2016. Since the lessee is no longer in possession of the site, it would not be right to order the lessee to give up vacant possession of the site.

[36] The judge ordered the lessee to pay mesne profits of $953,600 to the lessor for the period up to 30 October 2014. I would restore that part of the judge's order. In addition, the judge ordered the lessee to pay the lessor the market rent of the site until it vacated the site. However, the judge made no finding about what the market rent of the site was. Moreover, since the lessee was still in possession of the site, the market rent may have increased between the date of the judgment and when the lessee vacated the site. In the circumstances, I would restore the judge's order that the lessee should pay the lessor the market rent of the site until it vacated the site, but I would add that in the event of the parties not being able to agree what the rent should be, the parties be at liberty to apply for the market rent to be assessed by a master.

[37] The judge dismissed one head of loss for which the lessor had counterclaimed, namely damages for the loss of the profits which the lessor would have made had it been able to develop the site. The lessor appealed to the Court of Appeal against the dismissal of that feature of its counterclaim. The Court of Appeal understandably did not address that because by allowing the lessee's appeal, the damages to which the lessor may have been entitled did not arise. But since by this judgment, I would be restoring the dismissal of the lessee's claim, the lessor's appeal against the judge's dismissal of its counterclaim for this head of loss has to be heard. I would therefore order the case to be remitted to the Court of Appeal for it to determine that ground of the lessor's cross-appeal. I would also dismiss the lessee's summons for a review of the decision of the Supreme Court granting a review of its earlier decision.

[38] Finally, there is the question of costs. I would restore the trial judge's order that the lessee should pay $8,000 towards the lessor's costs of the claim, but the lessor's costs of the appeal to the Court of Appeal and the application for leave to the Supreme Court need to be considered – as well as its costs of the review. I would order the lessee to pay a further $15,000 towards the lessor's costs incurred since the trial, involving as they did a hearing in the Court of Appeal and two hearings in the Supreme Court.

Dep J

[39] I have read the draft Judgments of Keith J and Jayawardena J who have extensively dealt with the facts of the case and cited several authorities in support of their decisions. I decided to right a separate judgment.

[40] The Petitioner filed a petition in the Supreme Court to review the judgment dated 1st November 2019 pronounced by the Supreme Court. Having considered the petition, the Supreme Court allowed the Application for review. The Order is reproduced below:

> "After having considered the above and following the procedure laid down in The State v Eliki Mototabua (CAV0005.09, 9 May, 2012), we grant the application for a review on the ground that it is strongly arguable that the Court of Appeal and the Supreme Court erred in its construction of the letter of 6th October, 1999 from the predecessors in title of the Petitioner ("the lessor") to the Respondent ("the lessee").

[41] I was one of the judges in the panel that granted review on the basis that it could be strongly argued that the Supreme Court and Court of Appeal erred in the construction of the letter dated 6th October 1999. On that basis review was granted. It does not mean that the panel of judges of the Supreme Court who decided to grant a review has predetermined this matter.

[42] In this application it is the task of the Petitioner to establish that the Court of Appeal and Supreme Court have erred regarding the construction of the letter dated 6th October 1999 and there was a grave error in the judgments of both Courts.

[43] The Respondent has filed objections to the review and went to the extent of applying to review the decision of this Court to grant a review. There is no provision to review the decision granting a review.

[44] Both parties have filed written submissions and made oral submissions at the hearing. Respondent's main contention is that the Supreme Court made an error in granting a review.

[45] In its written submissions Respondent in somewhat in a strong language submitted that:

> 'The Supreme Court made an error of law in granting the leave to review when there were no new circumstances justifying the review and when the application in substance and in form was no more than a repeat of the submissions originally made by the Petitioner applicant in 2019, such being a well-established abuse of process in accordance with the above leading authorities of this Honourable Court'.

[46] The Constitution of Fiji has provided the power to the Supreme Court to review its judgments. Section 98 (7) states 'The Supreme Court may review any judgment, pronouncement or order made by it'. This power should be exercised subject to other provisions of the Constitution and the written law. The relevant written law applicable is the Constitution of Fiji 1998.Neither the Constitution nor the Supreme Court Act laid down the procedure regarding the criteria in granting review of the Supreme Court judgments. According to the previous judgments of this Court dealing with review applications it held that this jurisdiction should be exercised sparingly, cautiously and in exceptional circumstances.

[47] When filing an application for review, a party is exercising his/its Constitutional rights. However as of right a party cannot appeal to the Supreme Court and it has to obtain leave in the first instance after satisfying the criteria set out in section 7 of the Supreme Court Act. In respect of review applications threshold is much higher and the Supreme Court will grant a review in exceptional circumstances.

[48] In this review application, a review was granted only on one issue that is as regards to the construction given to the letter dated of 6th October 1999 by the Court of Appeal. The hearing should be restricted to this issue but the parties virtually re argued the case.

[49] The letter dated 6th October 1999 is vital for the determination of the main issue of the case as to whether the lease agreement was renewed or not.

[50] There is no dispute as to the fact that the lessee did not exercise its option within the stipulated time that is six months prior to the expiry of the lease. Therefore, lease could not be renewed. That is the legal position. The next question is whether by its letter

dated 6th October, the lessor waived its rights and invited the lessee to renew the lease which is due to expire on the 31st of December 1999.

[51] In this case the matter to be decided is whether the letters dated 6th October 1999 and 12 October 1999 has the effect of renewing the Lease. Relevant portion of the letter dated 6 October 1999 send through a firm of Solicitor read as follows:

> 'As you are no doubt aware that the current lease term expires on the 31st December 1999 and we are instructed to ascertain from your company what its intentions are particularly whether it would wish to remain in occupation of the premises or alternatively relinquish possession at the end of the term.'

We would appreciate your early response.

[52] On 12th October 1999 Respondent has replied to the letter and the relevant portion of the letter reads thus:

> 'Please accept this letter as our formal notification of our intention to exercise our option for the renewal of the lease. Under the lease for a further (20) years from the 1st January 2000.'

[53] This letter was received by the lessor, but the lessor has not replied. If the lessor did not contemplate in extending the lease, it could have replied to the lessee stating that as the lessee failed to exercise its option within the time stipulated in the agreement, lease could not be renewed.

[54] The Petitioner submits that the letter dated 6th January in not an offer but a mere inquiry as to the intention of the lessee. But the Lessee submits that it is an offer.

[55] The Petitioner submits that the option to renew lapsed when it was not submitted within the stipulated time. The Respondents argue that the letter dated 6th October contains an offer and by their letter dated 12th October 1999 accepted the offer for renewal of the lease. The lessor by its letter waived his right to reject the offer.

[56] The main issue in trial court and in the appellate courts is to decide whether or not a new lease was granted. Letters dated 6th October 1999 and 12 October 1999 are important documents for this purpose. The Court of Appeal has considered the other factors such as subsequent correspondence, subsequent conduct of the parties to ascertain the intention of the parties. Subsequent correspondence show that the parties

have acted on the basis that the lease was renewed, and they conducted themselves for several years without any dispute and the sales purchase agreement through which the present petitioner acquired title is subject to the lease.

[57] If the original lessor acted on the basis that the lease has expired, it could have given notice to the respondent to vacate premises, if not quit notice could have been issued before entering into the sale purchase agreement to grant vacant possession to the purchaser.

[58] The Court of Appeal held that the lease was renewed, and the Court of appeal had given reasons for that, and the Supreme Court affirmed the judgment of the Court of Appeal.

[59] I am of the view that the Court of Appeal had given a proper construction to the letter dated 6th October 1999, having considered the letter dated 12 October 1999, subsequent correspondence and the conduct of the parties. There is no flaw in the approach adopted by the Court of Appeal.

[60] The Petitioner has failed to satisfy this Court that there was a grave error in the judgment of Court of Appeal that was affirmed by the Supreme Court resulted in failure of justice or miscarriage of justice.

Jayawardena J

[61] This is an application under section 98(7) of the Constitution of the Republic of Fiji to review the judgment of 1st of November, 2019 pronounced by this court. Having considered the said application filed by the petitioner, the objections filed by the respondent and the written submissions filed by the parties, this court has made an order on the 27th of April, 2002 allowing the application for review.

[62] At the hearing, the counsel for the petitioner made submissions in support of the application to review the said judgment delivered by this court, and the counsel for the respondent opposed the said application. Further, the counsel for the respondent submitted that the application to review the aforementioned judgment delivered by this court should not have been entertained and that this court made an error in making an order to review the said judgment dated 1st of November, 2019 delivered by this court. In any event, it was submitted that the said application for review should not be allowed.

Facts in brief

[63] On the 15th of February, 1984 the respondent company had entered into a lease agreement bearing No.209221, with Fiji Investment and Agency Company Limited (herein after referred to as "FIACL") in respect of the land under consideration for a period of 20 years with effect from the 1st of January, 1980.

[64] Clause 10 of the said lease agreement provided for an option for the lessee to have the said lease renewed for another period of 20 years.

[65] The respondent stated that it continued to occupy the property even after the expiration of the said lease period, which ended on the 31st of December, 1999. However, it continued to pay the rentals to the landlord and the rates to the Municipal Council in accordance with the terms of the said lease agreement.

[66] Seven years after the expiration of the said twenty-year period of the lease, the landlord had executed a sale and purchase agreement on the 4th of April, 2007 to sell the property under consideration to the petitioner. Thereafter, the said property was sold to the petitioner on the 2nd of May, 2007. The respondent stated that, thereafter, it started to pay the rent to the petitioner at the request of the former landlord. After a few months, the petitioner had stopped accepting the rentals paid by the respondent and had sent a Notice to Quit dated 17th of May, 2007 to the respondent on the basis that the respondent was occupying the property on a monthly tenancy and that the said monthly tenancy was terminated by the petitioner.

[67] Soon after receiving the Notice to Quit, Total (Fiji) Limited, the plaintiff – respondent (formerly known as Shell (Fiji) Limited) (hereinafter referred to as the "respondent"), filed a Writ of Summons and a Statement of Claim seeking a declaration that it has a lease over the land described in Certificates of Title Nos. 3157 and 3357. Further, it sought a declaration that the Notice to Quit dated 17th of May, 2007 sent by Auto World Trading (Fiji) Limited, the defendant-petitioner (hereinafter referred to as the petitioner), is null and void.

[68] The petitioner disputed the aforementioned position of the respondent and stated that the said lease had expired on the 31st of December, 1999. Further, clause 10 of the said lease provided an option for the lessee to request an extension in writing six months

prior to the expiration of the lease. However, no request had been made by the respondent to renew the lease until the 12th of October, 1999. Hence, as the right to request a renewal of the lease lapsed on the 1st of July 1999, the said request made after the 1st of July, 1999 for the renewal of the lease has no effect in law.

[69] Accordingly, the issue before the High Court was whether the former landlord extended the lease for a further period of 20 years from the 13th of December, 1999.

Judgment of the High Court

[70] After the trial, the learned High Court judge delivered the judgment dated 30th of March, 2016 and held that the option to renew the lease had not been exercised by the respondent prior to six months of the expiration of the lease. Further, the said lease had not been extended by the former landlord. Accordingly, the learned High Court judge dismissed the case filed by the respondent.

Judgment of the Court of Appeal

[71] Being aggrieved by the said judgment, the respondent appealed to the Court of Appeal. After the hearing of the said appeal, the Court of Appeal allowed the appeal and granted the reliefs sought by the respondent.

Application for Special Leave to Appeal

[72] Being aggrieved by the said judgment of the Court of Appeal, the petitioner sought special leave to appeal from the Supreme Court.

Judgment of the Supreme Court

[73] After hearing the parties, the Supreme Court delivered the judgment on the 1st of November, 2019 and held, *inter alia*;

> "In the circumstances, it is evident that the facts pertaining to the matter in issue show that it is a dispute between two private parties and does not involve any matter of substantial interest in the administration of civil justice. It is only a dispute in relation to a lease agreement over a

privately-owned property. It is only a dispute concerning contractual rights between a lessor and a lessee.

Hence, I do not see any general or public importance is involved in this instance. Moreover, it is clear that no far-reaching question of law exists in this instance for the Supreme Court to determine.

Orders of Court

The orders of the Court are:

1. Petition for leave to appeal is refused
2. The Petitioner to pay the Respondent costs assessed at $5,000.00"

Jurisdiction and Power of the Supreme Court to Review its Judgments

[74] Section 98(3) of the Constitution states that the Supreme Court is the final appellate court. Further, section 98(6) of the Constitution states;

> "Decisions of the Supreme Court are, subject to subsection (7), binding on all other courts of the State." [emphasis added]

[75] However, section 98(7) of the Constitution has conferred jurisdiction on the Supreme Court to review "any judgment, pronouncement or order made by it". It is a special and exclusive jurisdiction conferred on the Supreme Court by the legislator.

[76] The Oxford dictionary defines the word 'review' as an "examination of something, with the intention of changing it if necessary". A review of a judgment, pronouncement or order (hereinafter referred to as "judgment" for the purpose of convenience) delivered by the Supreme Court is a reconsideration of a specific issue in a judgment pronounced by it with a view to ascertaining whether there is a grave error which goes to the root of the case and rectifying it, if any.

[77] Section 98 of the Constitution states;

> "(1) ……
>
> (2) ……
>
> (3) Supreme Court –
> (a) **Is the final appellate court**;
> (b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to **hear and determine appeals from all final**

judgments of the Court of Appeal; and

(c) Has original jurisdiction to hear and determine constitutional questions referred under section 91(5)

(4) An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal **unless the Supreme Court grants leave to appeal**.

(5) In the exercise of its appellate jurisdiction, the Supreme Court may –

(a) review, vary, set aside or affirm decision or orders of the Court of Appeal; or

(b) make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs.

(6) Decisions of the Supreme Court are, subject to subsection (7), binding on all other courts of the State.

(7) The Supreme Court may review any judgment, pronouncement or order made by it."

[emphasis added]

[78] The wording in section 98(7) of the Constitution is also found in section 8(5) of the Administration of Justice Decree 2009. Moreover, the power to review the judgments delivered by the Supreme Court was enshrined in section 122(5) of the previous Constitution.

[79] The aforementioned provision to review judgments delivered by the apex court is an exception to the principle of *stare decisis.* The principle of *stare decisis* binds lower courts to follow legal precedents set by previous decisions of higher courts.

[80] The underling rationale behind reviewing judgments delivered by a court is referred to in the maxim *"actus curiae neminem gravabit"*, which means that "an act of court shall prejudice no one". Thus, the court will take steps to undo a wrong done to a party, if any.

[81] Section 98(7) of the Constitution and section 8(5) of the Administration of Justice Decree, 2009 do not specify the criteria on which an application for review should be allowed. Hence, it is useful to consider the judgments that have considered the said sections and the relevant jurisprudence on this aspect.

(A) <u>Review of a judgment, pronouncement or order pronounced by the Supreme Court</u>

[82] Section 98(7) of the Constitution of the Republic of Fiji and section 8(5) of the Administration of Justice Decree 2009 (both sections contain identical wording) confer jurisdiction on the Supreme Court to review any judgment, pronouncement or order delivered by it. However, both sections do not stipulate the procedure and the criteria that should be followed by the Supreme Court in reviewing its own judgments. Thus, I will first consider the law relating to reviewing the judgments delivered by the apex court.

(B) <u>Applicable Law</u>

[83] An appeal is a judicial examination of a judgment, decision, or order by a higher court. In an appeal, a superior court will consider the facts and the law to ascertain whether the lower court has made an error in law and fact in delivering the judgment. If the appellate court finds any errors in a judgment delivered by a lower court, it will rectify the same by allowing the appeal.

[84] Section 98(3) of the Constitution states that the Supreme Court is the final appellate court. Hence, appeals from the judgments of the courts of first instance can go all the way to the Supreme Court**,** which is the apex court in Fiji Islands.

[85] However, an appeal to the Supreme Court can be brought only after obtaining special leave to appeal from the Supreme Court, in terms of section 98(4) read with section 7 of the Supreme Court Act, 1998.

[86] Review of a judgment is an act of looking into something again with a view of correcting any mistakes if any. The underlying principal behind reviewing judgments delivered by the apex court is referred to in the latin maxim *"actus curiae neminem gravabit*", which means that an act of court shall prejudice no one. Thus, the court will take steps to undo a wrong done to a party if any.

[87] To allow an application for review of a judgment, the error in a judgment should be self-evident and obvious, and it should not be after a long-drawn process of reasoning on points on which there may conceivably be two opinions.

[88] If there could be two viewpoints and the error is not obvious and grave, the Supreme Court will not allow a review of a judgment delivered by it. In ***Girdhari Lal Gupta v***

D.H. Mehta 1971 AIR SC 2162, the Supreme Court reviewed its judgment in a criminal appeal involving a violation of the Foreign Exchange Regulation Act 1947, where it was later brought to the attention of the court that section 23-C (20) of the Act was not drawn to the attention of the court, and thereupon the court modified the sentence of imprisonment to a fine.

[89] When a review of a judgment takes place, the court will not take a fresh stock of the appeal but only correct grave errors in the judgment. Further, a reviewing of a judgment delivered by the apex court will only correct vital errors and not minor mistakes of inconsequential import.

[90] Furthermore, a review of a judgment of the apex court is not a re-hearing of the same appeal and substituting the previous judgment with a new judgment based on the same facts and law.

[91] Moreover, a party is not entitled to seek a review of a judgment delivered by this court merely for the purpose of repeating the same arguments or with fresh arguments with a view to obtaining a different judgment. Further, the power to review a judgment cannot be used to substitute an opinion in one judgment with another judgment containing a different opinion.

[92] When the Supreme Court reviews a judgment, it does not mean that the Supreme Court will run through the proceedings again and decide the appeal afresh. It is only a consideration of a specific vital error or errors in a judgment with a view to rectifying the same.

[93] Further, a review of a Supreme Court judgment is not in any way an appeal in disguise where the appeal is heard again with a view to having a different judgment on the same facts and law. Thus, a hearing in a review application cannot be put on par with the original hearings of the appeal. Hence, the petitioner has a higher burden in an application to review a judgment delivered by this court.

[94] In another case, ***Kerala State Electricity Board v Hitech Electronics & Hydrogen Ltd 10th of August, 2005 Review Petition (civil) 238 0f 2003,*** the Supreme Court held;

> *"The appreciation of evidence on record is fully within the domain of the appellant court. If, on appreciation of the evidence produced, the*

> *court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that an error is apparent on the face of the record or for some reason akin thereto. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."*

(C) Review Procedure

[95] The process of reviewing judgments commences by filing a petition in the Supreme Court specifying the vital error or errors in a judgment delivered by the Supreme Court.

[96] After considering such an application and the objections to the application, if any, the court will entertain such an application only if there are vital errors on the face of the judgment. Otherwise**,** the application will be dismissed in *limine*.

[97] In the case of ***Silatolu*** **CAV0002.06**, ***17th of October, 2008*** it was held;

> "The Court in the first instance will deal with such applications without an oral hearing. The applicant must lodge written submissions in support of the application, and the respondent will be given an opportunity to answer those submissions in writing, and the applicant may lodge a written reply. If the application is not summarily dismissed on the papers it will be listed for an oral hearing at the same or a later session of the Court."

[98] Moreover, if the court decides to allow an application to review a judgment, in the same order the court will **specify the points** on which the application for review will be heard in open court. Thus, the hearing of a review application shall be restricted to the issues on which the court has granted permission to hear the review application. Hence, the hearing of a review application cannot be used to argue other points which were not allowed in the order made by the court in allowing the application to review the judgment.

[99] Further, the hearing of a review application has a limited purpose of correcting one or more grave errors in a judgment. After considering such an application, the court will either entertain or refuse such an application.

[100] In addition to the above, the Supreme Court can act *ex mero motu* under section 98(6) of the Constitution and review its own judgments. In the review of the judgment in ***Eremasi Tasova and Office of the Director of Public Prosecutions (The State) and***

Fiji Independent Commission Against Corruption CAV 0012 of 2019, 26th of September, 2022 the Supreme Court held;

> *"In the circumstances, this Court on its motion, has initiated the review process."*

[101] Furthermore, in ***Dromudale v State*** **CAV 13 of 2013**, ***7th of October, 2013*** it was held;

> "The nature of the review. The third hurdle which Dromudole must overcome is that the current application is an application for review. Such an application will always present an applicant with difficulties. It has been said that a decision of a final appellate court is one of great sanctity. It should not be disturbed save in exceptional circumstances. That is not to say that an application for review of a previous judgment of the Supreme Court can never be granted, but it does mean that only compelling reasons will justify taking that course."

[102] The aforementioned decision was endorsed and adopted by this court in the review judgment of ***Fiji Independent Commission Against Corruption CAV 0012 of 2019*** by the Supreme Court of Fiji.

[103] Further, the power to review is not a routine process of the Supreme Court and the power to review should only be exercised in exceptional circumstances when it is essential to rectify a grave error that goes to the root of a judgment. In the case of ***The State and Eliki Mototabua CAV0005 of 2009***, it was held, "The bar no doubt is extremely high but nonetheless may yet be overcome in a rare case." Furthermore, the power conferred on the apex court to review its own judgments should be exercised with caution in appropriate cases. Frequent review of judgments of the apex court can undermine the entire justice system of a country.

[104] Hence, a review of a judgment is a serious matter in the administration of the justice system. However, the exercise of such discretion shall not be withheld in appropriate instances.

[105] Since the instant application is for review of a judgment delivered by the Supreme Court where the granting of special leave to appeal was refused under section 7 of the Supreme Court Act 1988, I will first consider the applicability of section 7 of the Supreme Court Act to the instant application.

Applicability of Section 7 of the Supreme Court Act

[106] Section 98(3)(b) of the Constitution has conferred jurisdiction on the Supreme Court to hear and determine appeals from all judgments of the Court of Appeal.

[107] However, the said jurisdiction to hear and determine appeals from the judgments of the Court of Appeal has been qualified by section 98(4) of the Constitution. Accordingly, special leave to appeal should be obtained from the Supreme Court as a condition precedent to hear and determine an appeal arising out of a judgment of the Court of Appeal.

[108] Section 98(4) of the Constitution states;

> "An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal." [emphasis added]

[109] Further, the said section does not set out the criteria for consideration of an application for special leave to appeal. Thus, the legislature has enacted section 7 of the Supreme Court Act, 1998 which stipulates the applicable procedure and criteria in consideration of applications for special leave to appeal. Particularly, section 7(2) deals with criminal matters and section 7(3) deals with civil matters.

[110] Section 7 of the Supreme Court Act, 1998 states;

> "7(1) In exercising its jurisdiction under section [98 of the Constitution of the Republic of Fiji] with respect to … leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –
>
> (a) refuse to grant leave to appeal;
>
> (b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant leave and allow the appeal and make such other orders as the circumstances of the case require.
>
> 7(2) In relation to a **criminal matter**, the Supreme Court must not grant special leave to appeal unless-
>
> *(a)* A question of general legal importance is involved;
> *(b)* A substantial question of principle affecting the administration of criminal justice is involved; or
> *(c)* Substantial and grave injustice may otherwise occur."
>
> **7(3) 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 rises-**

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." [emphasis added]

[111] Therefore, section 7 of the Supreme Court Act, 1998 should be read with sections 98(3)(b) and 98(4) of the Constitution in considering applications for special leave to appeal.

[112] The principles of interpretation of laws are set out in section 3 of the Constitution. The said section states;

> "3. – (1) Any person interpreting or **applying** this Constitution must promote the sprit, purpose and objects of this Constitution as a whole, and the values that a democratic society based on human dignity, equality and freedom.
>
> (2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is in consistent with this Constitution.
>
> (3) This Constitution is to be adopted in the English language and translations in the **iTaukei and Hindi** languages are to be made available."
>
> [emphasis added]

[113] In view of the said section 3, it is necessary to consider section 7 of the Supreme Court Act and sections 98(3) and section 98(4) of the Constitution in harmony with each other. Therefore, I am of the opinion that section 7 of the Supreme Court Act cannot be considered in isolation.

[114] Further, sections of an Act or in the Constitution should be considered as a whole and interpreted in harmony. No section or a subsection of a section shall be interpreted in isolation in the absence of clear words in the section to that effect. Hence, section 98(7) of the constitution also should not be considered in isolation.

[115] Therefore, I am of the opinion that sections 98(7), 98(3)(b) and 98(4) of the Constitution should be considered together.

[116] Further, any other interpretation which dispenses the requirement to obtain special leave to appeal set out in section 98(4) of the Constitution or in section 7 of the Supreme Court Act in respect of an application to review a judgment of this court will result in the said sections being made redundant.

[117] Moreover, such an interpretation will not only violate section 3 of the Constitution but also general principles of interpretation of legislation, which require the court to give a meaning to every word in the legislation on the basis that the legislature will not waste words in enacting legislation.

[118] Further, it is not possible to interpret one constitutional provision by disregarding another provision of the Constitution. It is pertinent to note that subsections 98(3), 98(4) and 98(7) are in the same section of the Constitution and are applicable to the issue under consideration.

[119] Furthermore, when interpreting a constitutional provision, it is necessary to consider the Constitution as a whole and interpret all sections in harmony. Once such an interpretation is applied to section 98(7) of the Constitution, it is not possible to disregard the application of section 98(4) of the Constitution to the instant application.

[120] If section 7 has no application to an application to review a judgment of this court where the granting of special leave has been refused, anyone can circumvent the requirement to satisfy the stringent criteria set out in section 98(4) of the Constitution read with section 7 of the Supreme Court Act.

[121] Thus, I am of the opinion that both section 98(4) of the Constitution and section 7 of the Supreme Court Act apply to the instant application.

Submissions of the Petitioner

[122] At the hearing of this application, the counsel for the petitioner submitted that the petitioner's main argument before the Court of Appeal and the Supreme Court was based on paragraph 5 of the Statement Claim. It states;

> "In 1999 the Plaintiff exercised its option to renew the Lease for further period of 20 years from 1st January 2000"

However, both the Court of Appeal and the Supreme Court overlooked the above point.

(ii) the respondent did not make a request to extend the lease within the time frame stipulated in clause 10 of the lease agreement. In this regard he drew the attention of court to the letters of 6th of October, 1999 and 12th of October, 1999.

(iii) as the request was not made within the stipulated time frame it is not possible to extend the lease No. 2092221 Hence, parties should have entered into a new lease agreement if they wanted to lease the property for a further period.

(iv) the Court of Appeal erred in law by holding that the petitioner has waived off the requirement to give notice six months prior to the expiry of the lease.

(v) the Court of Appeal erred in law by concluding that the petitioner is now estopped from disputing the fact that the said lease was not extended by agreement of parties.

(vi) no evidence was led at the trial to prove that the letter of 12th of October 1999 was accepted by the previous landlord. In this regard he drew the attention of court to paragraph 47 of the Court of Appeal judgment where it was stated –

> "[45] The option which was the subject matter in United Scientific Holdings Ltd (supra) relates to rental and not renewal of a lease. It was held by the House of Lords that the new rents should be determined in accordance with the procedures specified in the respective leases (There were two leases. One of them was for 99 years and the other for 21 years). It was held that there was nothing in either of the leases in question to displace the presumption that strict adherence to the time tables specified in their rent review clauses was not the essence of the contract. The learned Judge in the appeal under review appears to have strongly relied on the statement of Lord Diplock that, "It is well established that a stipulation as to the time at which notice to exercise the option must be given is the essence of the option to renew".

(vii) the letter dated 6th of October, 1999 does not refer to a renewal of the agreement.

(viii) the Court of Appeal and the Supreme Court misdirected themselves by interpreting the aforementioned letters and holding that the said letters shows that the parties have waved off the requirement stipulated in clause 10 of the lease agreement.

(ix) the Supreme Court erred in law by not holding that the lease agreement if any is illegal as it did not have the ministerial approval.

(x) the Supreme Court erred in law by holding that the requirement to obtain the ministerial consent was a fresh argument and it was not possible to raise fresh arguments at the hearing. In this regard, the petitioner sighted the judgment delivered in *Motil v North (Fiji) Group Ltd* [2018] FJSC20; CBV005.2017 (24th August 2018) where it was held an illegality can be raised at any stage of the case.

(xi) the Court of Appeal erred in law by rejecting the letters 22nd of March, 2004 and 24th of March, 2004 stating that those letters contained hearsay evidence.

(xii) Court of Appeal erred in law by holding;

> "[54] After seven years of the commencement of the renewed lease, FIACL entered into a sale and purchase agreement (supra) with the respondent. In that, FIACL as the vendor and the respondent as purchaser agreed to the fact that the sale is subject to lease No. 209221 given to the appellant. The appellant is not referred to as a monthly tenant in the sale and purchase agreement. FIACL does not refer to lease No. 209221 as an expired lease. Parties to this agreement agree not to take vacant possession due to the occupation of the appellant in the premises as lessee under lease No. 209221. If there was no renewal of the lease, why did the sale and purchase agreement covenant the sale to be subject to the lease No. 209221? The transfer was done on 27 April 2007. This transfer was "pursuant to the sale and purchase agreement". The premises were sold subject to the lease No. 209221. If the respondent could determine the lease with one month notice, why did he agree to the sale subject to lease No. 209221?"

Further, the Supreme Court erred in law by affirming the said finding of the Court of Appeal.

(xiii) in view of the finding that the respondent has not complied with clause 10 of the lease agreement and said lease agreement was not extended by the parties, the learned High Court judge did not consider the claim for damages submitted by the petitioner. However, as the Court of Appeal and the Supreme Court set aside the said finding of the learned High Court judge, the case should have been remitted back to the High Court to appropriate mense profit of the properties until the vacation.

(xiv) there are far-reaching questions of law and matters of public importance involved in the application for special leave to appeal,

(xv) in the circumstances, the petitioner submitted;

(a) the application for review of the Supreme Court judgment of 1st of November, 2019 should be allowed,
(b) the judgment of the Supreme Court dated 1st of November, 2019 to be set aside,
(c) special leave to appeal should be granted,
(d) the judgment of the Court of Appeal dated 30th November, 2018 should be set aside,
(e) the judgment of the High Court dated 30th of March, 2016 to be affirmed, and
(f) grant costs.

Submissions of the Respondent

[123] The respondent had filed written submissions prior to the hearing of this application and has objected to the order of this court dated 29th of April, 2022 allowing the application to review the judgment of the Supreme Court under consideration. Further, it was submitted that the petitioner has not urged any grounds to allow the application to review the said judgment of the Supreme Court.

[124] At the hearing, the counsel for the respondent submitted that;

(i) the submissions made on behalf of the petitioner at the hearing of the review application were earlier made before the High Court, the Court of Appeal and the Supreme Court,

(ii) the threshold in a review application is higher than in an application to obtain special leave to appeal from the Supreme Court.

(iii) those who are unable to obtain special leave to appeal will get another opportunity for fresh hearing of their appeal,

(iv) if the need to obtain special leave to appeal has no application to application made under section 98(7) of the Constitution, it will allow unsuccessful petitioners to come through "the back door",

(v) in the last paragraph of the Supreme Court judgment it was held that the issue is a dispute concerning contractual rights between a lessor and a lessee.

(vi) private contracts do not attract section 7 of the Supreme Court Act,

(vii) there are no far-reaching questions of law and matters of public importance involved in the application for special leave to appeal,

(viii) a review application would be entertained under exceptional circumstances or if fresh evidence which goes to the root of the finding of court has transpired after the judgment is delivered,

(ix) the property under consideration was handed over to the petitioner after the second twenty year period lapsed. Therefore, now this case is academic (counsel for the petitioner conceded that the property was handed over. However, the petitioner wishes to pursue the application as it suffered losses because there was no increase of the rent),

(x) the petitioner was aware of the existing lease at the time of entering into the 'sale and purchase agreement'. In this regard he drew the attention of court to clauses 2, 4, 5 and 17 of the said agreement and the letters dated 6th of October, 1999, 12th of October, 1999 and 19th of October, 1999.

(xi) the argument relating to the renewal of the rent was a fresh point raised in this hearing. It should have been raised at the time of the renewal of the lease,

(xii) correspondence with the third party is hearsay evidence and the court should not consider such correspondence,

(xiii) at the trial the issue with regard to the need to obtain ministerial consent was not allowed at the trial before the High Court and therefore, the respondent did not lead evidence on that issue. Thus, the said issue cannot be raised before the Court of Appeal and the Supreme Court, and

(xiv) the application for review should be dismissed.

Reply by the Petitioner

[125] In reply, the counsel for the petitioner submitted *inter alia* that;

(i) the lease was not extended and therefore, it was necessary to obtain a ministerial consent for the new lease, if any, as the land is far in excess of one acre,

(ii) the documents produced at the trial were not objected to at the time of them producing at the trial. Hence, it is not possible to object to the documents that were already accepted by the court,

(iii) the plaintiff did not prove its case, and

(iv) there are important questions of law involved in the instant application, such as renewal rights if a lease, ministerial consent and the quantum of damages.

Findings with Regard to the Submissions made by the Parties

[126] A cursory glance at the aforementioned lengthy submissions shows that both the parties re-argued the appeal once again at the review hearing, which is not permissible in law. Further, most of the said arguments can be found in the written submissions filed in the Supreme Court prior to the pronouncement of the judgment by the Supreme Court on the 1st of November, 2019 The only difference was the objections raised by the respondent to allowing the application for review. Moreover, the petitioner tried to persuade the court to accept the same submissions that were refused by this court at the hearing for the granting of special leave to appeal.

[127] Furthermore, the petitioner raised fresh issues such as rent should be re-assessed if the court is of the opinion that the lease was extended with the mutual consent of the parties. Also, with regard to the requirement to have ministerial consent, which was not allowed by the trial judge.

[128] In terms of section 2(2) of the Supreme Court Act, 1998 appeals from final judgments of the Court of Appeal are heard by not less than three judges. Similarly, reviews are also heard by three judges. Hence, this court cannot re-write the judgment in these

proceedings and substitute the same in place of the previous judgment delivered by this court on the 1st of November, 2019.

Scope of the Hearing

[129] This court *inter alia* made the following order on the 29th of April, 2022.

> "[3] After having considered the above and following the procedure laid down in The State v Eliki Mototabua (CAV0005.09, 9 May 2012), we grant the application for a review on the ground that it is strongly arguable that the Court of Appeal and the Supreme Court erred in its construction of the letter of 6 October 1999 from the predecessors-in-title of the Petitioner ("the lessor") to the Respondent ("the lessee"). We think that it is arguable that the Court of Appeal and the Supreme Court erred in
>
> (i) concluding that by that letter the lessor had reinstated the lessee's right to exercise its option to renew the lease for 20 years, and
>
> (ii) failing to conclude that
>
> (a) although the lessee had lost the right to exercise that option, the lessor still had the right to grant the lessee a new lease on the same terms as before if it chose to do so,
>
> (b) by that letter, the lessor was merely inquiring of the lessee whether the lessee wanted to have a new lease, and was not resurrecting the lessee's right to insist upon a new lease,
>
> (c) although the lessee remained in occupation of the sire for many years thereafter, there was no agreement under which a new lease was granted to the lessee, and
>
> (d) in these circumstances the lessee held over as a monthly tenant pending any agreement about what the terms of a new lease should be, no such agreement was ever reached, and the lessor was entitled to terminate this monthly tenancy by the service of a notice to quit.
>
> Although the proper construction of a letter will not normally raise a far-reaching question of law, we think that it is arguable that does not apply to a review, which exists in order to correct errors made by the Supreme Court." [emphasis added]

[130] A careful consideration of the said order shows that this court allowed the application to be reviewed only on the point with regard to the construction of the letter dated 6th

of October, 1999 produced at the trial.

[131] However, as evident from the written submissions and the oral submissions made by the parties, both parties made submissions outside the aforementioned order made by this court. Hence, I am of the view that it is not possible in law to entertain such submissions at the hearing of the revision application. Further, when the court allows an application to review a judgment on a particular point, it should not be considered as an opportunity to have a second bite on the cherry. I have dealt with this point in detail under the heading 'Applicable Law' in this judgment.

[132] Furthermore, the petitioner pleaded "For the aforesaid reasons, the Petitioner seeks a review of the decision by the Supreme Court delivered on 01 November 2019 pursuant to section 98(7) of the Constitution, that leave be granted to it to appeal under section 98(4) of the Constitution and section 7(3)(c) of the Supreme Court Act."

[emphasis added]

[133] However, it is not possible in law to review the judgment of the Court of Appeal in these proceedings.

[134] Furthermore, this court has refused to grant special leave to appeal, stating that the matter involved in the instant appeal is a private matter between the parties. However, the said opinion of this court was not the subject matter of the review proceedings, and therefore, this court cannot set aside the said opinion and substitute the same with a different opinion.

[135] Earlier in the judgment, it was pointed out that section 7 of the Supreme Court Act applies to applications to review judgments. Therefore, the petitioner has to first satisfy the court that a vital error is in the judgment which refused to grant special leave to appeal, prior to addressing the errors in the findings, observations and orders of the judgment delivered by this court. However, the petitioner failed to satisfy the court that this court made a vital error in refusing to grant special leave to appeal.

[136] For the reasons stated above, I am of the opinion that the application to review the judgment dated 1st of November, 2019 should be dismissed.

[137] Further, in view of the aforementioned finding, it is a futile exercise to consider the objections raised by the respondents with regard to the order made by this court on the 29th of April, 2022. Thus, I shall not endeavour to consider the said objections.

[138] Notwithstanding the above finding, I wish to consider the important correspondence and the agreements entered between the parties.

[139] A careful consideration of the oral and written submissions made on behalf of the petitioner shows that those submissions are outside the scope of the issues raised at the pre-trial conference. Further, such submissions raise new issues and factual positions. As stated above, it is not possible to present a new case in an application to review a judgment pronounced by the apex court.

[140] The respondent and the former landlord (former owner of the land) had executed the lease agreement on the 15th of February, 1984 for a period of 20 years with effect from the 1st of January, 1980. Thus, the lease was due to expire on the 31st of December, 2020.

[141] Relevant parts of the extracts of the said lease agreement is reproduced below;

> "L E A S E
>
> HEREBY LEASES to SHELL FIJI LIMITED a duly incorporated Company having its registered office at Suva Fiji (hereinafter called "the Lessee") all the said land to be held by the Lessee as tenant for the space of Twenty (20) years computed from the First day of January 1980 at a yearly rental of $37,500 (Thirty Seven Thousand Five Hundred Dollars) (subject nevertheless to clause 17 hereof) such rental to be payable by equal calendar monthly instalments each in advance on the 1st day of each month during the said term the first such payment being due and payable on the said 1st day of January 1980.
>
> **10**. The Lessor will, upon the written request of the Lessee made not less than six months before the expiration of this renewed term and provided the Lessee during the term shall have duly and promptly paid the rent payable during such term and observed and performed the covenants and conditions on the part of the Lessee in this Lease thereof (as the case shall require) contained or implied grant to the Lessee a lease of the demised land for the further term of twenty years from the expiration of the term hereof reserving a rental to be assessed in accordance with the provisions of clause 12 hereof and containing the like covenants agreements and provisos as are

contained in these presents excepting this present covenant for renewal.

12. The rent reserved by this Lease and any renewal thereof pursuant to clause 10 hereof shall be subject to reassessment and determined in the manner hereinafter set forth for the period of the last ten years of the term of this Lease commencing on the 1st day of January 1990 (hereinafter referred to as "the second period") and again for each succeeding ten-year period thereafter of any renewal of the said term of (each such ten-year period of a renewed term being hereinafter referred to as and included in the term "each renewed period"). The annual rentals for the said second period and each renewed period shall be rentals to be.

14. If any dispute or difference shall are between the Lessor and the Lessee in respect of the amount of the unimproved value of the demised land upon reassessment of rent under clause 12 hereof or the amount of the fair value of any building structure or other improvement under Clause 13 here of the same shall be referred to the award of a single arbitrator in case the parties can agree upon one and otherwise to two arbitrators one to be appointed by each party or if necessary to an umpire to be appointed by the arbitrator. The award no obtained shall be final and binding on the parties and the costs shall be borne in accordance with the award in that respect of the arbitrator arbitrators or umpire." [emphasis added]

[142] In terms of the said agreement, the annual rent was required to be paid in equal monthly instalments during the term of the lease. Accordingly, the respondent had been paying the annual rent to his former landlord in monthly installments.

[143] Further, in terms of the said clause, the respondent was entitled to make a written request for an extension for a further period of 20 years. However, the said request should be made 6 months prior to the expiration of the said lease agreement. i.e. before 30th of July, 1999. However, admittedly, a request had not been made by the respondent prior to the said date but continued to occupy the land.

[144] In this background, lawyers for the former landlord had sent the letter of 6th October, 1999 to the respondent and informed it that they were instructed to ascertain whether the respondent wished to remain in occupation of the premises or alternatively relinquish possession at the end of the term. The said letter is reproduced below;

MUNRO LEYS

BARRISTERS & SOLICITORS
NOTARIES PUBLIC

PARTNERS
BARRIE NELSON SWEETMAN, LL.B.
CHATTUR DASRATH SINGH (MIDDLE TEMPLE)
DENNIS JULIUS WILLIAMS, LL.B.

CONSULTANT:
ROBERT ANDERSON SMITH, LL.B.

ASSOCIATE:
RICHARD KRISHNAN NANDU B. COM. LL.B.

6 October 1999

The Directors
Shell Fiji Limited
Rona Street Walubay
GPO Box 168
SUVA

Dear Sirs,

re: **Fiji Investment and Agency Co. Ltd.**
Lease No. 209221 affecting Cs. T. 3157 and 3357

We act as Solicitors to Fiji Investment and Agency Co. LTD., the Lessor named in Lease No. 209221 and your Company is named as the Lessee thereunder.
As you are no doubt aware that the current Lease term expires on the 31st December 1999 and we are instructed to ascertain from your Company what its intentions are particularly whether it would wish to remain in occupation of the premises or alternatively relinquish possession at the end of the term.
We would appreciate your early response.

Yours faithfully,

MUNRO LEYS

[145] On the 12th of October, 1999 the respondent had replied to the above letter with the following;

> "We are in receipt of your letter dated 12/10/99 concerning lease number 209221 affecting Cs. T. 3157 & 3357.
>
> Please accept this letter as our formal notification of our intention to exercise our option under the lease to renew for a further twenty (20) years from the 1st January, 2000."

[146] Thereafter, the respondent had continued to pay the rent monthly to the former landlord.

[147] The respondent had sent the letter dated 4th of May, 2004 and informed the former landlord that clause 10 of the lease agreement provided for the option for the renewal of the lease for a further period of 20 years, and the said option was exercised and it continued to be in possession under the renewed term of the said lease No. 209221.

The said letter further stated that it came to know that the said landlord had been calling for expression of interest for the said property and that it would take legal action if he interfered with the quiet enjoyment of the property disregarding the renewed lease.

[148] On the 7th of June, 2004 the former landlord had sent the following letter to the respondent;

Rolle Associates
Valuers Property Consultants Retail Estate Agents

7th June 2004

Sherani & Co.
2nd Floor, Harlfam Centre
Greig St.
Suva.

Attan: Mr. Nagin
Fax: 330 1546
Dear Nagin,

Re: Shall Hibiscus Service Station – Victoria Parade

Further to our discussion last week regarding the above property, the following are details of the lease option as proposed by a potential buyer for consideration by Shell Fiji Ltd:

Period	**Annual Rental (plus VAT)**	**Monthly Rental (plus VAT)**
First 3 years	$105,000	$8,750
Next 3 years	$112,800	$9,400
Next 4 years	$ 126,000	$10,500

In addition to the annual rental the tenant to be responsible for all property outgoings including but not limited to rates, power, water, city council rates and maintenance of buildings or other property.

The above lease terms were floated by the interested party originally and may be subject to change.

I hope to hear from you regarding the above soon.

Yours sincerely,

Keni Dakuidereketi
Director

[149] In view of the above dispute, the respondent had registered a caveat on the property. Thus, the former landlord had requested the petitioner to cancel the said caveat by letter 15th of June, 2004. The respondent had responded to the letter by letter dated 7th of July, 2004 and informed it that the lease was renewed and that the negotiations were merely on the issue of renewed rentals. Moreover, the said letter stated that it does not stop the landlord from selling the freehold land subject to its rights.

[150] Further, the lawyers for the former landlord had informed the respondent that the proposed buyer wished to increase the lease rentals. However, the respondent had declined to enter into negotiations on the said proposal and informed the same by letter of 7th of July, 2004.

[151] In the meantime, the former landlord, who was also the owner of the freehold land, had entered into a sale and purchase agreement with the petitioner on the 4th of April, 2007. The said agreement stated, *inter alia;*

> "WHEREBY it is agreed as follows:
>
> The Vendor will sell and the Purchaser will purchase from the Vendor all those pieces of Freehold Lands known as Allotment 6. Section VIII, containing of an area of one rood more or less and comprised in Certificate of Title Register Vol. 32, Folio 3157 Allotment 7. Section VIII, containing an area of 39.57 perches more or less and comprised in Certificate of Title Register Vol. 33 Folio 1357 and excluding all improvements thereon (hereinafter referred to as ("Lands") at and for the purchase price of FJ$1,709,150.00 (plus VAT, if applicable) (One Million Seven hundred and Nine thousand One hundred and Fifty Fiji Dollars) ("Purchase Price") on the following terms and conditions:
>
> **2**. THE Lands are sold on an "as is where is basis" free from all mortgages, charges, liens and other encumbrance whenever excepting the lease No. 209221 made between the Vendor a tenor and Shell Fiji Limited Lessee.

4. THE Purchaser acknowledges that vacant possession of the Lands will not be given by the occupying under Lease No. 209221.

17. SERVICE of any notice or document under or relating to this Agreement may be effected by sending the same by registered mail or facsimile which in the case of the Vendor shall be addressed to its solicitors:

Munro Leys

PO Box 149
Suva
Fiji

Facimile: +679 330 2672

and in the case of the Purchaser to its solicitors:

Khan & Co
PO Box 549
Suva

Facsimile: + 679 330 0173

THIS agreement shall be governed by and consumed in accordance with the laws of Fiji and the parties hereby submit to the exclusive jurisdiction of the Courts of Fiji.

EACH party shall pay their own solicitors costs. The Purchaser shall pay all stamp duty and registration fees on the transfer document and any other disbursements.

THIS agreement may be executed by facsimile and in counterparts and each counterpart when joined shall form the one agreement.

THIS agreement shall not be changed or modified in any way subsequent to its extension except in writing signed by the parties.

THIS agreement forms the whole of the agreement between the parties respecting the subject matter hereto and no representation warranty or statement not included or specifically provided for herein shall form part of the agreement between the parties.

[152] However, on the same day, the lawyers for the petitioner had written to the former landlord stating that their client had entered into the sale and purchase agreement without any independent and proper legal advice.

[153] Further, it stated that the sale and purchase agreement had been executed subject to lease No. 209221, which had apparently expired on the 1st of January, 2000. However, their client had executed the said agreement on the basis that the lease had expired on

the 1st of January, 2000. Accordingly, the said lawyers had inquired from the former landlord of the respondent whether there was any arrangement with the lessee who was the respondent in this application.

The said letter is reproduced below;

> 4th April 2007
>
> Messrs Munro Leys & Co
> Barristers & Solicitors
> SUVA
>
> Attention: Miss Basawaiya
>
> Dear Sir/Madam
>
> Re: Sale of CT 3159 & 3357 by Fill Investment & Agency Ltd To Autoworld Trading (Fiji) Ltd
>
> We have been instructed to act for the purchaser in respect of the above transaction.
>
> Our Instructions are that it has executed a Sale and Purchase agreement without any independent and proper legal advise. The said agreement has been executed subject to lease No.209221, which apparently expired on 1st January 2000. This was registered on the respective Certificate of Titles but upon search neither the renewal is registered on titles or the lease itself.
>
> When our client executed the agreement, it relied on the basis that the lease had expired on 1st January 2000 and there was no renewal.
>
> However, in terms of clauses 10 and 12 of the said lease it could have been removed naturally by the lessor and the lessee our client is very much concerned if there is any such arrangement to extend the lessor's lease.
>
> In view of the above our clients' needs to know the arrangement if any between the lessor and the lessee.
>
> Could you please therefore supply to us all communication/letters etc between lessor and the lessee regarding the renewal of the lease at least from a year before its expiry to-date.
>
> Our client is interested to proceed to settlement at the earliest upon clarification of the above issue.
>
> Could we have your client's response as soon as possible.

Yours Faithfully,

MAHARAJA CHANDRA & ASSOCIATES

Per ……

Mr. Suresh Chandra/mt

cc. Mr. Ravin Lal – Fax No. 3381388

[154] Responding to the said letter dated 4th of April, 2007 the said landlord has sent a response on the 19th of April, 2007. The said letter, *inter alia,* states;

> "We refer to your letter of 4 April 2007. With respect to your instructions on Autoworld's lack of 'independent and proper legal advice', we were led to believe that Autoworld sought the advice of Khan & Co (which explains why that firm is referred to in clause 17).
>
> You say that when Autoworld entered into the sale agreement it **relied on the basis that the lease had expired on 1st January 2000 and there was no renewal.** We enclose a copy of Mr. Lal's letter dated August 2006 which is self-explanatory. Refer also the entire agreement clause, clause 22"

[155] On the 10th of May, 2007 the lawyers for the former landlord had sent a letter to the respondent informing them that their client had sold the property to the petitioner company on the 2nd of May, 2007 and that the said company was the new landlord of the respondent. Therefore, to pay the rentals to the new buyer from the month of May. Since then, the respondent has been paying the rent to the petitioner.

[156] However, on the 17th of May, 2007 the lawyers for the petitioner had sent a Notice to Quit to the respondent on the basis that the respondent was occupying the property on a monthly tenancy.

[157] A careful consideration of the aforementioned correspondence shows that the lease was extended by the parties, notwithstanding the fact that the respondent did not exercise the option given to renew the lease for a further term in terms of clause 10 of the lease agreement.

[158] Further, the above position is corroborated by the sale and purchase agreement. It is crystal clear that the petitioner was represented by a firm of lawyers at the time it entered into the said agreement.

[159] Thus, the said sale and purchase agreement demonstrates the fact that the petitioner was aware that the respondent was occupying the land and therefore, it would not get the vacant possession of the said land.

[160] Moreover, a careful consideration of the recitals of the lease agreement shows that the respondent was paying the annual lease rental in monthly instalments. In addition to the rentals, it was also paying rates to the Municipal Council.

[161] Further, even after the initial period of the lease lapsed, the respondent and the former landlord continued with the same arrangement.

[162] Moreover, after the sale of the property, the respondent and the petitioner continued with the same arrangement for a few months.

[163] Thus, I am of the opinion that the respondent was not occupying the property on a monthly tenancy but paying the annual lease rental in monthly instalments.

[164] Further, the above correspondence shows that though the former landlord and the respondent agreed to extend the lease, they had not agreed on the renewal of the lease rental. It is evident from the letter dated 7th of July, 2004.

[165] In the circumstances, I am of the opinion that the question of executing a lease or signing an addendum to the lease under consideration will not arise. Such a step would be necessary only if the parties reached consensus on all the matters relevant to the renewed agreement.

[166] In such circumstances, the question of obtaining ministerial consent will not arise.

[167] Further, obtaining ministerial consent for the extension of the lease or for a fresh lease would arise only after entering into a formal lease agreement.

The Effect of the Arbitration Clause in the Lease Agreement

[168] If a dispute or difference arose between the parties in respect of the reassessment of the rent under clause 12, such a dispute or difference should be referred to arbitration in terms of clause 14 of the lease agreement (Clauses 10, 12 and 14 were reproduced earlier in the judgment).

[169] The purpose of such a reference to arbitration is to determine the rentals that should be paid for the renewed period of the lease.

[170] In such circumstances, it is not possible to assume that the lessee should vacate the property until the reassessment of the rent is determined by arbitration and return to the property after the reassessment of the rent.

[171] Similarly, the lessee does not become a monthly tenant of the leased property until the reassessment of the rent by arbitration.

[172] However, none of the parties invoked clause 14 and referred the dispute to arbitration to reassess the rent applicable to the extension of the lease. Instead, the petitioner (new owner) sent a Notice of Quit, alleging that the respondent was occupying the property on a monthly tenancy.

[173] I am also of the opinion that the petitioner is not entitled to disregard the arbitration clause in the lease agreement and serve a Notice of Quit on the respondent. It made sections 10, 12 and 14 of the lease agreement redundant.

[174] Therefore, the authorities cited by the petitioner applicable to 'monthly tenancy' have no application to the instant case.

[175] It is pertinent to note that the petitioner made a futile effort to absolve himself from the application of clauses 2, 4 and 17 of the sale and purchase agreement that he entered into with the former landlord. I am of the opinion that it is a vital issue in determining whether the lease agreement was extended or not, and it sheds light on the entire issue of the extension of the lease by mutual consent by the parties.

[176] Furthermore, clauses 10, 12 and 14 should be read together in considering the renewal of the lease.

[177] Moreover, the issue involved before the courts below was an interpretation of clause 10 of the lease agreement and the correspondence between the parties. In fact, this is reflected in the order made by this court on the 29th of April, 2022 in deciding to consider the application for review.

[178] In fact a similar view was expressed in ***Kerala State Electricity Board v Hitech Electronics & Hydrogen Ltd 10th of August, 2005 is applicable to the instant application.*** In the said case, the Supreme Court of India held;

> "The appreciation of evidence on record is fully within the domain of the appellant court. If, on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that an error is apparent on the face of the record or for some reason akin thereto. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

[179] Thus, I am of the opinion that the Court of Appeal did not err in holding that the parties extended the lease and the absence of the ministerial consent would not vitiate the said extension of the lease.

[180] Further, the Court of Appeal did not err in coming to the conclusion that the dispute is in respect of contractual rights between a lessor and a lessee and refusing to grant special leave to appeal.

[181] For the reasons stated above, I am of the opinion that the judgment of the Supreme Court does not contain vital errors that warrant the review of the said judgment under and in terms of section 98(7) of the Constitution. Accordingly, the application to review the judgment of this court under consideration should be dismissed.

Orders of Court

(i) By majority decision the application to review the judgment of the Supreme Court dated 1st November, 2019 is dismissed.

(ii) I order a sum of $5,000 as costs to be paid to the respondent by the petitioner.

The Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Mr. Justice Priyasath Dep
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Priyantha Jayawardena
JUDGE OF THE SUPREME COURT