

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0029 OF 2000S
(High Court Civil Action No. 198 1992L)

BETWEEN:

NEMANI DRIU

Appellant

AND:

ROBERT HAROLD NETHERWOOD
JILL NETHERWOOD

First Respondent

REGISTRAR OF TITLES

Second Respondent

Coram:

Reddy, P
Tompkins, JA
Ellis, JA

Hearing:

Thursday, 7th November 2002, Suva

Counsel:

Mr. C.B. Young for the Appellant
Mr. A. Patel for the First Respondent
Mr. S. Kumar for the Second Respondent

Date of Judgment: Friday, 15th November 2002

JUDGMENT OF THE COURT

This is an appeal against the decision of Madraiwiwi J. ordering that the first respondent Mr and Mrs. Netherwood be permitted to register a second caveat against the title of the appellant to certain land known as "Naseva" on the island of Waya.

On 9 January 1971 the Netherwoods entered into a lease of the land with

the late Nikotimo Taumama for a term of 30 years with a right of renewal for a further 30 years. The relevant clauses of the lease are in these words:

"Rent: *\$300.00 per annum for the first three years of the term and \$500.00 per annum for the following two years. Thereafter rental be increased to 5% of the net annual profits derived by the lessees from operating a tourist resort on the land but in no case to be below \$600.00 per annum."*

"Bure *If and when the lessees develop the said land as a tourist resort they shall provide the Lessor with a standard bure of the type to be erected for the accommodation of guests at the resort free of charge."*

Other Conditions:

The lessees shall forthwith apply for permission from the Fiji Government to reside and carry on business in Fiji and if such permission shall be refused this agreement shall thereupon be determined provided however that no moneys paid on account of rent shall liable to be refunded."

To protect their interest as lessees the Netherwoods lodged caveat 132274 against the title to this land.

By solicitors' letter dated 22 June 1989 Mr Taumama gave the Netherwoods notice that he had applied to remove the caveat from the title. The Netherwoods rang the solicitors and learned that Mr Taumama thought the rent was in arrears. They wrote a letter to the solicitors seeking our details of payments taking this rent to 15 July 1989. This

was accepted by the lessor who wrote to the Netherwoods on 27 April 1990 to that effect. On 18 September 1990 the lessor's solicitors wrote to the Netherwoods claiming that they had been refused permission to reside and carry on business in Fiji and accordingly terminated this agreement. The Netherwoods replied claiming they had been granted permission saying :

"Thirdly, Re the condition that we apply to the Fiji Government for permission to reside and carry on business in Fiji.

This was done, and contrary to your instructions, permission was forwarded on 15th July, 1974 which read in part,

Dear Sir,

I refer to our application for a permit to enter, reside and develop and operate a tourist resort on Waya Island in the Yasawas and am pleased to advise that your application has been approved.

The approval was signed by G.B. Singh for Permanent Secretary for Labour."

Despite subsequent demands by the appellant to see the whole letter it has never been produced. There was no reply to that letter and the Netherwoods followed it up with another letter on 15 March 1991 referring to the possibility of legal proceedings to protect their lease. On the same day they wrote to the Registrar of Titles asking about the caveat and seeking his legal advice. They also wrote to the lessor's solicitors to the same effect. The solicitors replied immediately saying that their client was now handling the matter with his son Nemani Driu. On 4 July 1991 the Netherwoods wrote again to the lessor indicating they had continued to make rental payments, enquiring about the position of the caveat and seeking to resolve the apparent disputes. They again wrote to the Registrar enquiring the position.

In the meantime the application under s.110 of the Land Transfer Act 1978 (Cap.131) for removal of the caveat, and which was filed on 4 June 1989 had been actioned by the Registrar. He gave notice to the Netherwoods of it in June 1989. He said in his affidavit that as the Netherwoods had not responded within the 21 days he had cancelled the caveat on 18 March 1991. The provisions of s.110 require the Registrar to do so unless he has previously been served with an order of the Court extending the time as provided in the section. Subsection 3 of the s.110 provides:

“(3) The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit.”

The Netherwoods failed to obtain such an order and, no explanation has been tendered except what may be implied from the correspondence just referred to. The scheme of the Land Transfer Act is that a caveat gives immediate protection for unregistered interest such as leasehold, but as soon as it is challenged the caveator must obtain the Court's authority to continue it in a way that will enable the caveatee to challenge the caveat on its merits. Instead of proceeding in this way the Netherwoods wrote letters and on 1 June 1992 applied to the High Court for leave to lodge a fresh caveat. They filed an affidavit sworn in May 1992 in support doing little other than annexing correspondence. They did not disclose the rental position or the letter they

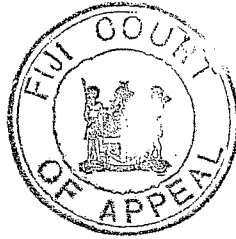
claimed satisfied the special condition in the lease. Eventually this came before Madraiwiwi J. in August 1999 and in March 2000 he granted the application. At the hearing all parties were represented by counsel but the evidence before the Judge was the 1992 affidavit of the plaintiffs, two affidavits of Nemani Driu dated 1993 and 1996 and an affidavit by the Registrar dated 1999. There was no evidence up to date as to rental or the permission from the Fiji Government. Before us the position was the same and it is therefore not possible to decide whether or not the lease is still current. From the bar it was claimed that rent had been tendered and rejected and there had been a purported application for renewal. These are the very things that would be canvassed before the Court in an application under s.110 as already discussed.

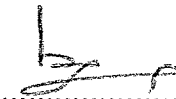
The dilatory prosecution of the application compounded by the absence of evidence tending to show the lease is still in existence lead us inevitably to the conclusion that if the appellants wish to pursue their claims they must do so by action. If they do so they can apply for an interim injunction to restrain further dealings but would be obliged to provide the evidence that is lacking in these proceedings.


Before parting with the matter we also record two further aspects of the case. Since the original caveat was removed the title has been transferred to Nemani Driu as sole beneficiary in his late father's estate. This too would have to be considered in future proceedings and any application for interim relief. The appellant also raises the question of limitation in an equitable claim. This depends on determining if and when the lease

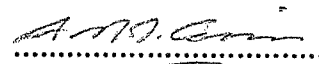
may have expired which involves the factual enquiry we have referred to, This too would bear on any further action the Netherwoods might take.

For the above reasons we consider the application should have been refused. The appeal is allowed and the application is refused. The appellant is entitled to costs which we fix at \$500.




.....
Reddy, P


.....
Tompkins, JA


.....
Ellis, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellant
Messrs. S.B. Patel and Company, Lautoka for the First Respondent
Office of the Attorney-General's Office, Lautoka for the Second Respondent