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

CIVIL APPEAL NO. ABU 68 OF 2015
(Judicial Review No.1 of 2013)

BETWEEN	:	**KILOWEN FIJI LIMITED**
		Appellant
AND	:	**1. THE DIRECTOR OF LANDS**
		2. REGISTRAR OF TITLES
		Respondents
Coram	:	**Calanchini, P**
		Almeida Guneratne, JA
		Alfred, JA
Counsel	:	**Mr. D. Sharma for the Appellant**
		Mr. J. Pickering for the Respondent
Date of Hearing	:	**17 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Calanchini, P

[1] I agree that the appeal should be dismissed with costs.

Almeida Guneratne, JA

Introduction

[2] This is an appeal from the judgment of the High Court of Suva dated 25th August, 2015. By that judgment the learned High Court Judge declined the Appellant's application for judicial review. The said application was against the decisions of the first and second Respondents to re-enter and cancel a 99 year lease (CL No. 13569) initially granted to the Appellant on the ground of non-payment (or arrears) of rental.

The basis on which the said application had been declined

[3] Three grounds could be discerned in that regard;

viz: (a) The application lacked a public law element and accordingly the procedure contemplated by Order 53 of the Rules of the High Court was not the correct procedure to have been pursued and therefore the application was misconceived;

(b) The appellant had failed to seek the alternative remedies available under the Property Law Act;

(c) Even on its merits, the Appellant had not made out a case.

The Appeal Hearing

[4] At the outset of the hearing this Court called upon the Appellant's Counsel to address on the aforesaid ground [3](a) in as much as the said ground, in this Court's view was a threshold issue.

Counsel's Submissions on the said threshold issue

[5] The Appellant's Counsel's submissions thereon may be summarised as follows:- He submitted that:

(a) Both, the 1st Respondent and the 2nd Respondent were exercising statutory functions;

(b) the lease in question was not an ordinary lease but involved the State foreshore (vide: Sections 22 and 23 of the State Lands Act) in regard to which a statutory process was required to be followed such as objections from the public having to be heard before granting the same;

(c) the Appellant (as lessee) could not accomplish the purpose for which the said lease had been obtained (the construction of a hotel) on account of other statutory functionaries imposing restrictions under the Town Planning Regulations;

(d) the manner in which the lease was cancelled by the 2nd Respondent (the Registrar of Titles) was also contrary to the requirements laid down in Section 57 of the Land Transfer Act;

(e) in any event, the Respondents had consented to leave to apply for judicial review.

[6] Thus, Mr. Sharma submitted, the public law criterion was satisfied given the fact that, the impugned cancellation of the lease was brought about by the application of a number of statutes through the actions of statutory functionaries exercising statutory power under those statutes having regard to the additional factor that the Respondents had consented to leave to apply for judicial review as contemplated by Order 53 of the High Court Rules.

The determination

[7] No doubt, the lease in question was granted by a statutory functionary (the 1st Respondent) in the exercise of his statutory power. It was cancelled by the Registrar of Titles (the 2nd Respondent) again in the exercise of his statutory power.

[8] One may even concede that, the Appellant was not able to accomplish the purpose for which the said lease had been obtained on account of restrictions imposed by other statutory functionaries under the Town Planning Regulations.

[9] But, apart from the fact that, the said other statutory functionaries had not been made parties to the Appellant's application for judicial review, the core issue to be determined is whether the matter involved a public law issue.

[10] The learned High Court Judge was guided largely by the thinking reflected in the Single Judge ruling in **Proline Boating Company Limited v. Director of Lands** [2013] FJCA 39 (per Calanchini, A. P.) In that ruling, leave to appeal to the full Court against the High Court Order refusing leave to apply for judicial review had been granted. The subsequent decision of the full Court had held that, leave to apply for judicial review ought to have been allowed. (vide: [2014] FJCA 159.

[11] The said thinking in the said Single Judge ruling in the **Proline** case (supra) was recapped by the learned High Court Judge at paragraph 3(l) of his judgment (vide: page 5 of the said judgment).

[12] The full Court in the said **Proline** case (supra) in granting leave to apply for judicial review had been struck by the fact that, the Director of Lands having issued a one-day notice for re-entry had accepted payments thereafter from the applicant in that case after the cancellation and re-entry. (vide: Paragraph 3(o) of the High Court Judgment at page 6).

[13] See also the reference made by the learned High Court Judge to the ratio in the said full Court decision at paragraph 3(q) of his judgment (supra, at page 6).

[14] Consequently, the learned High Court Judge held that, "... *in the **Proline** case, the re-issue to (a) third party in the aftermath of the cancellation, brought the dispute within the realm of public law*" (paragraph 3(p) at page 6 of the High Court Judgment).

[15] Accordingly, the learned High Court Judge held that the said **Proline** case stood distinguished from the present case on the basis that, the instant case involved decisions taken by the Respondents for breach of the lease agreement on the ground of arrears of rental" (vide: paragraph 3(p) of the said judgment at page 6).

[16] I am in complete agreement with the learned High Court Judge's reasoning in that regard and fully endorse the authorities he relied on at paragraph 3 (S) of his Judgment (at page 6).

[17] For the aforesaid reasons I conclude that, for the lack of a public element in the context of the dispute in question, the procedure contemplated in Order 53 of the High Court Act which the Appellant had pursued was misconceived.

What is a Public Law issue?

[18] What constitutes a public law issue was demonstrated clearly in **O'Reilly v. Mackman** [1983] 2 AC 237 (HL)

[19] In that case four plaintiffs, prisoners in Hull Prison, were charged with disciplinary offences before the board of visitors to the prison. In the case of each plaintiff the board held an inquiry, found the charges proved and imposed penalties. Three of the plaintiffs brought actions by writ in the Queen's Bench Division of the High Court against the board alleging that it had acted in breach of the Prison Rules and the rules of natural justice and claiming a declaration that the board's findings against them and the penalties awarded were void and of no effect. The fourth plaintiff started proceedings by originating summons in the Chancery Division against the Home Office and the board of visitors alleging bias, by a member of the board and claiming a declaration that the board's adjudication was void for want of natural justice.

[20] The House of Lords held that, since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action."

[21] In **O'Reilly's** case, there had been an infringement of prisoners rights protected by public law (by the application of prison rules). Accordingly, judicial review was held to be the correct procedure.

[22] In contrast, in the instant case, a contractual relationship was created by the private actions of the Appellant and the Respondents, that is, the relationship of a lessor and a lessee. In such a case judicial review would not be the correct procedure.

[23] As I said earlier the **O'Reilly** decision clearly demonstrates the divide between a public law and a private law issue.

[24] In the full Court decision of the **Proline** case (supra) although the matter *prima facie* appeared to be a contractual matter as between X (a private party) and Y (a statutory functionary), the issuance and cancellation by Y of the leases in question were intrinsically connected to mortgages consented to by Y involving a third party which the Court held, took the matter to the public law domain.

[25] That added factor is not present in the instant case.

[26] The aforesaid determination should conclude this appeal.

[27] However, at this point I shall briefly refer to the ground referred to at paragraph [3] (b) above. That is,

The availability of alternative remedies to the Appellant

[28] In that regard, I do not think I could add anything to the learned High Court Judge's reasoning based as it were on established precedents such as **R v. Epping and Harlow General Commissioners, exp. Goldstraw** [1983] 3 All ER 257 at p.269; **Wilkinson v. Barking Corporation** (1948)1 All ER 564 at p.567 as per Asquith CJ; **Halsbury's Law of England** Vol. 27, paragraph 442 (4th ed.) and the case of **Central Rentals Limited v Patton and Storck Limited** [1996] 42 FLR 137 at p140.

[29] As observed by Asquith, LJ in **Wilkinson v. Barking Corporation** [1983] 1 All ER 564 at 567.

> *"It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a*

specific tribunal for its enforcement, party seeking to enforce the right must resort to that remedy or that tribunal and not to others."

The factual Content (Re : Ground 3(c) referred to at paragraph 3 (c) above)

[30] The learned High Court Judge proceeded to consider the factual merits of the Appellant's application as well.

[31] In that regard also I wish to make a brief comment.

The rationale relating to disputed facts

[32] The Appellant had put in issue several factual circumstances in challenging the decisions of the Respondents that had led to the cancellation of the lease in question. Consequently, the Appellant's Counsel submitted that in such circumstances, the appellant ought not to have been regarded as having fallen into arrears of rental payment.

[33] That is not admitted by the Respondents.

[34] Thus, the matter fell into the area of disputed facts.

Is the process of judicial review the correct procedure to determine disputed facts?

[35] I think not.

[36] In that regard, Lord Wilberforce described the position of the Court which hears applications for judicial review as follows: His Lordship said:

"... evidence, as to which cross examination, though allowable, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements."

(vide: **R v. Home Secretary exp. Zamir** [1980] AC 930 at 949.

[37] Given the disputed factual context in the present case I have no hesitation in adapting the view expressed by Lord Wilberforce in that case.

[38] Accordingly, I am of the view that, for the aforesaid reason as well, the application for judicial review was misconceived.

The Appellant's contention that leave to apply for Judicial Review had been consented to by the Respondents

[39] The learned Counsel for the Appellant raised the point that, leave to apply for judicial review had been consented to by the Respondents and therefore it was not open for the Respondents to argue that judicial review was not the correct remedy for the appellant to have pursued.

[40] That contention on the part of Mr. Sharma involves a question of jurisdiction and certain legal principles adjunct thereto.

The Criterion of jurisdiction

[41] In that regard respectfully I could do no better than to reflect with approval on the thinking of Calanchini, A.P. (as His Lordship then was in the Single Judge decision of this Court in **Proline** case (supra). His Lordship said:

> *"[17]. The point is that if Order 53 proceedings are not appropriate, then there is a discretion under Order 53 Rule 9(5) given to the Court below to proceed on the basis that the proceedings had been commenced by a writ. It is on the basis, if none other, that I am inclined to grant leave to appeal so that the Court of Appeal could, if it considered it appropriate, consider the possibility of giving the necessary directions for the Court below to proceed on that basis. However, it must be noted that Order 53 Rule 9(5) can only be invoked when the relief sought is a declaration, injunction or damages. As a result in the event that the relief claimed is otherwise and relates to a private law dispute between lessor and lessees, then the Order 53 procedure was not appropriate and there would be no jurisdiction for the Court to proceed under Order 53. In my view whether Order 53 was the*

appropriate procedure is a matter for the Court of Appeal to determine as a preliminary issue."

The adjunct principles of law

[42] Thus, if the High Court was bereft of jurisdiction to hear and determine the application for judicial review for the reasons articulated earlier, the question to be addressed is, whether the Respondents, consenting to the application for leave to apply for judicial review could have in law conferred jurisdiction on the Court.

Could parties by consent confer jurisdiction?

[43] It is a well established principle of law that parties cannot by consent confer jurisdiction on a court or tribunal.

[44] As Lord Reid said in **Essex Incorporated Congregational Church Union v. Essex Country Council** [1963] AC 808:

> *"... it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."*
>
> (at pp. 820-21 per Lord Reid)

[45] Accordingly, I reject the contention of the Appellant's Counsel referred to above.

Conclusion

[46] For the aforesaid reasons, I affirm the judgment dated 25th August, 2015 of the learned High Court Judge and dismiss the appeal with costs.

Alfred, JA

[47] I have read, in draft, the judgment of Almeida Guneratne JA and agree with his reasons and the decision.

Orders of Court

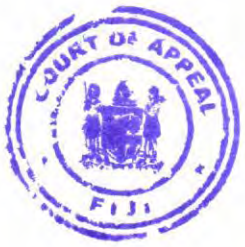
1. *The appeal is dismissed.*

2. *The judgment of the High Court in declining the application for judicial review of the decisions of the first and second Respondents to re-enter and cancel the lease in question is affirmed.*

3. *The appellant is ordered to pay as costs of this appeal to the Respondents a sum of $3,500.00 summarily assessed.*

4. *This shall be in addition to the sum of $3,000.00 ordered by the High Court by its Judgment dated 25th August, 2015.*

Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice D. Alfred
JUSTICE OF APPEAL