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

Civil Appeal No. ABU 0045 of 2016
(High Court Civil Action No. HBE 405 of 2008)

BETWEEN	:	**TOM WYNYARD & GULF PACIFIC LIMITED** ***Appellant***
AND	:	**THE TRUSTEES OF THE COLONY OF FIJI OF THE METHODIST CHURCH IN FIJI& MCF HOLDING TRUST** ***Respondents***
Coram	:	**Basnayake JA** **Lecamwasam JA** **Guneratne JA**
Counsel	:	**Mr. P. I. Knight for the Appellant** **Mr. S. Valenitabua for the Respondents**
Date of Hearing	:	**11 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Basnayake JA

[1] I agree with the reasons, conclusion and the proposed orders of Lecamwasam JA.

Lecamwasam JA

[2] This is an appeal filed by the Appellant against the judgment of the learned High Court Judge at Suva on 31st March 2016 on the following grounds of appeal:-

(1) That the learned Judge erred in fact and in law in finding that the exercise of the option to enter into a development lease of Kaba Island was conditional upon the first named Appellant obtaining a feasibility report and necessary approvals, that as the first named Appellant failed to obtain a feasibility report, the first named appellant was in breach of the option agreement dated 20th May 2005.

(2) That the learned Judge erred in fact and in law in not finding that by accepting the exercise of the said option, the respondents were estopped from alleging that any preconditions for the exercise of the said option by the first named appellant(which are denied) had not been satisfied.

(3) That the learned Judge erred in law in finding that the first named Appellant had breached the said option agreement by not obtaining a feasibility study when the first named and / or the second named respondent had not pleaded such a defence in their defence to the statement of claim.

(4) That the learned Judge erred in fact in finding that there was no evidence that the first named and/or the second named respondent/s failed to provide any assistance to the first named appellant and/or the second named Appellant in applying to the Minister for Lands under the Land Sales Act for approval of the issue of the said development lease.

(5) That the learned Judge erred in fact and in law in finding that the exercise of the option was illegal as the consent of the Minister of Lands under the Land Sales Act had not been obtained.

(6) *That the Learned Judge erred in law in finding that the exercise of the option by the first named Appellant was illegal under the Lands Sales Act as the consent of the Minister of Lands had not been obtained when the first named Respondent and/or the second named Respondent had not pleaded such a defence in the defence to the statement of claim.*

(7) *That the learned Judge erred in failing to find whether the second named Appellant in whose favour the development lease was to be issued was a resident for the purposes of the Land Sales Act.*

[3] The facts of this case are succinctly stated by the learned High Court Judge in the very first paragraph of the judgment in the following manner:-

> *"....the subject matter was an island, namely Kaba Island and an options agreement was entered for purposes of obtaining a feasibility report and necessary approvals for development of it. The said agreement contained certain obligations on parties. The Plaintiff had not complied with the said agreement, gave notices of the exercise of the options. The plaintiff filed his action against the two defendants seeking specific performance of the option agreement and/or damages in lieu of that. The plaintiff also claimed a lien over the subject matter (Kaba Island) of the option agreement (OA). The plaintiff alternatively claimed damages for the breach of contract. When the parties entered into the "option agreement", it was envisaged to carry out a tourist resort operation in the island of Kaba subject to certain conditions as seen in the development option agreement. The decision of the whole case seem to be revolving around the issue of approval of the feasibility study as contained in Clause 1 of the Agreement which states thus:-*

1. *"..that in consideration of the sum of ... payable by the developer to the owner on the execution by both parties on this agreement, the owner shall grant to Tom Wynyard of Gulf Pacific Private Limited, an option to lease Kaba Island subject however to the* ***satisfactory completion of an approval of the feasibility study."*** *(p.81 of HCR)*

[4] The learned High Court Judge in paragraph 40 of his judgment held as follows:-

> *Conclusion*
>
> *[40.] "The feasibility study was a primary requirement under OA. The other essential requirements were contained in Clause 3 of the OA. The plaintiff's failure to comply with those provisions had resulted in the non - execution of DL. There was no breach of contract from the defendant as they were prevented from any form of negotiation about DL due to the actions of the Plaintiff. A project as outlined in Clause 2 cannot be approved without a feasibility study, environment impact assessment and also other necessary consents from the relevant authorities. So the action for specific performance and/or damages fails. At the same time the action for breach of contract by the defendant fails. The plaintiff had also claimed a lien over the land. There cannot be common law lien over the said land. No submission was made on this point, either at the hearing or in the written submissions. The action is dismissed and struck off. Considering the circumstances of the case, I do not award any costs."*

[5] As per Clause 2 of the Agreement, it was agreed that the option shall remain open for a period of one year from the date of the agreement, which is from 20th May 2005. It is evident the time period given to exercise the option was initially one year but the failure to fulfil the requirements led to the extending of the agreement for another period of 6 months.

[6] However, the developer intimated to the respondents his/its' intention to exercise the option by 17th November 2006, i.e. two days before the expiry of the period which the respondents rejected by way of letter dated 21st November, 2006. After lengthy correspondence between the parties, on 20th August, 2007 the Respondents again accepted the exercise of the option in the following manner:-

> *"...further to our letter of 1st August 2007, we confirm, that our client, NCFHT held its Board's meeting on 6th August, after considering the 'pros and cons' of the various options now available to them which I included in my presentation, the full Board unanimously agreed to accept the exercise of the option by your client".*

[7] It is hence evident that the Respondents have accepted the exercise of the option by the Appellant on 20th August 2007, even though they had previously rejected the exercise of the option on 21st November 2006. Then the story yet again took a different turn by letter dated 16th September 2008 (page 283 of HCR) according to which the Respondents had withdrawn entirely from the transaction which prompted the Plaintiff/Appellant to file the writ of summons dated 11th November 2008.

[8] As correctly identified by the learned High Court Judge, the entire dispute pivots around the absence of the feasibility study, required as per the option agreement the parties have entered into on 20th May 2005. If I may repeat paragraph 1 of the above agreement;

> "**NOW THEREFORE THE PARTIES HERETO HAVE AGREED AS FOLLOWS:**
>
> 1. *THAT in consideration of the sum of .....payable by the developer to the owner on the execution by both parties of this agreement the owner shall grant to TOM WYNWARD of GULF PACIFIC PTY LTD an option to lease KABA Island subject however to the satisfactory completion of and approval of the feasibility study."*

[9] In agreeing to the content of the above paragraph, the owner had without doubt agreed to lease out Kaba Island as per the option agreement, provided the conditions stated above were satisfactorily fulfilled.

[10] Hence it is crystal clear that the "satisfactory completion and approval of the feasibility study" is a condition precedent to the eventual grant of the development lease, the importance of which has been pointed out and emphasised by the Respondents throughout the case.

[11] The insistence on the completion of the feasibility study by the Respondents is evident by e-mail dated Tuesday, 31st October 2006 (page 165 HCR), in which the Respondents have stated as follows; *"we are quite happy to meet. However, I wish to remind you of the Clause 2 of the Option agreement and in that you have yet to submit a complete feasibility study for the approval of the Board of Trustees"*

[12] Subsequently, on 15th November 2006, the respondents have re-reminded the Plaintiff of his obligation to complete the feasibility study by way of letter forwarded by the Solicitors of the Respondents, the content of which points indelibly to the fact that the Respondents continued to be keen in the completion of the feasibility study. It says; "following *on from our client's letter of 25th August, 2006, we are instructed to advise you that the following issues remain unresolved preventing the exercise of the option. They are:-*

> *1. Feasibility Study*
>
> *The option agreement states the exercise of the option is "subject to the satisfactory completion and approval of the feasibility study for the development generally in accordance with the intent of Clause 2 – Clause 2 further defines this as " the developer should direct his feasibility study toward the development of one or more tourist operations..."*

[13] Cumulatively, these correspondences make it abundantly clear that the requirement of the completion of the feasibility study is not only stated in the option agreement itself, but also the respondents were conscious of the completion and approval of the feasibility study which led them to mention it whenever an occasion arose. Therefore it is not permissible for the appellants to consider the above condition as an insignificant provision. As the whole agreement is based on the above condition precedent one cannot overlook it in his haste for legal relief.

[14] I have lent my attention to the various reports prepared by Tonkin and Taylor, Orton Architects, Macquarie Assets Services Ltd, Bayleys Evaluation and Consultancy Services, etc. which demonstrate that the Appellants were committed to and keen on the successful completion of the preliminary work related to the feasibility study and had in fact expended quite a sum over these reports. Yet they have failed to fulfil one of the cardinal requirements of the option agreement which is a *"sine qua non"* of the said agreement. Therefore, it is clearly the failure on the part of the Appellants that resulted in the fall of the contract.

[15] While the Respondents too are not without fault to a certain degree in the failure of the performance of the contract, as without doubt the respondents have at different times taken different positions which is reflective of their inconsistent conduct in relation to this transaction as stated previously, the Appellants bear the onus.

[16] It was the fault of the appellants which contributed to the failure of the agreement in not obtaining the approval of the Respondents prior to the exercise of the option being conveyed to the respondents.

[17] In their objections, the Appellants have taken up the position that the respondents have not pleaded as to the absence of approval of the feasibility study and the relevant Minister's consent.

[18] At the stage of the pre-trial conference, under agreed issues, parties have agreed in paragraph 2.2 to the following issue: "*Is the 2nd Defendant entitled to decline entering into the development lease until it has agreed with the final terms and conditions of the said development lease?*"

[19] When it refers to terms and conditions, it invariably includes the feasibility study without which the option agreement cannot proceed to achieve a development lease. Therefore, even if the appellants succeed as to the position taken up in relation to the Minister's consent, I hold they cannot clear the hurdle of condition precedent which lies in the approval of the feasibility study.

[20] Hence, on the ground of the absence of approval in regard to the feasibility study alone, I would dismiss the appeal of the Appellant. Further, in this circumstance it becomes superfluous to consider whether the prior ministerial consent is necessary or enquire into the issues of whether the 1st Appellant is a foreigner affecting his legal capacity to own property, etc.

[21] When the grounds of appeal are considered cumulatively, I hold that these grounds cannot succeed for the reasons I have already stated above. The appeal is dismissed and parties to bear their own costs.

Guneratne JA

[22] I agree with the reasons, conclusion and the orders proposed by Justice Lecamwasam.

The Orders of the Court are:

1. *Appeal dismissed.*
2. *Parties to bear their own costs.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL