

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 184 OF 2014

BETWEEN : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** a duly incorporated Company having its registered office at 11 Kennedy Street, Martintar, Nadi.

PLAINTIFF

AND : **DENARAU CORPORATION LIMITED** a company duly incorporated under the laws of Fiji having its registered office at Level 10, FNPF Place, 343 Victoria Parade Suva in the Republic of Fiji.

DEFENDANT

Appearances

Mr A K Narayan for plaintiff

Mr S A Lateef for defendant

Date of Hearing : 21 January 2015

Date of Judgment : 24 February 2015

J U D G M E N T

[1] By Originating Summons ('OS') filed on 11 November 2014 plaintiff seeks the following declaration and orders:

1. *A declaration that the Defendant's refusal to grant development permission or consent and the withholding thereof to construct a residence on*

Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 situate on Denarau Island on the grounds that a shareholder of the Plaintiff, Deo Family Trust, owes levies for its own properties to the Defendant is unreasonable, unjustified, without any legal basis and wrong in law.

2. *An order that the Defendant forthwith issue the development consent to the Plaintiff submitted on 8th April 2014.*
3. *The Defendant do pay damages to the Plaintiff to be assessed.*
4. *Such other declarations and orders as this Honourable Court may deem just and expedient including injunctive reliefs to restrain the Defendant from interfering with the Plaintiff's use and enjoyment of its property covered by Certificate of Title Number 35924.*
5. *The Defendant pay the costs of this application and proceedings on a Solicitor/Client full indemnity basis.*

[2] The plaintiff relies on the following documents in support of his OS.

- i. Affidavit of Vimal Deo (VD's affidavit) sworn on 12 November 2014 and documents annexed thereto.
- ii. Pleading and Affidavits in Action No.32 of 2013.
- iii. Affidavit in Reply of Rupeni Fonmanu (Rupeni's Affidavit) sworn on 17 December 2014

[3] At hearing, the matter was orally argued and both parties have tendered their respective written submissions.

Background

[4] Deo Construction Development Company Limited ('DCDCL'), the Plaintiff is in the investment, development and construction business. DCDCL acquired a vacant section of land comprised in Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 with restrictive covenant number 502650. This land is a waterfront lot situated in the

residential precinct known as “Sovereign Quays” on Denarau Island. It acquired this land from Coptic Orthodox Church Victoria Property Trust (‘COCVPT’) and the transfer formalities were completed on 23rd August 2014. During the course of completion of the acquisition of the above land DCDCL on 8th April 2014 applied for development consent from Denarau Corporation Limited (‘DCL’), the defendant. DCDCL’s development plan is for a construction of a residence. DCL’s approval is required before the Nadi Rural Local Authority, in whose jurisdiction Denarau falls, will process and approve the plans. DCDCL lodged the application form and paid the fee to DCL for which it gave a receipt. DCDCL did not receive a response from DCL. By 19th May 2014 Mr Deo Vimal, director of DCDCL spoke by phone to Mr Rupeni Fonmanu and Mr Roneel Deo who are employees of DCL. On 6th June 2014 DCL rejected the application citing that DCL was not the registered owner of the property and alleged that Deo Family Trust (DFT) a major shareholder of DCDCL owed outstanding levies to DCL. DCL advised that the consent will only be considered provided the DCDCL becomes the registered owner and that the levies owed to DCL are fully paid up. DCDCL commenced these proceedings seeking declaration and damages for wrongfully refusing to grant consent to development plan.

Determination

- [5] By letter dated 6 June 2014 DCL refused to grant development consent to the plaintiff for the following reasons:
- i) That the plaintiff is not the registered owner.
 - ii) That DFT owed levies to the defendant in respect property the trust owed and the trust was a shareholder of the plaintiff and its trustee a director.

- [6] DCL had refused development consent for the plaintiff in respect of its land on the Denarau Island on the grounds stated above. I will deal with those grounds in turn shortly.

Irregularity of Originating Summons

- [7] It seems to me that the defendant has taken an issue with regard to OS in that the defendant says it is irregular as it does not state which HCR or Acts of law the plaintiff is seeking its injunctive relief and its declaration under. It should be noted that the defendant itself does not state that which HCR or Law requires the plaintiff to state in the summons the rule under which the application is made. According to the defendant, it is considered a matter of practice that such a description is provided to guide and explain to the court and other parties to the proceedings what the application was made pursuant to.
- [8] Mr A K Narayan, counsel for the plaintiff submits that, OS is not irregular as it complies with HCR in accordance with the 'Forms' found in the Appendix.
- [9] It is pertinent to note that what O. 7, r. 3 (1) requires OS to state in addition to the relief sought. O.7, r.3 (1) provides:

'3.-(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

(2)Order 6, rules 3, 4 and 7 shall apply in relation to an originating summons as they apply in relation to a writ.'

[10] OS filed by the plaintiff states that the defendant unreasonably refused the development consent and seeks declaration, injunction and damages hence it includes a concise statement of the relief claimed in the proceedings with sufficient particulars to identify the cause of action in respect of which the plaintiff claims that relief as required by O.7, r.3 (1). In any event, failure to state in OS under which HCR or law the application is made is not fatal and the defendant will not be prejudiced thereby. I therefore reject the objection raised by the defendant that OS filed by the plaintiff is irregular.

Development Consent

[11] Mr Lateef, counsel for DCL submits that, DCL has the absolute discretion on granting consent for development under Article 44.2 of its Article of Association (AOA) which states:

- (a) *“Every application for development consent must be referred to the Development Review Committee for its opinion, provided that if the application relates to development which the board, in its absolute discretion, considers is de minimis, the Board may determine that the application not be so referred;*
- (b) *In considering whether or not to grant the development consent, the Board must take into account the opinion of the Development Review Committee. If the Board reaches a decision which departs from or substantially conflicts with the opinion of the Development Review Committee, such departure or conflict must be for good reasons;*
- (c) *Any Director voting on a decision made under this Article must declare any interests.*
- (d) *The Development Review Committee shall include a suitably qualified architect, landscape architect and civil engineer and such other appointees as the Board considers fit.”*

[12] The requirement for development consent is stated in Article 44(2) of the AOA and Clause 7 of the Charter which states:

“A development consent from DCL is required for any of the following on owner’s land-

- a) Erection, construction or installation of buildings or other things in the nature of fixed improvements which exceed 2 square meters in area and/or 2 meters in height;*
- b) Engineering works such as (but not limited to) foreshore stabilization, laying of underground services, roadways, car parks and outdoor lighting but excluding normal maintenance, repair or replacement works;*
- c) Landscape works, including planting, pools, ponds, waterways, paths, wall and feature lighting but not mere replacement of any of them with a thing which is of the same kind and scope and which otherwise meets the criteria in clause 7.5; and*
- d) Any signage external to a building (but including any mounted on a building)”.*

[13] The plaintiff acquired a vacant section of land comprised in Certificate of Title 35924 being Lot 6 on Depicted Plan 9135 with restrictive covenant number 502650 from COCVPT. This land is a residential site in the residential precinct on Denarau Island. The plaintiff intends to build a residence on the land with intention of letting it out on rental. As required by DCL under its AOA the plaintiff applied for development consent by lodging an application and paying the required fee.

[14] DCL refused to grant the development consent to the plaintiff. By letter dated 6 June 2014 DCL informs the plaintiff as follows:

‘Friday 06th June, 2014

*Attention: Mr Vimal Deo
Deo Construction Development Co. Ltd
P O Box PD 73 Port Denarau, Nadi*

Dear Sir

Re: LOT 6 SOVEREIGN QUAYS – HOUSE APPLICATION

We refer to the above.

Having reviewed your application, we note that Deo Construction Development Company Limited (DCDCL) is not the registered owner of Lot 6 Sovereign Quays. The current registered owner is the Coptic Orthodox Church. Development Consent is only granted to the registered owner of land. Since DCDCL is not the registered owner, your application for development consent has been unsuccessful.

Please note that the Denarau Corporation Ltd Board resolved that no development approval shall be granted to owners of land that have outstanding levies due to DCL. Our recent company search confirms that Deo Family Trust is the major shareholder of DCDCL with a 99% shareholding. With an overdue account of over 90-days, the Deo Family Trust is required to fully settle its arrears with DCL. Therefore, until DCDCL is the registered owner of Lot 6 Sovereign Quays, and only when all outstanding levies payable by the Deo Family Trust are cleared will DCL consider any application for development consent.

Please contact the undersigned for any further clarification required on above matter.

Kind regards.

*Sgd-
Roneel Deo
For Development Review Committee
Denarau Corporation Limited
...'*

- [15] It is interesting to note what DCL states in its affidavit in response sworn through Mr Rupeni. In paras 7, 8, 9 & 13 Mr Rupeni states that:

- '7. All the owners of the properties on Denarau Island pay levies as it is essential for the maintenance and up keep of the island. It is not fair on other owners when people like the Plaintiff do not pay. The Plaintiff has historically been in the habit of defaulting in its payment.*
- 8. The Plaintiff has been informed that development consent will not be granted until all levies that his related entities owe pay up what is rightfully due to the Defendant. Article 44.2(a) and Restrictive Covenant 2(a) refers.*
- 9. The Defendant has the discretion as to whether or not Development Consent is granted to an applicant as it is the regulating body of Denarau Island and must be seen to be properly carrying out its duties.*

13. *The Defendant denies that the Plaintiff would suffer any loss of income due to the fault of the Defendant as when initially the application was made by the Plaintiff it was not the owner of the said property. Subsequently on numerous occasions the Defendant has informed the Plaintiff in writing of the arrears on other properties controlled or owned or related to the Plaintiff and has refused consent based on that stated in paragraph 8 herein.'*

[16] Pursuant to Article 44.2 (a), every application for development consent must be referred to the Development Review Committee (DRC) for its opinion. However, if the application relates to development which the board, in its absolute discretion, considers it *de minimis*, the Board (Directors for the time being of DCL) may determine that the application not be so referred. So the board has absolute discretion not to refer an application for development consent when they consider such application *de minimis* (insubstantive). Apparently, the plaintiff applied for development consent to build a residence. Its application could not be considered *de minimis* hence the board must have referred it to DRC and must have taken into account its opinion before taking any decision on the plaintiff's application. This procedure is required by Article 44.2 (a). I could not find any material before me that suggests that the requirement that the plaintiff's application was referred to DRC and that its opinion was taken into by the defendant before taking a decision on the plaintiff's application.

Composition of Development Review Committee (DRC)

[17] DRC, according to Article 44.2 (d), shall include a suitably **qualified architect, landscape architect and civil engineer** and such **other appointees** as the Board considers fit. Basically, DRC is a four (4) member committee. The defendant must have disclosed who the members of DRC were, if there were referral to DRC and its opinion were taken into consideration before any decision taken in respect of the plaintiff's application for development consent. The defendant failed to do so. The plaintiff had a right to know who the members of DRC were.

Refusing development consent on the ground that the plaintiff is not the registered owner.

[18] One of the reasons adduced by the defendant for refusing the development consent to the plaintiff is that the plaintiff is not the registered owner.

[19] The application for consent was lodged on 8 April 2014 when acquisition of the land was not complete. The transfer was completed and the plaintiff became the proprietor of the land on 13 August 2014. This change of circumstance was duly informed to the defendant.

[20] As there was delay in processing the application for consent the plaintiff had few telephone conversations with Mr Rupeni and Mr Roneel Deo (employees of DCL) and afterwards wrote a letter to Mr Rupeni on 20 May 2014. The content of that letter is as follows:

‘ ...

Re: Subject House Application for Lot 6 Sovereign Quays

Further to our telephone conversation yesterday with you Roneel Deo, we write to advise the following:

- 1) Roneel Deo advised that our plan for the above Lot is approved, he cannot give DCL's letter because there is Levies due.*
- 2) This discussion was carried out when we submitted Lot 6 paradise Point Plan.*
- 3) We have incurred losses of approximately but not limited to \$250,000.00 in delay and we will claim for this in due course.*
- 4) You have stopped out letter for approval on Lot 6 SQ therefore we now have same claim for deliberate delays carried out by you, DCL and the Board of DCL.*
- 5) You advised DCL Board has stopped the approval letter, now we claim against DCL Board as well.*
- 6) Enclosed our lawyer's letter dated 15th November 2012 on the same issue.*

We look forward to your prompt attention and should you require further clarification then please contact us.

Yours faithfully,

Sgd-

Vimal Deo

Managing Director

cc. AK Lawyers'

- [21] By letter dated 6 June 2014 Mr Rupeni replied to the plaintiff that, having reviewed your application, we note that DCDCL is not the registered owner of Lot 6 Sovereign Quays and that the Denarau Corporation Limited Board resolved that no development approval shall be granted to owners of land that have outstanding levies due to DCL.
- [22] The fact that the plaintiff is now registered owner of Lot 6 SQ was informed to the defendant through its solicitors by letter dated 20 August 2014 ('VD7').
- [23] It will be noted that AOA or Charter does not make it precondition that an application for development consent must be lodged by the registered owner of the land for which the consent is sought. An application for consent may be made through agents such as architect and building engineer. The plaintiff should not have accepted the application and the fee in the first place if it were a requirement that an application for development consent must be made by the registered owner. I am of the view that refusing development consent on the ground that the plaintiff is not the registered owner of the land is unreasonable and unjustifiable.

Refusing to grant consent on the ground that Deo Family Trust owes Levies to DCL

- [24] The second ground for refusing to grant development consent to the plaintiff is that the DFT owes levies to the defendant in respect of

property the trust owned and the trust was a shareholder of the plaintiff and its trustee a director.

- [25] It was submitted on behalf of the defendant that, the plaintiff Company's owner has defaulted on payment of the levies but under separate entities. The Defendant's decision to refuse consent was based on the knowledge that the Plaintiff had outstanding levies on Lots 7 + 11 of the Industrial Area on Denarau Island. Proceedings were subsequently initiated by DCL in the High Court seeking Summary Judgment (High Court Civil Action No. 32 of 2013). It was also submitted that, DFT and the plaintiff Company are owned and managed by the same person, Vimal Deo. It is essential to see the merits of this case by considering and revealing the corporate personality behind the two entities especially with the history of evading levies by the owner of the plaintiff Company.

Civil Action No. 32 of 2013

- [26] DCL (the defendant in this case) instituted proceedings under action number 32 of 2013 against Vimal Deo in his capacity as the Trustee of DFT (not the plaintiff) to recover outstanding levies on Lots 7 & 11 of the Industrial Area of Denarau Island. DCL has applied for summary judgment in that case. Decision on that application is pending.
- [27] The plaintiff in this case is **DCDCL** and not **Vimal Deo**. Mr Vimal Deo is the Managing Director of DCDCL. He is also Trustee of DFT, the defendant in action number 32 of 2013.
- [28] Consent for development has been refused on the ground that DFT, a majority shareholder of DCDCL owed outstanding levies to DCL.
- [29] The issue that DFT owes outstanding levies to DCL in respect of Lot 7 & 11 is a separate matter which is *sub judice*. In action 32 of 2013, DFT has disputed the claim brought in relation to outstanding levies and filed a defence and counterclaim.

- [30] DCDCL applied for residential developmental consent on a property on which it had no levies. DCL admits that there no outstanding levies in respect of the land (SQ Lot 6) to which the application for development consent relates. If so, DCL should have given consent to development. Refusal of consent for development on the ground that DCDCL owed levies appears to be unreasonable.
- [31] Moreover, there no provision in AOA or in the Charter that consent for development may be refused if there is any levy outstanding in respect of any land to which the application for development consent relates. It follows that the Board cannot introduce any additional condition for granting consent for development. In this instance, the Board has imposed an additional condition that unless the outstanding levies to DCL are paid up consent for development will not be granted when in fact DCDCL had no outstanding levies.
- [32] The Board that has authority to grant consent for development of land on Denarau Island should not refuse its consent unreasonably. Refusal to grant consent for development unreasonably would be tantamount to abuse of its power and discretion. Not only must the Board not allow itself to be dictated to in the exercise of its regulatory discretion, but also it must not impose rigid or unreasonable conditions for the exercise of its discretion.
- [33] The Board in this case dictated unreasonable terms, terms that are not permitted under their constitutional documents, for granting development consent to the plaintiff. The Board imposed the condition that plaintiff should pay up all its outstanding levies to DCL when in fact the plaintiff had no outstanding levies.

Lifting of Corporate Veil

- [34] Mr Lateef, counsel for DCL submits that, DCDCL is owned by DFT, thus DFT owns Lots 7 & 11 in the Industrial Area on Denarau Island. The plaintiff (DCDCL) has chosen to elude the defendant (DCL) by

hiding behind its corporate veil. In essence, his submission is that DCDCL and DFT is the same person evading the levies. He cited few case authorities that dealt with piercing of corporate veil.

- [35] As noted above in this judgment, DCDCL has no outstanding levies to DCL. It is alleged that DFT owes levies to DCL in respect of Lots 7 & 11. A separate action (32 of 2013) is pending in this regard. Since there is no allegation that DCDCL has outstanding levies to DCL, I do not think there is any need to look behind its corporate veil.
- [36] It is well-established principle of company law that a company is separate and distinct legal entity different from its shareholders. The company has its own *locus standi* as a legal entity, see **Salomon v A. Salomon & Sons** [1897] AC 22. The liability of shareholders is therefore limited to the extent they have contributed to company's capital. Thus, the company acts as a shield to protect the assets of the shareholders from personal liability. Due to these rooted principles, the courts are cautious in piercing or lifting the corporate veil.
- [37] It is common knowledge that, the Courts generally show willingness to 'lift the veil' where the device of incorporation is used for some illegal or improper purpose, see **Merchandise Transport Ltd v British Transport Commission** [1962] 2QB173 and **Jones v Lipmann** [1962] 1WLR 483 (cited by FCA in **RC Manubhai & Co. Ltd v Herbert Construction Company (Fiji) Ltd** [2014] FJCA 175, ABU0002.2010 (29 May 2014)).
- [38] To pierce the corporate veil, the defendant must adduce some cogent evidence that DCDCL's corporate veil is used for some illegal or improper purpose. I find no evidence whatsoever that DCDCL is using its corporate veil to defraud DCL other than the plaintiff's assertion that DCDCL is hiding behind an entity which is no reason to default in payment.

Damage

[39] Whether the plaintiff is entitled to damage. The plaintiff seeks damages to be assessed as refusal to grant has caused delay in the construction and this has led to loss of potential income for the plaintiff. In para 13 of its affidavit in support the plaintiff states that:

‘The plaintiff intends to construct a residential building on the property and let it out for rental. There is currently shortage of properties for residential lettings in Denarau. The plaintiff has been in the business of letting out properties since its inception in 1993. The plaintiff currently owes four properties in Denarau out of which three are on rental. The subject property has not been built on. The refusal by the defendant to grant consent has caused delay in the construction and this has led to loss of potential income for the plaintiff.’

[40] Award of damages is a private law remedy. To obtain an award of damages it is necessary that the plaintiff has suffered a private law wrong such as breach of contract. An award of damages may also be granted on the ground that the defendant has acted wrongfully in refusing to grant development consent. The plaintiff has proved a causal link between the wrongful decision and the loss suffered. The plaintiff applied for development consent to build a residence to rent it out and earn income. The consent has been refused wrongfully by the defendant. The refusal to grant consent has caused delay in the construction. The plaintiff suffers loss as a result of the defendant’s wrongful decision. I feel the plaintiff is entitled to an award of damages. I would therefore order the defendant to pay damages to the plaintiff to be assessed.

Injunction & Declaration

[41] The plaintiff seeks an order in the nature of mandatory injunction that the defendant forthwith issue development consent as applied for on 8 April 2014. The defendant has refused or withheld rather the development consent after favourably considering the application

lodged by the plaintiff on 8 April 2014 seeking such consent. Mr Roneel Deo, an employee of the defendant had advised the plaintiff over the phone that plan for Lot 6 SQ is approved, he cannot give DCL's letter because there is Levies due. This has been confirmed in the letter dated 20 May 2014 ('VD5') sent to Mr Rupeni by the plaintiff. It should be noted that consent was withheld after approving the plaintiff's plan by the Board for the reasons not found in the DCL's constitutional documents such as the Charter, AOA and By Laws.

[42] Mandatory injunction may be granted when the case is unusually strong and clear, even if it is sought to enforce a contractual obligation. The plaintiff, in my opinion, has established a clear case for mandatory injunction. I therefore grant the injunction sought in OS with declaration that the Defendant's refusal to grant development permission or consent or the withholding thereof to construct a residence on Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 situate on Denarau Island on the grounds that a shareholder of the Plaintiff, Deo Family Trust, owes levies for its own properties to the Defendant is unreasonable, unjustified, without any legal basis and wrong in law.

Costs

[43] The plaintiff asks for costs on the solicitor/client indemnity basis. The plaintiff is entitled to be indemnified against the expense to which has been put by litigation for attainment of justice. I think it appropriate to order costs to be assessed on the solicitor/client basis.

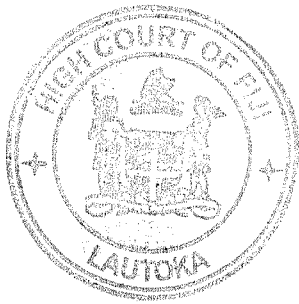
Conclusion

[44] To conclude, for all these reasons, I give judgment in favour of the plaintiff. I accordingly grant orders in terms of prayers 1, 2, 3 & 5 of the originating summons filed by the plaintiff on 11 November 2014.

Final Orders

[45] I would therefore make the followings orders:

- a) Enter judgment in favour of the plaintiff.
- b) Grant orders in terms of prayers 1, 2, 3 & 5 of the originating summons filed by the plaintiff on 11 November 2014.
- c) The plaintiff is entitled to costs to be assessed on the solicitor/client indemnity basis.



M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
Puisne Judge

At Lautoka

24/02/2015

Solicitors:

For plaintiff: Messrs A K Lawyers, Barristers & Solicitors

For defendant: Messrs Lateef & Lateef Lawyers, Barristers & Solicitors