IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

CIVIL APPEAL NO:CBV0003 OF 1994
(Fiji Court of Appeal No. ABU0032 of 1994)

BETWEEN:

MITCHELL LIMITED

Appellant

A N D:

ROBERT YOUNG
ALFRED YOUNG

Respondents

Coram: The Hon. Sir Timoci Tuivaga, President
The Right Hon. Lord Cooke of Thorndon
The Hon. Sir Anthony Mason

Hearing: 3 September 1996

Counsel: V. M. Mishra for the Appellant
A. Patel for the Respondents

Judgment: 12 September 1996

JUDGMENT OF THE COURT

This is an appeal by Mitchell Limited ('the company') from a judgment of the Court of Appeal (Tikaram P., Williams and Dillon JJ.A.) delivered on 25 August 1993 dismissing an appeal from Sadal J., who in the High Court on 8 July 1994 dismissed a claim by the company against the respondents for loss and other damages for breach of contract.

The case relates to land in Housing Authority lease No. 203460 being lot 16 on Deposited Plan 4297 situated in Naigaga Street, Lautoka. On the land there is a factory building and office floor, and also two flats. By a memorandum of agreement dated 15 November 1990 the respondents, who were the registered proprietors, agreed to grant and the company agreed to take a tenancy of the whole property for a term of six years commencing on 1 December 1990 with a right of renewal for one further term of six years and also an option to purchase at a price to be negotiated. The initial rent was $4,400 a month; it was to increase in steps, first to $4,840 and then to $5,324 a month.

The agreement was drawn up by the company's solicitors, Messrs Young & Associates. No solicitor acted for the respondents. Both parties were aware that at the date of the agreement the property was occupied by a garment workshop business under an existing tenancy from the respondents. It was appreciated that other acceptable accommodation would have to be found for the garment workshop.

The memorandum of agreement of 15 November 1990 provided that the landlord (the respondents) would yield up vacant possession of the flats within ninety days from the date of its execution. Curiously, there was no express provision about vacant possession of the factory and office premises; but

the case was conducted and dealt with in the Courts below on the basis that vacant possession was to be given on 1 December 1990. The evidence of the surrounding circumstances shows that the company was in urgent need of business premises. The agreement includes references to 'enjoyment' and 'full and free use and benefit'. We approach the case on the same basis.

Clause 8 provided simply: 'This Agreement is subject to the consent of the Housing Authority as Head Lessor'.

When the memorandum of agreement was executed the company's solicitors obtained the signature of one of the respondents to a form of application for Housing Authority consent to sublet. The anticipated duration of the tenancy was shown in this document as six years. Called for the company at the trial, the solicitor concerned, Mr Chen Bunn Young, testified 'Plaintiff undertook to get the consent from Housing Authority..... 27.11.90 application for consent was made'. The respondent Mr Robert Young likewise testified that Mr Young the solicitor was to make the application. So this factual arrangement is common ground.

The agreement also provided that the company might prior to the commencement of the term and during the term, at its discretion, make alterations and improvements to the premises.

Expenditure under this head is part of the $58,722 claimed for loss and damages. It is also common ground that the company never received vacant possession.

Messrs Young & Associates sent the application for consent to the Housing Authority under cover of a letter dated 27 November 1990, only a few days before the term was to commence. They wrote 'Kindly let us have your consent at the earliest'. As early as 11 December 1990 the solicitors wrote to the respondents giving notice on behalf of the company that the company thereby rescinded the tenancy agreement and treated it as having been terminated, on two grounds. Ground (a), though strangely expressed, was in substance failure to give vacant possession. Ground (b) was that consent of the Housing Authority had not been obtained. The letter demanded the return of $13,200 paid as advance rental; and this amount was returned by the respondents about a month later. Both parties thus treated their agreement as at an end. The letter of 11 December 1990 also reserved the right to take legal action for damages.

The company obtained other accommodation under a six-year lease commencing 1 January 1991. It began the present proceedings against the respondents as early as 19 December 1990. On 25 March 1991 the Housing Authority wrote to the solicitors as follows:

"HOUSING AUTHORITY

Our ref: LS/4297/16/VD

25th March 1991

M/s Young & Associates
Barristers and Solicitors
P O Box 60
LAUTOKA

Dear Sir

re: APPLICATION TO SUBLET LOT 16 DP 4297

We refer to your application dated 29th December 1990 to sublet the above property to Mitchell Ltd for a period of 1 year and are pleased to inform you that we have no objections to the subletting arrangement as applied for provided that the sum of $2802.00 is paid in full being ground rent.

Please note that this consent is valid only for the period of one year effective as from the date of this letter. In the event you wish to continue the subletting arrangement after the expiry of the period as allowed for herein, or should you wish to sublet to another within the period allowed for above, then you will need to fill in another subletting application form pay the requisite fee and forward the application for our consideration.

Yours faithfully

(EPELI NAQASE)
DIVISIONAL MANAGER WESTERN
for CHIEF EXECUTIVE
IK/EN/AK/rkn"

The evidence casts no light on the reference to an application dated 29 December 1990.

In his judgment in the High Court Sadal J. described the main defence as being that the agreement was made subject to obtaining the consent of the Housing Authority. He noted that the head lease contained a covenant by the lessee not to sublet without the consent of the lessor in writing first had and obtained. That had not been done. He found as a fact that the responsibility of obtaining the consent was undertaken by Young & Associates. He said that after the repudiation of the agreement they did get the consent but only for a period of one year. In his opinion, consent was a condition to be fulfilled before the parties were bound. As there was no consent as stipulated, neither party was bound and the company was entitled to the refund in fact made.

The Court of Appeal judgment proceeded on wider lines. They considered that the evidence established that responsibility was undertaken by Young & Associtates not only to obtain the consent of the Housing Authority but also to secure vacant possession. In both respects they regarded the failure as attributable to the company by its solicitors, not to any breach of contract by the respondents. Accordingly they affirmed the conclusion that damages could not be recovered.

In this Court the burden of the argument of Mr Mishra for the company was that the Courts below had in effect illegitimately amended the written contract of the parties. On the true construction of the document, he maintained, both vacant

possession and Housing Authority consent were the responsibility of the respondents, who consequently must be in breach of contract.

As to vacant possession, we accept that there is force in Mr Mishra's argument. When a lease or sublease requires vacant possession, it is prima facie the responsibility of the lessor or sublessor to provide vacant possession. And ordinarily that responsibility is absolute. We agree that an understanding on the part of the respondents that in fact the company's solicitors would take the necessary steps could not of itself derogate from the absolute obligation falling on the respondents in terms of the agreement.

As to Housing Authority consent, however, the position is somewhat different. It would be unusual for a party to warrant that such consent would be obtained. The brief words of clause 8 certainly fall short of a warranty. Clauses of this kind are commonly construed as impliedly imposing duties on both parties to make all reasonable endeavours, so far as they respectively can, to obtain the necessary consent. See Lipmans Wallpaper Ltd v. Mason & Hodghton Ltd. [1968] 1 All E.R. 1123; W.R. Clough & Sons Ltd. v. Martyn [1987] 2 NZLR 313; 27 Halsbury's Laws of England, 4 th ed. para 383 n. 2; 9 Halsbury's Laws of England, 4 th ed para 459.

Whether all reasonable endeavours have been made is a question of fact. The evidence can properly be looked at, and indeed must be looked at, to determine this question. It is not in dispute that an arrangement was made that the company's solicitors would in fact put in the application. Nothing more than signature was reasonably required of the respondents at that initial stage, nor were they asked to do anything more. Then the company chose to cancel the agreement only eleven days into the agreed term without asking for any further action on the part of the respondents in the matter of the consent. Whether the company acted prematurely insofar as it relied on absence of consent need not be decided, for there is no counterclaim. What is clear is that in face of the letter of 11 December 1990 the respondents could not reasonably be called upon or expected to take any further steps to procure consent. Possibly the company may in fact have taken some further step (we refer to the unexplained reference to an application of 29 December 1990) but, even when in March 1991 some consent was forthcoming, it was limited to one year and therefore did not fulfill the stipulation in clause 8. Consent to a sublease for the full six years could well have been the interests of both parties: the stipulation cannot be interpreted as for the benefit of the company alone, so it was not capable of being waived by the company unilaterally. And the company did not purport to waive it, but instead relied on it. The Housing Authority's letter shows that, even if the respondents' ground rent had been paid up, consent would not be for more than one year from 25 March 1991.

In the result the true analysis is that the agreement was subject to the consent of the Housing Authority. Full consent as required was never obtained. The failure to obtain it was not due to any lack of reasonable endeavours on the part of the respondents. The condition in the agreement to sublease was not satisfied within a reasonable time, or indeed ever, and the agreement therefore failed and was discharged. It is not necessary to consider any issue of restitution, as the advance rent was refunded. Moreover, there is no restitutionary claim: the company's claim has understandably been founded on alleged breaches of contract by the respondents. It must fail, as Sadal J. held, because through no default on the part of the respondents the agreement itself could not be implemented. The failure to give vacant possession becomes immaterial for the purposes of the action for damages.

For these reasons the appeal must be dismissed. In deference to Mr Mishra's argument we add a few words about each of the authorities cited by him on the consent branch of the case.

Mitchell, Cotts & Co. (Middle East) Ltd v. Hairo Ltd [1943] 2 All E.R. 552 was a case where under a c.i.f. contract a very different class of contract from one for a sublease, the property in goods had passed to the buyers. It was held that it was the buyers' own duty to obtain the necessary import licen thereafter. In the present case one of the respondents' duti

was to take all reasonable steps to obtain the consent, but as already explained they did not fail in that duty.

In Property and Bloodstock Ltd. v. Emerton [1967] 3 All E.R. 321 the subject matter, an assignment of a lease, was closer to the present case; but the decision was that a contract of sale by a mortgagee of the lease precluded the mortgagor's right of redemption so long as the contract of sale was subsisting; and it was subsisting because, although the consent of the lessor was necessary, it was available. But, as Sellers L.J. said at 333, if the requisite condition of consent was not performed the contract would be discharged without breach - which is this case.

Old Grovebury Manor Farm Ltd. v. W. Seymour Plant Sales & Hire Ltd. [1979] 3 All E.R. 504 held that an assignment in breach of a covenant not to assign without consent vested the lease in the assignee, on whom the landlord must therefore serve any notice of forfeiture. That case decided no question between assignor and assignee; their contractual rights inter se were not examined.

Perri v. Coolangatta Investment Proprietary Ltd. (1982) 149 C.L.R. 537 decided that, where a contract fixed no time for satisfaction of a certain condition, it had to be satisfied within a reasonable time. We are content to assume that this

applies to the condition of Housing Authority consent in the present case, although consent to the sublease as from 1 December 1990 was required. Perri also discloses a possible difference between Australian and New Zealand law, in that there the High Court of Australia held that notice making time of the essence and fixing a reasonable time was not necessary before a party could rely on such a condition, whereas in Hunt v. Wilson [1978] 2 NZLR 261 a view was expressed by one of the Judges that equity requires such a notice. The point is immaterial in the present case. The company rescinded without giving such a notice and obviously could not rely on any default on its part in that respect.

It will be seen that none of the foregoing authorities is quite in point, except the statement by Sellers L.J. which we have mentioned. Much more relevant are cases where a conditional contract is discharged because the condition is not fulfilled without the fault of either side. There is then often a total failure of consideration giving rise to a restitutionary claim (as for the pre-paid rent here). A pertinent case is Wright v. Colls (1849) 8 C.B. 150, where the plaintiff had paid money under a lease which the defendant was unable to grant, and the plaintiff was held entitled to recover that money. That is the situation here, but the plaintiff is not in our view entitled to damages as claimed for breach of a contract to sublease which,

in the event, was discharged because the essential condition of Housing Authority consent was not satisfied.

For these reasons the appeal is dismissed with costs.

Sir Timoci Tuivaga

Lord Cooke of Thorndon

Sir Anthony Mason

Solicitors

V. Mishra & Co,Ba for the Appellant
S.B. Patel & Co., Lautoka for the Respondents

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