IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji

CIVIL APPEAL ABU 0026/2023
High Court Civil Case No. HBC 70/2016

BETWEEN **TONY TESSITORE** trading as **UNDERWATER WORLD ENTERPRISE FIJI** of Vuda Point Road, Vuda, Lautoka, Business Proprietor

Appellant

AND **RUGGIERO INVESTMENT LIMITED** a limited liability company having its registered office at Vuda Point Road, Vuda, Lautoka

1st Respondent

AND **iTAUKEI LAND TRUST BOARD** a body corporate duly constituted under the iTaukei Land Trust Act

2nd Respondent

Coram **Prematilaka RJA**
Andrews JA
Andrée Wiltens JA

Counsel **Mr. M Yunus and Mr. R Prasad, on behalf of the appellant**
Mr. T Tuitoga and Mr. R Ragigia, on behalf of the 1st respondent
Mr. V Tuicolo, on behalf of the 2nd respondent

Date of Hearing : **13 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

Prematilaka RJA

[1] I agree with reasons and orders.

Andrews JA

[2] The appellant, Mr Tessitore, has appealed against the judgment of Justice Lyone Seneviratne, delivered in the High Court at Lautoka on 25 January 2023, in which he was ordered to pay the first respondent, Ruggiero Investment Ltd ("RIL") $48,961.74, together with interest, and costs of $3,000 ("the High Court Judgment").[1] An enlargement of time to appeal to this Court was granted in a Ruling delivered on 7 October 2024.[2]

Background

[3] The salient facts were not in dispute.

[4] RIL is the lessee of the property comprised in Native Lease No 20435, at Vuda Back Road, Vuda, Lautoka ("the property"). The lessor is the second respondent, the iTaukei Land Trust Board ("the iTLTB"). On 10 January 2015 RIL and Mr Tessitore entered into a written subleasing agreement, headed "The Conditions of Management Right for the Mediterranean Dining Hall and Villas Premises", under which Mr Tessitore subleased the land from RIL, for a period of five years ("the sublease").

[5] Pursuant to s 12(1) of the iTaukei Land Trust Act 1940 ("the iTLT Act"):

> *… it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void, …*

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1 *Tony Tessitore v Ruggiero Investment Ltd & iTaukei Land Trust Board* HC Lautoka ABN26.2023 (25 January 2023).

2 *Tony Tessitore v Ruggiero Investment Ltd & iTaukei Land Trust Board* [2024] FJCA 193; ABU 026/2023 (7 October 2024).

[6] Pursuant to s 12(1), the consent of the iTLTB was required to be "first had and obtained" prior to RIL and Mr Tessitore entering into the sublease. Such consent was neither sought nor obtained. As a result of the failure to obtain such consent the sublease was null and void.

[7] Between February and November 2015, Mr Tessitore paid a security bond of $18,000 ("the bond") and the $5200 (VAT excl) monthly rental. He also paid for electricity and water ("the utilities"), and undertook improvements and upgrading the property.

[8] On 16 March 2016 RIL's solicitors wrote to Mr Tessitore, requiring him to quit and deliver up vacant possession of the property by 18 April 2016. On 28 April 2016, RIL filed proceedings in the High Court at Lautoka, seeking an order to evict Mr Tessitore from the property. Mr Tessitore vacated the property on 28 October 2016.

This proceeding

[9] Mr Tessitore issued this proceeding by filing a writ of summons and statement of claim on 25 April 2016. He pleaded that RIL had breached its obligation to obtain the iTLTB's consent prior to entering into the sublease. He further pleaded that RIL was unjustly enriched by receiving the bond, rental, utilities payments, and the benefit of upgrading the property. He claimed for general damages, special damages in respect of his payments of rent and utilities, the costs of upgrading and improving the property, exemplary and punitive damages, interest, and costs on indemnity basis.

[10] RIL filed a statement of defence in which it accepted that the iTLTB's consent to the sublease was not obtained and stated that Mr Tessitore's occupation of the property was unlawful, null and void. RIL counterclaimed on the grounds that Mr Tesssitore was and remained in possession of the property as a trespasser and sought an order that Mr Tessitore deliver up immediate vacant possession of the property. RIL also counterclaimed for arrears of rent (in respect of Mr Tesssitore's occupation of the property after December 2015) amounting to $66,961.74, together with damages, aggravated damages, exemplary damages, and mesne profits for trespass, harassment, emotional distress, unpaid utilities bills, and repairs to property. RIL further sought an order restraining Mr Tessitore from molesting, stalking, annoying, harassing, assaulting Ms Taeko Ruggiero.

The High Court judgment

[11] The High Court Judge recorded at paragraph [6] of the judgment that it was admitted that consent was not obtained from the iTLTB prior to entry into the sublease. He noted that both sides' witnesses gave evidence that they were not aware of the requirement for such consent but held that that was no excuse. While not making any finding as to whose responsibility it was to obtain iTLB consent, the Judge found that the sublease agreement was null and void and unenforceable in law.

[12] The Judge held at paragraphs [9] and [10] of the judgment that Mr Tessitore was not entitled to relief on any of his claims, either because those claims arose out of payments for work done for his own benefit, or without the consent of RIL, or (in the case of the utilities) his own use of the utilities.

[13] The Judge refused RIL's counterclaims in respect of harassment and trespass. He held at paragraphs [11] and [12] of the judgment that Mr Tessitore was an "overstaying tenant", not a trespasser, and that there was no evidence of harassment. The Judge allowed RIL's claims for arrears of rent as mesne profits. He recorded that Mr Tessitore had admitted that he had not paid rent for the property for the period from 10 December 2015 up to his vacating the property on 28 October. He therefore ordered Mr Tessitore to pay rental arrears of $66,961.74, less the $18,000 security bond, resulting in a final order that Mr Tessitore was to pay RIL $48,961.74, plus interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. He also ordered Mr Tessitore to pay costs of $3,000.

Grounds of appeal

[14] Mr Tessitore's appeal was on the grounds that:

[a] the High Court Judge erred in fact and law in ordering him to pay RIL $48,961.74 for rent, despite finding that sublease was null and void and unenforceable; and

[b] the High Court judgment was not supported by evidence adduced at trial and therefore is unreasonable or repugnant to justice and as such in the interest of justice must be wholly set aside and revoked.

[15] There has been no cross-appeal by RIL.

Mr Tessitore's submissions

[16] Mr Yunus submitted on behalf of Mr Tessitore that the two grounds of appeal are interrelated, and are appropriately dealt with together. He submitted that the main challenge to the High Court judgment is against the order that Mr Tessitore pay RIL $48,961.74 for the balance of arrears of rental (after deduction of the $18,000 bond from RIL's claim), and $3,000 costs, notwithstanding that the iTLTB's consent to the sublease was not obtained. He submitted that it was agreed between the parties that the sublease was null and void because the iTLTB's consent was not obtained.[3]

[17] Mr Yunus further submitted that s 12(1) of the iTLT Act expressly provides that it is *not lawful for any lessee* to *alienate or deal with the land comprised in his lease … without the consent of the Board … first had and obtained.* He submitted that the High Court Judge failed to comprehend that it was RIL's obligation to obtain consent. He submitted that the effect of the failure to obtain consent is that the agreement was null and void; it could not be remedied or modified to correct what was wrong. Effectively, he submitted, the agreement never existed. Therefore, any actions taken on the void agreement were unenforceable and neither party is entitled to any claim against the other.

[18] Mr Yunus referred the Court to the judgment of the Privy Council, on appeal from the Fiji Court of Appeal, in *Chalmers v Pardoe*, which also arose out of a failure to obtain consent to a dealing in land leased under the iTLT Act.[4] He submitted that *Chalmers v Pardoe* is authority to the effect that where a contract is unlawful the Court is precluded from granting any relief to either party to the contract.

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3 Referring to Agreed Facts set out in Pre-Trial Conference Minutes dated 12 October 2018, High Court Record at page 139.

4 *Chalmers v Pardoe* [1963] 1 WLR 677.

[19] On Mr Tesssitore's challenge to the High Court Judge's finding that he should pay RIL $66,961.74 for rental arrears (less the $18,000 bond), awarded on RIL's claim for mesne profits, Mr Yunus submitted that as the claim was based on the unlawful, null and void agreement, it could not form the foundation of any claim, whether in law or equity, to recover damages arising from the illegal transaction.

[20] Mr Yunus referred this Court to the judgment in *Harry Parker v Mason*,[5] in which the English Court of Appeal referred to the principle that "no court will lend its aid to a man who founds his action upon an immoral or illegal act".[6] He submitted that in the present case the sublease was unlawful and unenforceable and in clear breach of s 12(1) of the iTLT Act, (RIL having failed to obtain the iTLTB's consent to the sublease) and RIL should not be allowed the benefit of rental under the illegal agreement. He submitted that the effect of the High Court Judge's finding that RIL could claim rental was to make an unlawful act lawful, and was contrary to public policy.

[21] Mr Yunus submitted that the rightful order of the High Court would have been that the parties must revert to their initial standing before entering into the sublease, and RIL should return the $18,000 bond to Mr Tessitore, and no further orders should be made in favour of either party.

RIL's submissions

[22] On the first ground of appeal, Mr Tuitoga, on behalf of RIL, submitted that the High Court Judge was justified in law and fact in ordering Mr Tessitore to pay rental, despite finding that the sublease was null and void, as it was founded on his occupation of the property, and RILs counterclaim for mesne profits. He submitted that the order was an appropriate application of the principle of mesne profits, as Mr Tessitore had occupied the property from February 2015 to October 2016, but had stopped paying rent in December 2015. He submitted that Mr Tessitore had also voluntarily undertaken renovations without RIL's approval, and had restricted RIL's access to the property.

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5 *Harry Parker v Mason* [1940] 2 KB 590.
6 Citing *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120.

[23] Mr Tuitoga submitted that Mr Tessitore had reaped all the benefits that came with occupation, while RIL had no share in those benefits. He submitted that it was, therefore, clear that Mr Tessitore had been unjustly enriched, by occupying property rent-free while restricting RIL's access. He submitted that it would be inequitable for Mr Tessitore to retain that benefit without compensating RIL.

[24] Mr Tuitoga submitted that the second ground of appeal is unreasonable and repugnant to justice, and the judgment was firmly supported by the evidence given at the trial, and RIL's counterclaim. He submitted that the High Court Judge properly considered the evidence related to occupation, unpaid rent, and RIL's losses, and Mr Tessitore was essentially seeking to be relieved of the financial consequences of his occupation of the property, despite the sublease agreement being null and void. He submitted that this would not be a just outcome.

[25] Mr Tuitoga further submitted that there are exceptions to the principle set out in *Harry Parker v Mason*: the Courts will assist if a party has been unjustly enriched. He referred to the judgment of the High Court at Lautoka in *Petherick v Aussie Houses International Ltd & Heeley*,[7] in support of that submission.

Discussion

[26] As recorded earlier, there was no dispute that the consent of the iTLTB was neither sought nor obtained, and that the sublease was null and void, unlawful, and unenforceable. Before proceeding further, it is helpful to refer to the authorities cited by counsel: *Chalmers v Pardoe*,[8] *Harry Parker v Mason*,[9] and *Petherick v Aussie Houses International Ltd v Healey*.[10]

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7 *Petherick v Aussie Houses International Ltd & Heeley* [2018] FJHC 293; HBC129.2009 (16 April 2018).
8 Above, fn 4.
9 Above, fn 5.
10 Above, fn 7.

Chalmers v Pardoe

[27] In *Chalmers v Pardoe*, Mr Pardoe was the lessee of land leased from the Native Land Trust Board. With Mr Pardoe's consent, Mr Chalmers built a residence and other buildings on the land. The Privy Council concluded on the facts that the arrangement between Mr Pardoe and Mr Chalmers could reasonably be inferred as being a sublease, for which the Board's consent was required to be "first had and obtained". Consent was never obtained.

[28] Mr Chalmers and Mr Pardoe fell out, and Mr Pardoe issued proceedings in trespass, seeking an injunction in trespass. Mr Chalmers issued proceedings claiming to be entitled to an equitable charge or lien on the land, to which Mr Pardoe counterclaimed. The Supreme Court (as it was then known) rejected all claims and counterclaims, but made an order allowing Mr Chalmers to remove the buildings. Both parties appealed to the Court of Appeal, which dismissed Mr Chalmers' appeal (holding that an equitable charge cannot arise out of an unlawful transaction), and allowed Mr Pardoe's appeal against the order that Mr Chalmers could remove the buildings.

[29] Before the Privy Council, the sole issue was whether Mr Chalmers was entitled to equitable relief. The Privy Council held that since the Board's consent had not been obtained, it followed that the dealing between Mr Chalmers and Mr Pardoe was unlawful. In those circumstances, equity would not assist Mr Chalmers. His appeal was dismissed.

Harry Parker v Mason

[30] The English Court of Appeal was concerned in this case with an illegal betting contract which also involved allegations of false representations. The Court held that Mr Mason could not recover money paid to Mr Parker, on the basis of the principle that no action can be brought for the purpose of enforcing an illegal contract, either directly or indirectly, by any of the parties to it.

Petherick v Aussie Houses International Ltd v Healey

[31] In this case, both the purchaser (Mr Petherick) and the vendor of a parcel of land at Denarau Island (the 1st and 2nd defendants (the 2nd defendant being a director of the 1st defendant)) were non-residents. Therefore, s 7(1) of the Land Sales Act 1971 required the written consent of the Minister of Lands before they could enter into a contract for the sale and purchase of the land. Consent was neither sought nor obtained. The contract was therefore unlawful and unenforceable. Mr Petherick sought to recover the money he had paid the vendor on the grounds, first, that it was the non-resident vendor's responsibility to obtain consent and, secondly, that the defendant would be unjustly enriched if he were allowed to retain the money.

[32] In a Ruling after hearing submissions on the preliminary question as to whether Mr Petherick was entitled to recover his payments, Tuilevuka J applied the decision of the English Supreme Court in *Patel v Mirza,*[11] and ruled that Mr Petherick, could claim under unjust enrichment. He found that the burden of seeking and obtaining consent was on the non-resident vendor (the defendants).

Did the High Court Judge err in finding in favour of RIL on its claim for mesne profits for trespass?

[33] RIL's claim for mesne profits was made on the grounds that Mr Tessitore was a trespasser. However, the High Court Judge found that he was not a trespasser – he was an overstaying tenant. In other words, the Judge rejected RIL's claim in trespass. This removed the foundation in law for the claim for mesne profits. In any event, in accordance with *Chalmers v Pardoe,* an unlawful, unenforceable contract cannot support such a claim.

[34] I accept Mr Yunus's submission that the High Court Judge erred in ordering Mr Tessitore to pay rental arrears as mesne profits.

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[11] *Patel v Mirza* [2017] AC 467.

Could RIL obtain relief for unjust enrichment?

[35] The question that must first be asked is: whose responsibility was it to obtain consent? Section 12(1) of the iTLT Act provides that it is *not lawful* for a *lessee to alienate or deal with* the leased land *without the consent of the Board as lessor … first had and obtained* and that … *any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void.* Section 12(1) does not refer to the other party in the dealing (unlike s 7 of the Land Sales Act 1974). I accept Mr Yunus's submission and conclude that it must follow that the responsibility to seek consent rests on the lessee: in the present case, RIL.

[36] As recorded earlier, while submitting that the High Court Judge's order for Mr Tessitore to pay rental arrears was an appropriate application of the principle of mesne profits, Mr Tuitoga also submitted that Mr Tessitore was unjustly enriched in occupying the land rent free and it would be inequitable for him to retain the benefit of that occupation without compensating RIL.

[37] RIL faces three difficulties with that submission:

[a] First, RIL did not plead unjust enrichment in its counterclaim. Accordingly no such claim was properly before the High Court Judge for determination.

[b] Secondly, as lessee, the onus was on RIL to obtain consent of the iTLTB, and it failed to do so. Accordingly it lacked the required "clean hands" to seek the aid of equity.

[c] Thirdly, Mr Tuitoga referred to *Petherick v Aussie Houses International Ltd* in support of RIL's claim to relief in equity. Tuilevuka J's finding that Mr Petherick was entitled to relief on the basis of unjust enrichment (which had been pleaded) was based on his finding that the non-resident vendor (*Aussie Houses*) had been at fault, not Mr Petherick.

[38] I conclude that the High Court judgment cannot be supported on the basis that RIL was entitled to equitable relief for unjust enrichment.

Conclusion as to the appeal

[39] The consequence of RIL's failure to obtain iTLTB consent was that the sublease was an illegal contract; it was unlawful and unenforceable. Neither party can claim, whether in law or equity, for damages or compensation arising from the illegal contract. I have concluded that whether based in law or equity, as the sublease was unlawful and unenforceable, RIL was not entitled to recover rental from Mr Tessitore. The High Court Judge erred in making the order that Mr Tessitore pay RIL $66,961.74 (less the $18,000 bond). Nor is Mr Tessitore entitled to reimbursement of the bond. The appeal should be allowed, and the judgment of the High Court set aside. The order for costs made in that Court must also be set aside.

Andrée Wiltens JA

[40] I agree.

ORDERS:

(1) The appeal is allowed.
(2) The judgment and orders made in the High Court are set aside.
(3) The appellant's request for an order for reimbursement of the $18,000 bond is refused.
(4) The appellant's request for an order that the costs order made in respect of his application for enlargement of time be set aside is refused.
(5) We make no order as to costs in respect of this appeal.

Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL