IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

CASE NUMBER:	**HBC 43 of 2008**
BETWEEN:	**MARIMUTTU & SONS LIMITED**
	PLAINTIFF
AND:	**NATIVE LAND TRUST BOARD**
	DEFENDANT
Appearances:	Mr. S. Sharma for the Plaintiff.
	Ms. E. R. Raitamata and Ms. Macedru for the Defendant.
Date/Place of Judgment:	Wednesday, 11 September 2013 at Labasa.
Coram:	The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Landlord and Tenant – Native Land Trust Board as Landlord- Entering into contract of tenancy- Increase of rent- Notice of proposed increase not given to Prices and Incomes Board as required by s. 13 of the Counter- Inflation Act- does the increment of rent then become invalid-binding agreement to increase in certain instances- right of PIB to impose restriction on increase of rent under s. 12 of the Counter-Inflation Act: does that right bind the Native Land Trust Board- contractual provision against subletting without written consent of the Landlord: can it be substituted by oral consent-acknowledgment and acquiescence of breach of the contractual provision against subletting.

Legislation:

Counter-Inflation Act Cap. 73: ss. 12; 13; 26; 33(1).

The Native Land Trust Act Cap 134: s. 3(6).

The Claim

1. The plaintiff claims from the defendant judgment for restitution of the illegally increased rent in the sum of $109, 727. 24, interest on the said amount, and costs.

2. The plaintiff says that on 9 December 1997, it entered into a tenancy agreement with the defendant wherein it agreed to lease all that piece or parcel of commercial land being Crown Grant No. 1520 described as Lot 1 on Plan SS146 with an area of 26.3 perches together with the wooden building situated at Savusavu Town for a period of two years.

3. The agreed rental was 550 (VIP) per month. On various occasions, the defendant, without the approval of the Prices and Incomes Board *("PIB")* and despite the objection by the plaintiff, commenced increased rents on the said premises. The increases were on 1 January 2000 to $660 (VIP) per month; 1 February 2002 to $880 (VIP) per month; 1 May 2003 to $1,000 (VIP) per month; 1 September 2004 to $1125 per month; and 8 June 2005 to $2215 (VEP) per month.

4. The plaintiff claims that it was forced to pay the increased rent or vacate the premises.

5. The plaintiff says that sometimes in 2008 the defendant forwarded the plaintiff a tenancy agreement asking it to sign the same to accept the illegal increase of the rent and another document whereby it required the plaintiff to undertake not to take any action against the defendant seeking refund of increased rentals paid by the plaintiff which the plaintiff refused to execute.

6. The defendant was charged with four counts for the offence of failing to give at least 12 weeks' written notice to PIB of the proposed increase in rent, convicted and sentenced to a fine of $40 on each count.

7. The plaintiff's says that on all occasions of increase, the defendant falsely and fraudulently, in order to induce the plaintiff to enter into the said agreement, represented to the plaintiff that it had the approval of the PIB. The approval of the PIB was not there and the defendant well knew it at the time of making the representations or but for its reckless indifference ought to have known. The plaintiff claims that the

defendant has been unjustly enriched by the illegal increase in the rent and ought to refund the said monies paid.

The Defence

8. The defendant admits increasing the rent but states that it did so under the belief that it was exempt under s. 33(1) of the Counter-Inflation Act from giving the PIB notice of the proposed increase. The defendant says that the plaintiff did not object to the increase in the rents but on every occasion entered into an agreement with it for the increase.

9. The defendant further says that the plaintiff had illegally sublet the premises without the knowledge and consent of the defendant and thus could not have lost any benefits as it imposed equivalent increases on its sub lessees.

10. The plaintiff was earning much more from the illegal subletting than the amount it was paying it and that is the reason why it did not vacate the premises.

11. The defendant denies that it imposed upon the plaintiff to sign the agreement or that it was under any duress to sign the same. The plaintiff never signed any agreement waiving its rights to claim monies paid as increased rentals.

12. The defendant says that it was charged for failing to give notice for increase of rent and not for increasing the same.

13. The defendant strenuously refuted the allegations of fraudulent misrepresentation.

14. The defendant says that the plaintiff must be regarded as having waived his right to remedy because of the delay and by improperly subletting the premises and increasing the rents of the subtenants.

15. Irrespective of the notification provision in the Counter-Inflation Act, the increase in the rent was fair.

16. The plaintiff is not entitled to any relief as it has not come to Court with clean hands.

The Agreed Facts and the Issues

17. The parties have agreed to the following:

1. *The plaintiff is a limited liability company having its registered office at Savusavu.*

2. *The defendant is a body corporate constituted under Native Land Trust Act Cap 134 and is capable of being sued in its corporate name.*

3. *That on or about 9 day of December 1997, the plaintiff entered into a tenancy agreement with the defendant wherein it agreed to lease all that piece or parcel of commercial land being Crown Grant No. 1520 described as Lot 1 on Plan SS146 with an area of 26.3 perches together with a wooden building situated at Savusavu Town for a period of two years.*

4. *That on or about 1 January 2000, the rent of the premises was increased to $660 per month inclusive of VAT.*

5. *That on or about 1 February 2002, the rent was increased to $880 per month inclusive of VAT.*

6. *That on or about 1 May 2003, rent was increased to $1,000 per month inclusive of VAT.*

7. *That on or about 1 September 2004, rent was increased to $1125 per month.*

8. *That on 8 June 2005 the plaintiff and the defendant entered into an agreement regarding the premises and increased the rental to $2215 plus VAT.*

18. The parties require the following issues to be decided by the Court:

1. *Whether the increase in rental by the defendant is illegal?*

2. *Whether due to the actions and/or inactions of the defendant in increasing the rental, the plaintiff suffered loss and damages?*

3. *Whether the defendant made fraudulent misrepresentations to the plaintiff when making an increase in rent?*

4. *Whether the fraudulent misrepresentations of the defendant induced the plaintiff to enter into a and/or subsequent rental agreements with the defendant?*

5. *Whether the said representation and each one of them were false in that the approval of Prices and Incomes Board had not been obtained and the defendant well knew at the time that it made the representations aforesaid?*

6. *Whether by reasons of increased rentals, the plaintiff lost the benefit of the monies paid by it?*

7. *Whether the plaintiff had come with clean hands?*

The Evidence

PW 1

Mr. Marimuttu: Managing Director of Plaintiff Company

19. In his evidence in chief Mr. Marimuttu stated that he is a businessman. He is educated up to class 2. His wife is educated and looks after the business. He also has got a clerk to assist as well. He entered into a tenancy agreement with the defendant on 9 December 1997. The agreed rent was $500 plus VAT. Then on various occasions, as appears in the agreed facts, the rental was increased. He raised his objection. He raised his objection with the property manager verbally by phone. He said he told the manager that the rent was too much and that he does not have that much turnover to pay the increased rent. Initially he had a grocery shop then he changed it to clothing and drapery shop.

20. In June 2008, he signed an agreement with the defendant to increase the rent to $2215 per month plus VAT at the defendant's Suva office. He was not asked to seek any independent legal advice.

21. Sometimes in 2008, the defendant sent him an agreement which stated that he will not make any claims for increased rental. He refused to sign the agreement.

22. Whilst he was occupying the premises, the PIB officers' came to him because he had increased rent for a tenant since the defendant had increased its rents. They took his statement. He was charged for increasing rents and he paid $50 fine. He had increased rent for only one tenant and that too was $20 per month. Then he realized that PIB had not given approval for increase of rent.

23. Each time his rental was increased, he was advised by the defendant that it had an approval from the PIB so he agreed to the increase. He had objected because rent was being increased every year or the other and business was not doing well but it stated that it would remove him and so he had no other option but to agree. The defendant also stated that he could sublet the premises to cover for the increase. This representation was made by the property manager of the defendant through phone. When he did sublet, the property manager saw it because he used to come to the premises with the general manager to inspect the property 3 to 4 times a year. They both talked to his tenants as well. He told them that the defendant could take the rent directly from the sub tenants so that his rent would decrease. At that time he did not receive any notice that he has breached the conditions of the lease.

24. He has suffered a lot of loss and damage by paying increased rent. He was given notice to vacate. He asked NLTB for time and the Court gave him 6 months time to vacate. He looked for alternative premises. There was a restaurant. He bought the assets and put clothes for sale.

25. The defendant was also charged and convicted.

26. In his cross-examination, the plaintiff stated that he signed the first tenancy agreement with the defendant in 1997. He has been in business since 1991 so tenancy agreement is not a new document for him. When he signed the agreement he stated that he knew it was for rent and whatever is written there in that agreement is correct.

27. He agreed that he had subtenants on the property. He said, on and off, there were two tenants. He charged rental to this tenants. He stated that he does not understand clause 4 of the first agreement which read ***"not to assign, sublet or part with the possession of any part of the demised premises without the prior written consent of the Lessor".***

28. He stated that he was charged for increasing rent without PIB's consent and not for levying rent on the tenants. He stated that he did not breach clause 4 as he was permitted by the agents of the defendant being the general manager and the property manager to keep the subtenants. . The permission was given orally and by telephone.

29. He did not find a lawyer because he did whatever the general manager and the property manager asked him to do. He entered into the agreement 6 times. Each time clause 4 was in all the agreements but the property manager never gave him notice. He was aware of the rental increase. He paid all his rents although he was late at times.

30. He was shown an agreement where it was stated that he was letting the premises to one Pushpa Wati Prasad t/a Savusavu Jewellers. He agreed that the rent was $300 per month. The agreement was entered into on 1 May 2007, was for two years but he said that the tenant left in one year because the business was not good.

31. He agreed receiving a notice to quit from NTLB dated 26 April 2010. He wrote back to the defendant asking for it to withdraw the termination notice. He stated that he had a wonderful opportunity and experience with the defendant. He stated that he wrote that because he had nowhere to go. He had stock of about $150,000. If he did not write that, he would suffer other losses. Other buildings in Savusavu were occupied. He had to operate because he had credit from other people. When his rental was $500, he made profit. He has not breach the tenancy agreement at any time.

32. In his re-examination, the plaintiff stated that there was one other tenant who paid $150 per month. He was a shoemaker and he left in 6 months time. There was a third tenant. He was on and off. He stayed for more than a year. He paid $300 per month. He increased rent for one tenant by $20. He also increased the shoemakers rent for 6 months but he cannot recall how much he increased.

PW2

Anish Chandra: Court Officer: Savusavu Magistrates' Court

33. This witness was called to tender the Court records of Criminal Case Numbers 257 of 2005 and 279 of 2008. He stated that the defendant in 257 of 2005 was charged for 4 counts of failing to give 12 weeks' notice to the PIB of the proposed increase in rent. The defendant pleaded guilty and was fined $40.00 on each count and ordered to pay costs of $33.75. In case number 279 of 2008, the defendant was again charged for failure to give 12 weeks' written notice to PIB of the proposed increase in rent. The defendant pleaded guilty and was fined $50.00 with costs at $33.75.

PW3

S. Nasoiri: Inspector Commerce Commission

34. This witness stated in his examination in chief that in 2004 and 2005, he was an Inspector at PIB. He received an initial complaint from one Muttu Sami Pillay that the plaintiff had increased his rent from $230 per month to $250. The increase was by $20. He physically visited the complainant, interviewed him under caution, visited the plaintiff, recorded his statement, charged for illegal increase and took the plaintiff to Court. He realized then that it was a two phase case. The defendant was the owner of the building. Its Manager was then interviewed. He had already sighted the agreement on increase. The defendant had to give notice before increasing the rent. The PIB then approves the increase. If the approval is not granted, one cannot increase. All the increases were without the approval of the PIB.

35. In 2009, the requirement to give 12 months notice was uplifted for commercial rent. The PIB made an agreement for NLTB to refund the rent and it was refused. It is illegal to increase rent under Counter-Inflation Act.

36. In cross- examination, the witness stated that that agreement between the parties forbidded any subletting but the subletting was between the plaintiff and the subtenant. They did not thus charge the plaintiff for subletting and also because the defendant

continued to increase the rent. When they are faced with an application for proposed increase, they inspect the property to ascertain whether any renovations or improvements are made and assess how the increase was made. The amount of town rates payable by the landlord is also considered. The first rent is always a matter for the parties, thereafter any increase is assessed by the PIB. If the agreement expires and a new agreement is entered into, and the rent is increased, the landlord has to still go though the PIB. In this case the issue of consent to sublet is the issue for the defendant and not for the PIB.

DW 1

Mr. Joveti: Regional Manager ITLB

37. The witness stated that he is a registered valuer since 1997. The first agreement of the parties indicated that rent would be reassessed on 1 November 2000 and 1 November 2002. The agreement also prohibited subletting without prior written consent of the Board. The plaintiff breached this agreement. The rent was agreed by the two parties and also determined by the prevailing market rent in Savusavu. The parties again entered into an agreement in 2005. The rent was agreed to and the parties had agreed that there would not be any subletting without the prior written consent of the defendant but the plaintiff breached the agreement. He sublet the premises to three tenants. The tenants paid rent to him directly and not to the defendant.

38. In 2008, there were 3 tenants. One was paying $300 per month being Savusavu Jewellers; the second one was paying $500 per month being the video shop and the third being Arvind furniture and it was paying $562.50 per month. He cannot say for how long they rented in that property but when they visited the property they saw the tenants and they told the plaintiff that it was illegal to sublet. In 2005 the defendant has charged the plaintiff with $2215 per month in rent because the rent was agreed to and that was the market value in Savusavu too. In 1999 there was a separate agreement. Rent at that time was charged annually then it changed to being charged monthly. In 2005, there was lot

of demand for office space and that is why the rent was increased. The increase in rent is also determined by the market supply and demand. The lessee was given an opportunity to enter into an agreement based on the market supply and demand and it did. It considered what was fair to it.

39. The three tenants of the plaintiff were collectively paying $1362.50 per month.

40. On 1 May 2007, the plaintiff entered into a tenancy agreement with one Savusavu Jewellers to sublet the premises at the rate of $300 per month. On 21 April 2008, the plaintiff wrote to the defendant and expressed an interest for a renewal of the tenancy agreement and also indicated that if the defendant wanted to dispose the property, the plaintiff was willing to buy the same. The terms of the agreement are decided by the parties. One cannot impose on the other any terms and conditions without the other agreeing to it.

41. In 2008, the parties had entered into a fresh tenancy agreement. By clause 4 of that agreement there was prohibition to assign, sublet or part with the possession of the premises without the prior written consent of the defendant.

42. The property of the defendant was painted by a phone company without the prior consent of the defendant.

43. On 26 April 2010, the defendant gave Savusavu Jewellers a notice to vacate the premises on the grounds that subletting by the plaintiff was contrary to the provisions of clause 4 of the main tenancy agreement between the plaintiff and the defendant.

44. On 26 April 2010, the defendant gave notice to Unic Handicrafts & Sourvenirs to vacate the premises on the same grounds. This tenant was on the premises since 2008 till 2010. A notice was also given to Gospel Media to vacate on the same grounds. A notice was also given to the plaintiff as his request for renewal was rejected.

45. The plaintiff was never forced or pressured to sign any agreement. It signed the agreement voluntarily. There were a total of 3 agreements between the parties and a new rent was fixed each time. The plaintiff had agreed to the reassessment.

46. In his cross examination, the defendant's witness stated that there was not a rental increment. There were three fresh agreements and as such there was no need for PIB to approve the agreements. The plaintiff was a continuous tenant until he was asked to leave in 2010 and eventually left in 2011. He also stated that he has no idea whether the defendant's agents inspected the property during the term of the occupation of the property by the plaintiff and his sub-tenants.

47. The witness stated that he does not have the valuation to state the value of the property which was let out. In November 2008 the defendant discovered that one Pushpa was a subtenant at the property. From 1997 till 2008, the defendant served the plaintiff with a notice to the effect that he had breached the tenancy agreement. The tenants were allowed to continue because the defendant did not want to disturb the tenancy period between it and the defendant. The plaintiff did not ever stop inspection of the rented premises. The witness stated that he was not present when the agreement was executed so he cannot explain the circumstances in which the same was executed. When the defendant inspected the premises, they noticed that the plaintiff had breached the tenancy agreement in clause 4. It then prepared the report which was not available in Court. He cannot comment whether anyone gave him a verbal approval to sublet.

The Law and the Analysis

48. The first issue that the Court is required to determine is about the legality of the rental increment over the various years. The plaintiff says that it had entered into a tenancy agreement in 1997 for a period of two years. In the agreed facts the defendant agrees to this. The defendant states that the first agreement was entered into on 23 August 1999 as reflected by the final document of its first exhibit.

49. The tenancy may have begun from 1997 but the first agreement between the parties was entered into in August 1999. The tenancy was for a period of 5 years and was to expire in November 2004. The rent was agreed at $7,920 per annum to be paid in advance in equal monthly installments on the first day of each month. By that agreement the parties

had agreed that rental shall be reassessed on 1 November 2000 and on 1st November 2002.

50. The plaintiff says that the first increment was on 1 January 2000 to $660 (VIP) per month and the second increase was on 1 February 2002 to $880 (VIP) per month.

51. The first alleged increase on 1 January 2000 is actually not an increase. The plaintiff at no point in time complains about the August 1999 agreement, the validity or the authenticity of it. I accept it as an unchallenged contract, valid and enforceable in law. That thus is the starting document. The rent in the 1999 agreement was stipulated to be paid monthly to be calculated with reference to the annually fixed rental of $7,920. If the sum of $7,920 is divided by 12 months, the monthly rent comes to $660.00. So the amount levied in January 2000 was not an increase. The plaintiff was just required to pay the same amount of the annual rent albeit calculated monthly.

52. Secondly, the claim for that increment in 2000 was statute barred by the time the action was founded in 2008. Even if I give the plaintiff the benefit notwithstanding the prescription period, there in fact was no increment in January 2000. I cannot fathom why the defendant agreed in the facts that there was an increase in January 2000.

53. The second increment complained of is in February 2002. The agreement stipulated that the defendant was entitled to increase the rent in November 2000 and in November 2002. In November 2000, there was no increment as such. The November 2000 increment took place in February 2002 to $880 per month. The increase was by $220.

54. I find that under the agreement of August 1999, the plaintiff had agreed that the rental be increased in November 2002 and the defendant had the right to impose an increase as per the market demand and since there was no increment as agreed in November 2000, the defendant had a right to increase the rent in February 2002. The increments were agreed to by the parties and the plaintiff has no right to complain about the same.

55. The 3rd increase was as per the plaintiff's claim on or about 1 May 2003 to $1,000 (VIP) per month and the 4th alleged increase was in September 2004 to $1125 per month.

56. When the defendant entered in the agreement of August 1999, it specifically stated that the agreement will expire in November 2004 and that there would be two reassessments of the rent until expiry. In fact reassessments of rents are contractual provisions inserted in tenancy agreement for the benefit of the landlords and those provisions are reserved to increase the rents. They are not used by the landlords to decrease the rent so the plaintiff ought to have expected the February 2002 reassessment. If the tenant wished not to accept the reassessment it had the right to terminate the agreement by giving three months notice. However that same agreement of 1999 which is binding and enforceable did not indicate that there would be any other reassessment other than in November 2000 and November 2002. So the increment in 1 May 2003 and September 2004 was contrary to the terms and conditions of the contract of tenancy entered into by the parties.

57. When the parties agree what was to be done in terms of increase in rent, it impliedly agreed what it could not do. It agreed to increase rent in November 2000 and November 2002 so it impliedly agreed not to impose any other increments. Under the contract that is what the plaintiff expected or should have expected.

58. When the increment was imposed on the plaintiff in May 2003 and September 2004, it would have accepted it and I find from its evidence that it accepted it for continuity of its business and not that it had agreed to the same. I cannot find any clear and express agreement for the increment and as such I find that the increase in February 2002 at the rate of $880 ought to have continued until the tenancy expired. In my calculation the plaintiff was improperly levied with the following increases:

- ***May 2003 – August 2004***

  ($1000 - $880)- $120 per month x 16 months - $1920

- ***September 2004 – June 2005***

  ($1125 - $880) - $245 per month x 10 months = $2450

59. In November 2004, the plaintiff's tenancy had expired and so the defendant had a right to evict the plaintiff and to find a new tenant at a new rate according to the market demand for the rent. If the plaintiff wanted to continue, the defendant had the right to renegotiate the new rent after November 2004. The negotiation did not take place until 8 June 2005 when the rent was increased to $2215 plus VAT.

60. The plaintiff cannot complain of the increase in June 2005 as it had agreed to the increase. The 2005 agreement was for a period of 3 years. It expired in 2008 and the parties entered into a fresh agreement in June 2008 for a period of one year and the rent was the same as stipulated in the 2005 agreement. The plaintiff says that it was forced to accept the 2008 agreement and that he was not given an opportunity to get an independent lawyer's advice. Firstly an agreement of a nature to let premises does not need to be executed before a lawyer. The parties can enter into the same without the lawyer's attestation and if the plaintiff wanted any explanation or advice, he ought not to have executed the agreement until he sought one to his satisfaction. It is not the duty of the landlord to arrange a lawyer for the plaintiff or to ensure that the plaintiff is adequately explained and advised on the document. Once the plaintiff puts its signature on the said document it is bound by it and cannot renege on the agreement.

61. There is no need for the defendant to force the plaintiff to sign the agreement as even if the agreement did not emanate, the defendant was not going to lose financially as it would have found another tenant at a rate it wanted. The plaintiff company's director himself said that there was no other place to rent in Savusavu so from that evidence it is not difficult to ascertain that there was a very high demand for rental premises in Savusavu. The plaintiff definitely would have been at a loss if it did not acquire that agreement as it would have lost continuity of business and with all the debt that needed to be paid by the plaintiff company, it had to operate and to operate it had to agree to the increment. It was in the interest of the continuity of business that the plaintiff entered into various agreements with new rental, not that it was forced to enter into the same.

62. The plaintiff had averred that the increment of rent was invalid and that it has a right to recover the monies paid under s. 26 of the Counter Inflation Act.

63. S. 26 of the Counter Inflation Act reads as follows:

" A transaction shall not be invalid by reason only that it involves an offence under this Act; but the person paying a price or charge in excess of that fixed and declared under the provisions of this Act shall be entitled to recover the excess of any price or charge so paid by him over such fixed and declared price unless he himself has aided, abetted or produced the commission of the offence".

64. The charging of the defendant and the subsequent conviction does not render the increments invalid because the increments were agreed to *(except for the May 2003 and September 2004 increments).* Moreover, the charges were for failure to give 12 weeks' notice for the proposed increase in rent. That offence does not determine the legality or validity of the increase which has to be decided in a civil suit.

65. Mr. S Sharma relies on the part of the s. 26 of the Counter- Inflation Act which reads "*but the person paying a price or charge in excess of that fixed and declared under the provisions of this Act shall be entitled to recover the excess of any price or charge so paid by him over such fixed and declared price unless he himself has aided, abetted or produced the commission of the offence"* to recover the increased rental. I find that that provision applies to prices fixed or determined by the Act. The rental for the subject premises was not fixed by the Act and so the provision relied on by Mr. Sharma is not of any help to him. In this premises the rent was fixed by the agreement. However if I am wrong in my interpretation of that provision of s. 26 of the Counter- Inflation Act, I rely on the provision that the plaintiff itself aided, abetted or produced the commission of the offence by entering into an agreement without having to terminate the tenancy. It cannot complain now.

66. I must further say that under s. 12 of the Counter-Inflation Act the PIB has powers to implement restriction on increases of rent in respect of the letting and continued letting by any person or class of persons including the Crown of any premises under the tenancy. First this provision was not utilized against the defendant and secondly I must

say that by virtue of s. 12, the PIB has no powers to restrict the increase in the rent imposed by the defendant. The power to impose restriction on increase of rent is restricted by s. 12 (1) which states that s. 12 is *"subject to the provisions of s. 33"*.

67. S. 33 (1) (a) of the Counter-Inflation Act states that *"the provisions of this Act shall not affect the powers of the Native Land Trust Board under the provisions of the Native Lands Trust Act"*.

68. S. 3(6) of the Native Land Trust Act empowers the defendant to enter into contracts so I find that the defendant has the powers to enter into various tenancy agreements that it did with the plaintiff and that the PIB had no powers to restrict the increased rent imposed by the defendant via the various tenancy agreements. The various contracts that the defendant had entered into were for the benefit of the I-Taukei owners. As the trustee it had the right to enter into the agreement and negotiate the rent because the defendant can enter into the contract on such terms it thinks fit for the I-taukei owners. The increment by fresh agreements is not contrary to the provisions of the Counter-Inflation Act.

69. The plaintiff relied on fraudulent misrepresentation on the basis that the defendant fraudulently misrepresented to it that it had the approval of the PIB to increase the rental and it knew that it did not possess the approval of the PIB. I do not accept the evidence of the plaintiff that any representation of this sort was ever made. The defendant's evidence is credible that it did not know that it had to have the approval of the PIB to increase the rents. It always thought that the commercial landlords were exempted.

70. I must say that the claim for misrepresentation does not hold substance as under s. 12 of the Counter- Inflation Act, the PIB cannot impose any restriction on the increase in rent on the defendant. The defendant is free to enter into contracts for the benefit of I-Taukei owners on such terms it thinks fit. So there was no need for the defendant to make any representations about the approval.

71. I find that the issue of approval was something that the plaintiff caught onto in 2008 when it was charged for increasing the rent on its subtenants. If the representation was

made by the defendant that it had the approval of the PIB, the plaintiff itself would have then deduced the requirement to obtain approval and would not have been caught in breach of the law for increasing rent.

72. Further, if the plaintiff knew of the requirement for the increment, it would have definitely insisted on it being shown the same because in its evidence it has always maintained that the plaintiff had made numerous objections to the increase but had to accept the same as it needed to continue the business. If the plaintiff was so vehemently objecting to the increment, it would have, having known that the requirement for approval to increase rent exists would have insisted on seeing the approval.

73. The plaintiff states that it was being forced to sign an undertaking to waive his rights to make any claim for the increased rents and that he refused. In fact that agreement exists and appears as the 2nd document of the defendant's exhibit 1. If the plaintiff refused to execute this document, he could have refused to execute other documents which it entered into to increase the rents being the 2005 and the 2008. Why did it not? The plaintiff testified that when he was called to sign the 2008 agreement, he was also asked to sign the undertaking. He signed the 2008 agreement but refused to sign the undertaking. I find that he signed the tenancy agreement on his own free will realizing that he will reap monetary benefits under the agreement in that he would be able to continue doing business and I find that that was the underlying reason for signing the tenancy agreements, not that he was forced. He refused to sign the undertaking because it realized that it will suffer monetary loss in not being able to claim the value of the increased rents notwithstanding the validity of the agreement.

74. The plaintiff stated that the defendant has been unjustly enriched due to the increase. I find that there is no unjust enrichment as the plaintiff occupied the premises and reaped benefit out of the occupation. The only increase that was invalid and contrary to the agreement was the one in 2003 and 2004. Should the monies for the 2003 and 2004 rent be refunded?

75. This requires me to connect this issue with the question of illegal subletting of the premises. Did the plaintiff come to court with clean hands?

76. There is evidence that the plaintiff did subletting of the premises to three different tenants. In 2008, there were 3 tenants. One was paying $300 per month being Savusavu Jewellers; the second one was paying $500 per month being the video shop and the third being Arvind furniture and it was paying $562.50 per month.

77. There is a clause in each of the tenancy agreements against subletting without prior ***written consent*** of the defendant. The plaintiff's evidence is that the defendant's agents provided oral consent and that it acknowledged or acquiesced the subletting.

78. The agreement requires a written consent and so the plaintiff had no authority to sublet the premises for hire without a written consent. Nothing short of a written consent can come to the rescue of the plaintiff. On the question of acknowledgment or acquiescence, I find in favour of the defendant in that there was no acknowledgment or acquiescence. I accept the defendant's evidence that when it discovered the tenants on the property, it told the plaintiff of the illegality in the transaction but since the main tenancy agreement was in operation, it decided to let the agreement to conclude after which the plaintiff was not given another agreement but instead notices to quit were given to it and its subtenants.

79. If there is uncontradicted evidence that there were tenants on the property since 2008 and notices to quit were given in 2010, it is self conclusive that the tenants remained on the property from 2008 to 2010.

80. By an agreement between the plaintiff and one Savusavu Jewellers it is apparent that the subtenant had been on the property since May 2007. If it was given a notice to quit in April 2010, the minimum term of the tenancy would be 36 months and at the rate of $300 per month, the plaintiff would have earned a sum of $10,800. This sum is more than what the defendant improperly levied the increases for both 2003 and 2004 which calculates to $4370.

81. I am not calculating the other advantages the plaintiff sought from the other tenants as testified by the plaintiff himself and the defendant. There is no need as there is no counterclaim for refund of monies by the defendant but a calculation to some extent was warranted to ascertain whether the defendant at all ought to refund the monies which it received by increased rent in 2003 and 2004. As I have analysed, I find the answer in the negative.

82. I think it is finally important for me to comment something about the demeanour and deportment of the plaintiff's managing director. He was in fact discovered lying under oath. Initially in his evidence in chief he stated that he had one subtenant on the property whose rent he had increased by $20. In the cross examination, the witness stated that at any point in time he had two tenants who were on and off. Then in the re-examination he stated that he had three tenants and that he had increased rent for another tenant. The witness also stated that the Savusavu Jewellers was on the property for one year but that is not correct. Savusavu Jewellers stayed on the property since May 2007 to 2010 otherwise there was need for the defendant to serve a notice on the subtenant to vacate the property for illegal occupation.

83. The plaintiff ought to have given the Court a clearer picture of how many tenants he had on the property since his occupation as a tenant. He surely would have received income, declared the same and given receipts for payments of the rents. As a businessman he ought to keep all the necessary documents for tax purposes or he should have retrieved some documents as the defendant had put it on notice that the issue of monetary benefit from the illegal letting would need to be tried.

84. The plaintiff's managing director at all times was evasive when he was asked questions about the subtenants and he did not give a clear account of how much he has earned from the illegal subletting. That shows signs of selfishness and unjust enrichment oh his part. He has, I must say, not come to Court with clean hands and his remedy for restitution cannot be made available to him.

85. On his own evidence, he has received monetary benefits from subletting, whether that subletting was acknowledged or acquiesced or not.

Final Orders

86. In the final analysis I do not find *(except for the rent increments of 2003 and 2004)* that the rental increments were illegal or invalid. The rental increment of 2003 and 2004 were in breach of the 1999 tenancy agreement and ought not to have been levied but the plaintiff cannot recover this amount as it has on various occasions and in breach of the clause against subletting, rented the property to subtenants and gained monetary benefits out of the property. Its gains and benefits are far above the improper increase of rent in 2003 and 2004 and as such the plaintiff has no rights of recovery of the increases in rent.

87. I dismiss the plaintiff's claim and order that it pays costs to the defendant in the sum of $2500 within 21 days.

Anjala Wati

Judge

11.09.2013

To:

1. ***Mr. S. Sharma, counsel for the plaintiff.***
2. ***Ms. Raitamata and Ms. Macedru, counsel for the defendant.***
3. ***File: HBC 43 of 2008.***