

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 76 OF 2014

BETWEEN : **BEKANA GARDEN ISLAND RESORT LIMITED** a duly
incorporated company under the Laws of Fiji.

Plaintiff

AND : **ASWN GIBSON BLAKE** currently occupying Bekana
Island, Fiji.

Defendant

Counsel:

Mr W Pillay for plaintiff
Defendant in person

Date of Hearing : 18 August 2014

Date of Judgment: 26 November 2014

J U D G M E N T

- [1] This is a summary application for possession.
- [2] By summons dated 19 May 2014 (the application) plaintiff, **BEKANA GARDEN ISLAND RESORT LIMITED** ('BGIRL') seeks:

that the defendant, Aswen Gibson Blake do show cause why she or any other occupant therein should not give up immediate vacant possession to the Plaintiff of all that piece and parcel of land of which the Plaintiff is the registered lessee comprised and described in iTaukei Lease No. 20434 in the Tikina of Vitogo Province of Ba being land known as Bekana Island on the grounds set forth in the affidavit of the Plaintiff **KIM WATERS** and **SURESH BHAI PATEL** filed herein AND for a further

order that the costs of and incidental to this application be paid by the Defendant to the Plaintiff.

- [3] The Plaintiff relies on section 169 of the Land Transfer Act Cap 131 (LTA).
- [4] The plaintiff in support of its application has filed two affidavits namely:
- (1) Affidavit of Kim Waters sworn on 15 May 2014 and filed 16 May 2014 ('the plaintiff's first affidavit); and
 - (2) Affidavit of Suresh Bhai Patel sworn on 14 May 2014 and filed 16 May 2014 ('the plaintiff's second affidavits).
- [5] The defendant has filed affidavit of Aswen Gibson Blake in opposition on 4 August 2014 ('affidavit in opposition').
- [6] The plaintiff did not file an affidavit in reply to affidavit in opposition.
- [7] At hearing, both parties made oral submissions and they have also filed useful written submissions.

Background

- [8] The brief backgrounds of the case, according to Kim Waters's affidavit, are as follows:

8.1 BGIRL is the registered proprietor of iTaukei Lease No. 20434. He is a former shareholder and director of the Plaintiff Company. Whilst he was a shareholder and director of BGIRL operated a resort on Bekana Island under the name and style of Bekana Garden Island Resort ("the Resort"). The resort has not been in operation for the past 5 to 6 years. In February 2013, Mr Andrew Lum, the current majority shareholder and director of the Plaintiff Company decided to renovate the Resort as he intended to resume the operation of the Resort on Bekana Island. Andres entered into an informal arrangement with the Defendant and her husband to renovate the Resort and then to enter into a formal agreement with the Defendant allowing her to operate the renovated Resort. The particulars of the arrangement included:

- i) Andrew was to refinance the renovation of the resort.

- ii) The Defendant agreed to renovate the Resort to her specification, design and liking.
- iii) Upon completion of renovations the Defendant and Andrew agreed to enter into a formal agreement for the lease and/or management of the Resort by the Defendant.
- iv) The formal agreement for the lease and/or management of the Resort would require the Defendant to pay Andrew \$1,000.00 a week
- v) For all intents and purposes there would be no lease or assignment until renovations were complete and the parties entered into a formal agreement.

8.2 The defendant, her husband enlisted the aid of workers and commenced renovation works on Bekana Island, in particular the Resort, in June 2013. For convenience purposes the Defendant with others occupied the resort whilst renovating the Resort.

8.3 Between July 2013 and January 2014 Andrew advanced a total of \$501,569.64 to the Defendant for the purposes of renovating the Resort. The Defendant was to complete renovation works for the Resort no later than December 2013. Once the renovations works were complete Andrew and the Defendant were to enter into a formal agreement where it would be decided whether the Defendant would have a management agreement or a lease over the land upon which the Resort sits.

8.4 The defendant has failed/wilfully refused to enter into any formal agreement and at present the Defendant, her husband continues to occupy the Resort. Furthermore, the Defendant is now operating the Resort and even under an informal arrangement has failed/wilfully refuses to pay Andrew any consideration for occupation/use of the Resort and property. The application for vacant possession has been filed in these backgrounds.

Plaintiff's case

[9] Counsel for the plaintiff, Mr Pillay contended that the defendant was advanced \$500,000.00 to renovate the Resort. She has produced no evidence to show how this money was used and/or if she has used

any of her money. In any event the use of the defendant's resources cannot give rise to a right to remain on the land. He further contended that, the dealing with the land without consent first had and obtained- decisively renders the relationship illegal *ab initio*. As the source is contaminated the defendant cannot raise a legal or equitable objection because it arises from an illegal relationship rendering everything that flows therefrom as null and void. He relied on section 12 of the Native Land Trust Act and cases that dealt with s. 12 mainly **Chalmers v Pardoe** [1963] 3 All ER 552 and **Singh v Sumintra** [1970] 16 FLR 165 (13 November 1970).

Defendant's case

[10] The defendant appearing in person submitted that,

- a. Lum willingly promised to abide in a relationship of reciprocity for mutual gain, waiving any right to strict enforcement of legal rights by word of honour prior to defendant family agreeing to share in his demise and by contract when in exchange for Defendant entrusting into the honour of his promised word.
- b. The Defendant cautious of his legal rights offering him an upper hand, surrendered herself in genuine commitment and dedicated purpose to benefit Lum in an indisputable way, as her protection, abiding in that relationship beyond its early nullity to effect Lum freedom from the captivity of the breach of lease to permit his promised future possession in the form of the sublease.
- c. Her conduct was sanctioned by TLTB and Lum and the entire network of Regulator Authorities commissioned to confine business practice to fulfilling statutory law within the parameters of citizen's constitutional rights. The practice of law in business as in any arena, never designed to be a whip in the unclean hands of unscrupulous businessman.
- d. The business conducted from March 2013 to march 2014 and extended to whenever closure is achieved in this matter, was not for profit but by Social Entrepreneurship with on-going rights of business beyond the emergence of a future limited liability company.

[11] Thus Defendant argues that Lum is estopped by proprietary estoppel from enforcing his strict property rights for vacant possession.

Determination

[12] The plaintiff claims vacant possession of the land on the ground that it is the last registered proprietor (lessee) of the land. The application is made pursuant to section 169 (a) of LTA. That section allows the last registered proprietor of the land to summons any person to appear before a judge in chambers to show cause why he should give possession to the applicant.

[13] Pursuant to section 170 of LTA, the application must give description of the land and the application must be served on the defendant to appear before the judge in chambers on a day no less than 16 days after service of the application. The application describes the land sufficiently and there was no issue in this regard hence the description requirement has been complied with. The application which was returnable on 26 June 2014 was served on the defendant on 10 June 2014 which is clearly 16 days after service. By this, service requirement has also been complied with.

[14] In term of section 169 (a) of LTA the last registered proprietor of the land is entitled to make an application for possession. The Native Lease (Class 1-Special- Tourist) No. 20434 was granted to PRADISE ISLAND RESORT LIMITED, a limited liability company on 10 March 1989. Memorial of the lease recorded on 26 August 2003 shows change of name as 'BEKANA GARDEN ISLAND RESORT LIMITED'. It appears that name 'PRADISE ISLAND RESORT LIMITED' is changed as 'BEKANA GARDEN ISLAND RESORT LIMITED'. The change of name has been approved and registered in Memorial by Registrar of Title. When read with Memorial of 26 August 2003 the last registered proprietor of the Native Lease No.20434 is the plaintiff (BGIRL). I will therefore reject as untenable the argument advanced by the defendant that the plaintiff has no standing to maintain the action. I am satisfied that the plaintiff is the last registered proprietor of the land. As the last registered proprietor of the land the plaintiff can bring and

maintain the action under section 169 (a) of LTA for recovery of possession.

- [15] Since I am satisfied that the plaintiff is the last registered proprietor of the land, the burden now shifts to the defendant to show cause why she is refusing to deliver up possession of the land to the plaintiff. Section 172 of LTA, so far as relevant, provides:

*172. If the person summoned appears he may show cause why he refuses to give possession of such land and, **if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;***

- [16] It will be noted that, pursuant to section 172 of LTA, if the defendant proves to the satisfaction of the court that she has a right to the possession of the land the application for possession will be dismissed with costs against the plaintiff. In this connection, Fiji Supreme Court (Now High Court) in **Morris Hedstrom Limited v. Liaquat Ali** (Action No.153/87SC at p2) said that:

'The plaintiff's application would be dismissed with the cost against her if the defendant proved to the satisfaction of the court that she has a right to the possession of the land. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is to show some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.'

- [17] For refusing to give possession of the land, the defendant says that, Mr Andrew Lum (the director and major shareholder of plaintiff) gave license to occupy the island and renovate it for re-opening the hotel resort in about May 2013 with right of possession by subsequent sublease took on an ambulatory development. She seeking a way through the non-arrival of renovation funds and unwillingness to undertake Lum-suggested loan without formal agreement, sold her

bakery and household contents in full knowledge of Lum who encouraged them except for the sale of a second vehicle.

[18] The defendant has raised an issue regarding the supporting affidavit filed on behalf of the plaintiff. The supporting affidavit has been sworn by Kim Waters, a former shareholder and director of the plaintiff company. Kim Waters is authorized by the majority shareholder and director of the plaintiff company, Mr Andrew Lum to swear affidavit on behalf of the plaintiff company.

[19] Plaintiff is a limited company. A deponent may swear an affidavit on behalf of a company with authentication of that company. Section 40 of the Companies Act provides that:

'A document or proceeding requiring authentication by a company may be signed by a director , secretary or other authorized officer of the company, and need not be under its common seal.'

[20] Mr Andrew Lum, the major shareholder and director of the plaintiff has authorized Mr Kim Waters to swear affidavit on behalf of the plaintiff company. It is a valid and proper authentication in view of section 40 of the Companies Act. That authentication needs not to be registered with the Registrar of Title like a power of attorney. Section 119 of the LTA requires registration of every power of attorney intended to be used under the provision of the Act. The authority given to Mr Kim Waters is only an authentication to swear an affidavit on behalf of the company. Therefore section 119 of the LTA has no application to such authentication.

[21] The deponent has attached his authority to show that he is authorized to swear affidavit on behalf of the company (the plaintiff). The affidavit in support filed on behalf of the plaintiff is therefore regular and may be admitted in evidence.

[22] Through affidavit in support the plaintiff states that, Andrew entered into an informal arrangement with the defendant and her husband to renovate the Resort and then to enter into a formal agreement with the defendant allowing her to operate the renovated Resort.

[23] Since the land in this case is a land comprised in the Native Lease, section 12 of the Native Land Act (NLT) will come into play. Section 12 provides that:

“12 (1) Except as may be otherwise provided by regulations made hereunder, **it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in this 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:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.

For the purpose of this section “lease” includes a sublease and “lessee” includes a sub lessee.” (Emphasis provided).

[24] The defendant and the plaintiff made what you call a friendly arrangement in that the plaintiff invited the defendant to renovate the Resort and the defendant agreed to and completed the renovation works. According to the plaintiff the arrangement was to allow the defendant to operate the renovated Resort subject to certain conditions. But, according to the defendant, the arrangement was that the plaintiff will offer a sublease or buyout upon completion of the renovation.

[25] The parties did not obtain consent of the iTaukei Land Trust Board (the Board) prior to performance of the arrangement. Such consent was required in terms of section 12 of the NLTA. Section 12 declares any alienation or dealing with the native land 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. That section further declares that any

alienation or dealing effected without such consent shall be null and void.

[26] The plaintiff's counsel heavily relied on case authority of *Chalmers v Pardoe* [1963] 3 All ER 552 and *Singh v Sumintra* [1970] 16 FLR 165 (13 November 1970).

[27] In ***Chalmers v Pardoe*** (supra) P, who was entitled to a lease of land in Fiji, made an arrangement with C, whereby C. could build on part of the land provided that he got the consent of the Native Land Trust Board ("the Board"), without which it would not be lawful, under the Native Land Trust Board Ordinance (cap 104), s. 12, for P, to "deal with" the land comprised in his lease. C erected six buildings on part of the land, but did not get the consent of the Board. P was originally willing gratuitously to sublease to C. the land on which he built or to surrender P' s lease of that land with a view to a new lease being granted to C. Subsequently P. and C. having fallen to disagreement, C. claimed an equitable charge on P.'s land for the cost of the six buildings. Sir Terence Donovan delivering the judgment of the Privy Council, said:

'Their lordships after full and anxious consideration of the whole matter have reached the same conclusion as the Court of Appeal namely that a dealing in the land took place here without the prior consent of the Board as required by section 12 of the Ordinance: that the dealing was accordingly unlawful: and that in these circumstances equity cannot lend its aid to Mr Chalmers,. Their lordships will, therefore, humbly advise her Majesty that the appeal should be dismissed.'

[28] Returning to the case at hand, the defendant says she has equitable right to remain in possession, for she has renovated the Resort spending cash and kind. The dealing in the land took place without the prior consent of the Board as required by 12 of the NLTA. The dealing is therefore unlawful *ab initio*. The defendant cannot raise an arguable case out of the unlawful arrangement or dealing.

- [29] In **Singh v Sumintra** [1970] FJCA 2; [1970] 16 FLR 165 (13 November 1970), Gould V. P. and Tompkins, J. A (delivering majority judgment of the Fiji Court of Appeal) held:

'Per GOULD V.P and TOMPKINS J.A: there was ample evidence to support the finding that the panchayat agreement amounted to a dealing in land within the meaning of section 12 of the Native Land Trust ordinance. The dealing would not have been invalidated had the consent been applied for within a reasonable time and before the agreement was put into operation, but wherever the line must be drawn the full implementation of the agreement for four years before applying for the consent can only be in breach of the section; dealing was therefore void.

Per GOULD V.P : on a strict reading of section 12 in the light of its object an agreement for sale of native land would become void as soon as it was implemented in any way touching the land, without the consent having been at lease applied for.

Per TOMPKINS J.A: once the agreement was acted on as a valid agreement for the sale of the respondent's interest in the leased land it became null and void for lack of consent.

Per GOULD V.P: the dealing having become void before any application for consent was made the consent finally given (apart from challenge to it on other grounds) could not revive what was by law a nullity.'

- [30] There was no evidence before the court to show that the parties ever applied for the necessary consent for the dealing.

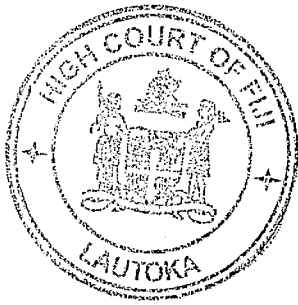
Conclusion

- [31] The arrangement made between the plaintiff and the defendant has been performed without the Board's prior consent. This offends section 12 of the NLTA. The defendant has renovated the Resort which is on the Native Land. The arrangement and performance clearly a dealing touching the land and it has been done without the Board's consent first had and obtained. The arrangement coupled with performance is unlawful and null and void by reason of section 12 of the NLTA. In the circumstances, the court will be precluded from lending its aid to the defendant. There is no lease to the defendant to occupy the land. Any permission granted to the defendant by the plaintiff has been revoked by the notice to quit. In my judgment, the defendant has failed to prove a right to remain in possession or to

show some tangible evidence establishing a right or supporting an arguable case for such a right. I would therefore order the defendant to forthwith deliver up vacant possession of the land to the plaintiff. The defendant will pay the plaintiff costs of 500.00, which is summarily assessed.

Final Outcome

[32] The final outcome is that the defendant will forthwith deliver up vacant possession of the land to the plaintiff. The defendant will pay summarily assessed costs of \$500.00 to the plaintiff. Order accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

PUISNE JUDGE

[Sitting as Master of the High Court]

At Lautoka

26/11/14

Solicitors:

For plaintiff: Messrs Gordon & Co., Barristers & Solicitors

For defendant: Defendant in person