

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 204 of 2010

BETWEEN : NATURAL WATERS OF VITI LIMITED

Plaintiff

AND : YAQARA PASTORAL COMPANY LIMITED

First Defendant

AND : THE REGISTRAR OF TITLES

Second Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr M. Corlett QC, Mr N Barnes with him, for the Plaintiff
Ms V. Lidice for the First Defendant
Ms B. Prasad, Mr A Prakash with her, for the Second
Defendant

Dates of Hearing : 25, 26, 27, 28 and 29 September 2017

Date of Judgment : 20 October 2017

JUDGMENT

1. The Plaintiff in its Statement of Claim dated 8 July 2010 says as follows:

- (1) The Plaintiff leases the land from the State under Crown Lease No.12700 (the Plaintiff's lease).
- (2) Since before 1995, the First Defendant carried on agricultural etc activities on Crown Lease No.14909 (Yaqara's Lease)
- (3) Nature's Best Products Co. Limited (Nature's Best) was the Plaintiff's predecessor in business.
- (4) On 15 July 1995, Yaqara and Nature's Best entered into the following interrelated agreements (agreements):
 - (a) An agreement to acquire the Blue Land (acquisition agreement)
 - (b) A deed by which Nature's Best would pay Yaqara a percentage of its monthly turnover (turnover deed).
 - (c) A reciprocal option for the first right of refusal over the other party's interest in their land (option deed).
 - (d) A deed restricting Yaqara's use of the Red Land (restrictive covenant deed).
- (5) The agreements refer to the land comprising the Plaintiff's lease as the Blue Land and the land comprising Yaqara's lease as the Red Land.
- (6) Prior to the agreements both the Blue Land and the Red Land were the subject of an approval notice issued to Yaqara.
- (7) On 21 December 1995, Yaqara, Nature's Best and the Plaintiff agreed that the Plaintiff would assume Nature's Best's rights and obligations under the agreements.

- (8) The acquisition agreement provided as follows:
- (a) Yaqara to surrender the Blue Land
 - (b) Yaqara to assist the Plaintiff in obtaining a 99 year lease from the Director of Lands (Director) to the Blue Land in order for the Plaintiff to operate a bottling plant thereon.
 - (c) Upon the grant of the Plaintiff's lease, the Plaintiff was to pay Yaqara \$75,000 and enter into the turnover deed.
 - (d) Upon receipt of the \$75,000, the Plaintiff was to enter into the restrictive covenant deed and the option deed.
 - (e) Upon Yaqara acquiring a registered lease for the Red Land, it was to use its best endeavours to assist the Plaintiff in registering a restrictive covenant against the said registered title.
- (9) Apart from (e) above, the Plaintiff and Yaqara have performed these obligations.
- (10) The Plaintiff has met its obligation under the turnover deed and paid Yaqara.
- (11) On 5 July 2010, the Plaintiff sent Yaqara a restrictive covenant instrument for execution, but Yaqara has not executed it.
- (12) The option gives a conditional option to Yaqara to purchase the Plaintiff's land and to the Plaintiff to purchase Yaqara's land. The conditions that have to be met before the Plaintiff's option crystallizes are:
- (a) Yaqara should wish to dispose of its lease to any other party; and
 - (b) Yaqara shall receive any offer or shall agree a price.

- (13) Once these conditions are met, Yaqara is required to notify the Plaintiff in writing of its wish to sell and the offer or price agreed. There is no time specified in which Yaqara is required to notify the Plaintiff. From the receipt of the notice the Plaintiff has 5 working days to purchase the Yaqara lease on the same financial terms as such offer or price agreed.
- (14) On the following 3 separate occasions, Yaqara has advertised for expressions of interest in its lease.
- (15) (a) The first was on 28 December 2005;
- (b) On 13 January 2006, Roll International Corporation (Roll) submitted an expression of interest;
- (c) Roll was invited to bid for the right to negotiate with Yaqara;
- (d) On 10 March 2006, Roll submitted an offer which included Yaqara's lease.
- (e) On 16 June 2006 Roll was informed that its bid to lease Yaqara had been approved in principle
- (f) On 21 February 2008, the Government terminated negotiations with Roll;
- (g) On 3 April 2008, Roll advised the Government that it did not accept the purported termination of negotiations.
- (16) The second was on 5 March 2008. On 7 April 2008, Roll, without prejudice to its existing rights, submitted another expression of expression.
- (17) On 24 June 2008, the Plaintiff asked Yaqara to acknowledge its rights under the option deed and the restrictive covenant deed.

- (18) The third was on 18 October 2008. On 21 October 2008, the Plaintiff informed Yaqara it would not submit an expression of interest given the existence of the binding and enforceable option and restrictive covenant. Yaqara did not respond to the Plaintiff's requests for an acknowledgement of its rights.
- (19) On 24 October 2008, the Plaintiff sought the Director's consent to register a caveat against Yaqara's Lease, which was given and a caveat was registered. On 21 June, 2010 the Plaintiff was notified by the Registrar of Titles (ROT) that Yaqara sought removal of that caveat.
- (20) Yaqara has never informed the Plaintiff that it wishes to dispose of its lease and that it has received an offer or agreed a price for it.
- (21) The Plaintiff has provided a restrictive covenant instrument to Yaqara but it has not executed it.
- (22) Accordingly, the Plaintiff claims an injunction to require Yaqara to execute the restrictive covenant instrument delivered to it on 5 July 2010, and an injunction requiring the Registrar of Titles to note on Yaqara's lease that it is subject to a restrictive covenant until that instrument is registered.
- (23) Between December 2005 and October 2008, Yaqara wished to dispose of its lease and Roll offered to purchase it.
- (24) Accordingly, the Plaintiff claims an injunction preserving the caveat until Yaqara notifies the Plaintiff of its option and the Plaintiff declines to purchase the lease or it fails to exercise its option within 5 working days.

2. The Statement of Defence of the First Defendant (Yaqara) states as follows:

(1) It admits that it entered into the acquisition agreement with Nature's Best on 15 July 1995 for the acquisition of the Blue Land and that the turnover deed, the option deed and the restrictive covenant deed annexed to the Acquisition Agreement, were also executed by Nature's Best and Yaqara. All 4 are referred to as the Agreements.

(2) The Red Land is not the land now comprised in Yaqara's lease.

(3) (i) It admits it has surrendered the Blue Land.

(ii) It admits it assisted the Plaintiff to obtain a 99 year lease for the Blue Land.

(iii) It has received the \$75,000 from the Plaintiff and further payments pursuant to the turnover deed.

(iv) No further agreements were executed after the Agreements.

(v) It admits receiving a restrictive covenant instrument from the Plaintiff which remains unexecuted by Yaqara, as it applies to the Red Land which is not comprised in its lease. Further, to do so would be a breach of its lease conditions and s.13 of the Crown (State) Lands Act as the prior consent of the Director has not been obtained.

(4) The option deed only created a right of pre-emption or of first refusal and did not apply to the Yaqara lease but only to the Red Land which is not comprised in that lease.

(5) Roll only submitted an expression of interest to lease and not an offer.

- (6) No portion of the Yaqara lease has been offered for sale to any third party.
 - (7) Yaqara has no obligation to inform the Plaintiff of any wish to dispose of its lease because that applies to the Red Land and the lease is not the Red Land.
 - (8) The restrictive covenant deed requires Yaqara to register a restrictive covenant against the Red Land only and not Yaqara's lease.
 - (9) The advertisements published were merely invitations to treat inviting expressions of interest and did not constitute a "wish to dispose" of its lease.
 - (10) Roll International Corporation (Roll) submitted an expression of interest to purchase.
 - (11) The option deed only created a right of pre-emption or of first refusal which do not create a caveatable interest.
 - (12) The First Defendant prays that the Plaintiff's claim be dismissed.
3. The Plaintiff did not file a Reply to the Defence.
 4. At the commencement of the hearing, the Plaintiff's Counsel informed the Court that his client wished to amend the Statement of Claim with regard to the relief sought, to include a claim for a declaration regarding any disposal of the Red Land.
 5. Counsel for the First Defendant said she had no objection to this, on condition they too are allowed to file an Amended Defence.

6. The Plaintiff's Counsel then informed the Court that he was withdrawing their Summons for Leave to amend their Statement of Claim. Accordingly I struck out the Summons with no order as to costs and the hearing commenced.
7. The Plaintiff's first witness was Wah Hoon Yee (PW1), a registered land surveyor since 1987. He said the land now leased is contained within the original area leased, the red line on the plan marked the original lease while the green area represents the current lease.
8. Under cross-examination by Counsel for the First Defendant, PW1 said the approval notice consisted of 5 distinct parcels of land. If one of the 5 pieces is missing, that it would not be a valid notice. The Yaqara lease is not the original Red Land in the approval notice.
9. In re-examination, PW1 said there could be a partial surrender with the issue of a new lease. It did not impede his plan that he did not have the original plan.
10. The next witness was Craig Bryan Cooper (PW2), the chief legal officer of the Wonderful Company LLC (Wonderful). The Plaintiff is owned 100% by Wonderful, having being bought by it in late November 2004. Nature's Best was the predecessor of the Plaintiff. He said they would not have proceeded without the restrictive covenant and without their right of first refusal. Their latest offer of F\$10M was circulated among the Government, and the deal was closed. They improved the offer. They did not receive any response. The First Defendant did not abide by the Plaintiff's right of first refusal. The First Defendant and the Government are the same and the Plaintiff wanted to know what happened to their tender but did not receive a response. He never received any document

from the First Defendant or the Government that these agreements do not apply. The Plaintiff did not send a further letter of expression. They did not receive the executed restrictive covenant.

11. Under cross-examination, PW2 said Nature's Best is different from the Plaintiff. The Plaintiff did not exist at the time of the agreements. He did not recollect whether the Director consented in regard to the 4 agreements/lands.
12. At this juncture as issues arose between the 2 Counsel, I ruled that Mr Corlett was permitted to take instructions from PW2, solely and exclusively confirmed to his oral submissions that morning. Having done so, Mr Corlett then asked the Court to rule whether the First Defendant had pleaded in its Statement of Defence that the consent of the Director of Lands to the restrictive covenant deed is required.
13. Having heard oral submissions from Counsel for all 3 parties, having read the written submissions and perused the authorities cited I made the following Ruling.

RULING

The issue before me is whether the consent of the Director of Lands to the Restrictive Covenant Deed is a pleaded issue.

Having heard the Counsel for the Plaintiff, the First Defendant, and for the Second Defendant, my decision is the First Defendant's Statement of Defence para 20 encompasses the issue at hand.

Consequently the Plaintiff's second witness is now to continue with his evidence.

14. After hearing my Ruling, Counsel for the Plaintiff sought an adjournment which I did not grant. Counsel then asked to be allowed to leave the Court to seek PW2's instructions on whether to withdraw the suit. When he returned he said he needed to know if the First Defendant's Counsel was raising a challenge to the other 4 agreements and the Blue Lease.
15. The First Defendant's Counsel informed that they were challenging the assignment deed, the option deed and the restrictive covenant deed but not the acquisition deed nor the validity of the turnover deed. The Blue Land is in issue.
16. The Plaintiff's Counsel informed the Court that he was realizing for the first time that these issues are raised by the First Defendant and said that PW2 was his final witness.
17. When the hearing resumed the next morning Counsel for the Plaintiff informed the Court that they were appealing and asked for the written reasons for my Ruling and my refusal to grant a postponement. He also asked for an adjournment, which was objected to by Counsel for the First Defendant while Counsel for the Registrar of Titles said she left it to the Court.
18. At this juncture, the Counsel for the Plaintiff, Mr Corlett of the New Zealand Bar launched a surprising and unwarranted tirade against the Government, which was not even a party to the suit. Mr Corlett said the Government of Fiji is trying to destroy the business of the Plaintiff which would have consequences and to invalidate the Blue Lease.

19. Counsel for the First Defendant asked that this statement of Mr Corlett be placed on record.
20. It was necessary for the Court to immediately upbraid Mr Corlett for his slanderous attack on the Government of a sovereign nation. The Court had to dispel any misconceived illusion that he might be nursing regarding the Court by articulating the maxim expressed in Latin as “fiat justitia ruat coelum” and in English as “let justice be done, though the heavens fall. I then directed the hearing to continue.
21. The cross-examination of PW2 resumed. He said he did not know if the Director had consented to the assignment deed. He had no knowledge if this assignment deed contains a right to assign. He said the Director consented to the change from Nature’s Best to the Plaintiff. There has to be a dominant and a subservient tenement. The restrictive covenant cannot be registered until the First Defendant has the lease. The Plaintiff acquired whatever rights Nature’s Best has. He disagreed that the Director did not consent to the Restrictive Covenant. He believed the Director has provided consent through his consent to the proceedings. He said the Government unlawfully terminated the negotiation. He disagreed that the Expression of Interest is not the intention of the Government to dispose of the land. He disagreed that all the 3 Expressions of Interest did not show the intention of the First Defendant to dispose of the land. He believed the First Defendant is bound by the option deed which binds the land.

22. In re-examination PW2 said the turnover deed, the restrictive covenant deed and the option deed are part of the acquisition deed. With that the Plaintiff closed its case.
23. After the mid-morning recess, Mr Corlett rose to address the Court. He apologized to the Court and to the Government. I informed him that I considered his earlier remarks as being both tendentious and insidious against me as a Judge of the High Court. Because he had retracted his statement and apologized unreservedly I would accept his apology and would consider the matter as closed.
24. The First Defendant now opened its case and called its sole witness Vikash Jagdishwar Mani Rao (DW1). He is the Senior Lands Officer at the Ministry of Lands. He said if an application involved 5 deeds, 5 consents are required. The Approval Notice of the lease was for 30 years from 1 April 1973 and was a protected lease. He said the Director did not give his consent to the option deed, the restrictive covenant deed and the assignment deed.
25. DW1 produced 2 documents marked respectively as Exhibit D4 and Exhibit D5 which had the Director's consent stamped on them. Both were from the Lands Department file.
26. Under cross-examination by Counsel for the Plaintiff, DW1 said Exhibit D4 is a restrictive covenant deed dated 4 April 2000 which the Director consented to on 7 December 2006, 6 ½ years later and the ROT signed 12 days after the Director had consented.

27. DW1 said Exhibit D5 is a restrictive covenant deed arising from a sale and purchase agreement dated 11 December 2003, with the Director's consent endorsed on 14 August 2009, and which was registered on 3 September 2009. With that the First Defendant closed its case.
28. The Counsel for the Second Defendant had no case to open or close.
29. The Counsel for the First Defendant now submitted. She said the Plaintiff seeks an injunction for the Defendant to do a number of things, regarding the restrictive covenant, and an injunction against the Registrar of Titles that he record on the First Defendant's lease that it is subject to the restrictive covenant. The Plaintiff's cause of action is based on the restrictive covenant and the option deed. She submitted that the restrictive covenant deed and the option deed both dated 15 July 1995 and the assignment deed dated 21 December 1995 were not consented to by the Director. Counsel then set out the bases why she contended the Plaintiff was not entitled to any of the reliefs sought.
30. Counsel for the Plaintiff then submitted. He said Counsel for the First Defendant never distinguished between a right in rem and a right in personam. A caveat here is not an interest in land so an order preserving a caveat is not a dealing in land. When an option is triggered it gives rise to a caveatable interest as it is an equitable right. Counsel said the Director's consent to the restrictive covenant deed is not needed. It does not give exclusive possession of the Defendant's land but only in personam rights and only when it is registered on the land is the Director's consent required. He said Counsel for the First Defendant did not call any evidence that the Expression of Interest did not show a wish to dispose. The Plaintiff says once the tender of Roll is accepted then the option is triggered and

gave rise to a caveatable interest. The First Defendant should have notified the Plaintiff once the offer was accepted. Counsel concluded by saying no illegality with the deed means no illegality with the instrument.

31. At the conclusion of the arguments, I directed the Counsel to respectively file his written submission and her written reply by 2 October 2017. I informed I would then take time for consideration. Having done so, I now proceed to deliver my judgment.
32. There are two issues for my decision. The first is (A) whether the Plaintiff is entitled to an injunction to compel the First Defendant to execute the restrictive covenant instrument delivered to it on 5 July 2010. The second is (B) whether the Plaintiff is entitled to an injunction preserving the registration of the caveat.
33. I shall first deal with (A). At the outset I note that the restrictive covenant instrument relates to the lease CL 14909 the registered title of which was acquired by the First Defendant on 30 December 2002.
34. A perusal of the restrictive covenant deed reveals the following. Clause 2 states "In the event" that Yaqara (First Defendant) acquires a title to the Red Land or any part thereof, it covenants to assist Nature's Best (now the Plaintiff) in registering a restrictive covenant against that title. Clause 3 states that Yaqara will duly execute any instrument required to give effect to the above restrictive covenant.
35. According to the Oxford Advanced Dictionary of Current English the words "in the event" mean "as it in fact happens". Thus it is as plain as a pikestaff that the

Plaintiff should have immediately or within a reasonable time thereafter sent the First Defendant the restrictive covenant instrument to execute. But it never did. Instead it was 7 ½ years later, by the Plaintiff's own admission, that that instrument was sent to the First Defendant for its execution.

36. In the Practitioner Series, Injunctions (12th Edition) by David Bean the author, a Lord Justice states at 2-01, that the court must make its decision by reference to the up to date factual evidence. The factual position here today is that approximately 14 years and 9 months have elapsed since the Plaintiff could and should have compelled the First Defendant via a mandatory injunction to execute the instrument. There is nothing before the Court whether by way of documentary or oral evidence to explain this inordinate delay to enforce the Plaintiff's claimed equitable right. This inaction on the part of the Plaintiff brings into operation the matters that the Court has to consider when it has to decide whether in its discretion it will grant this equitable remedy.
37. The first is acquiescence. Osborn's Concise Law Dictionary (7th edit) (Osborn) defines this "as assent to an infringement of rights, either expressed or implied from conduct by which the right to equitable relief is normally lost". This was manifested by the Plaintiff "standing by" and not providing the instrument to the First Defendant to execute, very shortly after 30 December 2002, the date it acquired the Land.
38. The second is laches. This is defined by Osborn as "negligence or unreasonable delay in asserting or enforcing a right. The equitable doctrine that delay defeats equities, or that equity aids the vigilant and not the indolent. A court of equity has always refused its aid to stale demands where a party has slept upon his

rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; when these are wanting the court is passive and does nothing". Here the negligence or the unreasonable delay was in not asserting or enforcing the Plaintiff's right to have a restrictive covenant registered on the First Defendant's Land.

39. In my opinion it is now no longer possible for the above reasons for the Plaintiff to be granted the injunction it seeks in (A). And it follows as the night the day that neither can an injunction be granted against the Registrar of Titles.

40. So I turn then to (B). The wording of the injunction sought is imprecise. After careful consideration I conclude it is to prevent the First Defendant from applying to remove the caveat and the Registrar of Titles from removing it pending the Notification to the Plaintiff. Clause 2.1. of the option deed states that if Yaqara shall wish to dispose of the Red Land or any part of it, it shall give Nature's Best the Notification of such intention and of any offer received. The offer/tender from Roll, is dated 13 January 2006. However, Clause 2.1. does not specify a period of time within which the First Defendant was to give the Notification to the Plaintiff. In fact it never did. But the Plaintiff allowed a period of approximately 4 ½ years to elapse before the writ was filed and a further 7 years have now gone by. There is no evidence before the Court that the Plaintiff has ever filed any claim for an injunction to compel the First Defendant to give it the Notification/option. The injunction here sought is to preserve the caveat. But the caveat cannot remain when the basis for its continued existence had never existed. Even if it had been accepted for argument's sake that there was once a basis, such basis has been extinguished both by the passage of time and by the Government's termination of the negotiations with Roll.

41. With regard to the Second and Third Expressions of Interest, I do not consider that these amounted to a wish to dispose of the First Defendant's lease, but even if they did, the Plaintiff had never sought any injunctive relief to compel the First Defendant to give it the Notification/option.
42. If I may say so, absent any extant option, absent also any right to preserve the registration of the caveat.
43. Having reached my decisions as above, it is consequently unnecessary in the circumstances to consider the other issues ventilated and the arguments canvassed during the hearing. Suffice it to say the cut and thrust of the advocacy from both sides of the Bar table were of competing positions which the Court has found is inappropriate to discuss further and inexpedient to refer to in this judgment.
44. In the result I shall enter judgment for the First Defendant and the Second Defendant.
45. In fine, I make the following orders:
 - (a) The Plaintiff's claim for an injunction requiring the First Defendant to execute the restrictive covenant instrument is hereby dismissed.
 - (b) The Plaintiff's claim for an injunction requiring the Registrar of Titles to note on the First Defendant's lease that it is subject to a restrictive covenant is hereby dismissed.
 - (c) The Plaintiff's claim for an injunction preserving the registration of Caveat No 711548 against Crown Lease No 14909 is hereby dismissed.

(d) The Plaintiff is to pay costs summarily assessed in the sum of \$5,500 to the First Defendant and in the sum of \$500 to the Second Defendant.

46. I cannot part with this matter without saying the following. No Court could conceivably have been dissuaded from pronouncing a judgment which met the ends of justice just because of a purely theoretical fear of adverse economic consequences.

Delivered at Suva this 20th day of October 2017.



David Alfred

JUDGE of the High Court of Fiji