

IN THE HIGH COURT OF FIJI AT LABASA  
CIVIL JURISDICTION

Civil Action No. HBC 51 of 2016

BETWEEN : ALFAAZ ABDUL ROUF KHAN

Plaintiff

AND : HASIM KHAN trading as Seaqaqa Shopping Centre

Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr K. Vuataki, Ms P Mataika with him, for the Plaintiff  
Mr A Sen, Mr Raramasi with him, for the Defendant

Date of Hearing : 8 March 2018  
Date of Judgment : 4 July 2018

## DECISION

1. This is the Defendant's Summons (summons) applying for the following questions of law to be determined first before this action proceeds further by way of hearing: Are the purported agreement (agreement) and the purported Deed of Trust (trust), described in the Statement of Claim null and void because of section 12 of the iTaukei Land Trust Act, Cap 134(Act).
  
2. The Summons is made pursuant to Order 33 rule 4 of the High Court Rules (HCR) and is supported by the affidavit of the Defendant. Therein he deposes as follows:-
  - (1) The Plaintiff is seeking various declarations in respect of Native Lease No.17554, known as Seaqaqa Township Lot 73 on Lot 19 on Plan M2717 (lease).
  
  - (2) The Defendant purchased the lease on 21 January 2014.
  
  - (3) The Plaintiff is seeking the following declarations and orders:
    - (i) That the trust dated 22 November 2013 is valid and binding on the Defendant.
    - (ii) That the Defendant holds the lease in trust for the Plaintiff or his nominee.
    - (iii) That the Defendant holds all proceeds and stock of Seaqaqa Shopping Centre for the Plaintiff.
    - (iv) An injunction that the Defendant comply with all instructions given by the Plaintiff in respect of the lease.

- (v) A permanent injunction that the Defendant or in lieu of himself, the Deputy Registrar of the Labasa High Court execute all documents required for the transfer to the Plaintiff or his nominee of the lease.
- (vi) A permanent injunction that the Defendant and others vacate the premises on the iTaukei Land in the lease.
- (vii) An order that the Defendant account to the Plaintiff for the operation of the Seaqaqa Shopping Centre.

(4) The Defendant maintains the Plaintiff's claim contravenes s.12 of the Act as no consent had been obtained for the dealing.

3. The Plaintiff in his affidavit in opposition deposes as follows:-

- (1) The purchase of the lease was made through the funds he provided to the Defendant.
- (2) No consent is required for the Defendant to hold the lease on trust as he (Plaintiff) acted on the advice of the NLTB.
- (3) The Plaintiff's claim does not offend s.12 of the Act.

4. The Defendant in his affidavit in reply deposes as follows:

- (1) He is not holding the (lease) in trust as he is the transferee of the lease.
- (2) The deed is fraudulent as he never executed the same.
- (3) The claim deals with the Plaintiff seeking a declaration in respect of a native lease for which he has not obtained consent to the dealing.

5. The hearing commenced with the Counsel for the Applicant/Defendant making his submission. He said the Defendant had stated he did not sign the trust deed. The court is to decide whether consent is the pivotal issue or not.



6. Counsel for the Plaintiff then submitted. He said s.12 of the Act does not apply. The trust deed was executed on 22 November 2013 and registered by the Registrar of Deeds on 7 January 2014. He said consent is not a pivotal issue and the case should go for a full trial. The trust deed is not a sale nor a sublease and therefore does not require consent. The NLTB says there is no need for consent at this stage unless there is a transfer.
7. Counsel for the Defendant in his reply said the statement of claim shows the Plaintiff is dealing with the land and is the real owner. The question of consent finally decides the issue.
8. At the conclusion of the arguments I said I would take time for the consideration. Later the same day (8 March 2018) both Counsel appeared in court on the hearing of the Plaintiff's application for leave to file and serve a supplementary affidavit which would enclose a letter from the NLTB dated 10 January 2018 and which would assist the Court.
9. After hearing both Counsel, I gave the Plaintiff leave to file the supplementary affidavit which was thereby deemed to have been filed and served.
10. Having considered the matter, I shall now deliver my decision.
11. The arguments on both sides have proceeded exclusively regarding the deed of trust only. Neither Counsel referred to the purported oral agreement and for that matter none of the affidavits of both parties referred to it either. However my decision regarding the trust must necessarily have the same effect on the purported oral agreement that led to the trust.

12. I have perused the memorandum of lease which discloses it is a native lease. The letter from the i-Taukei Land Trust Board dated 10 January 2018 to the Plaintiff states that after perusing the trust deed dated 22 November 2013 the Board's consent will be required during the transfer stage from the Defendant to the Plaintiff. It goes on to say that the trust deed does not fall within the ambit of s.12 of the Act.
13. "Ambit" means "bounds, extent, range of power or authority' (Oxford Advanced Dictionary of Current English (Dictionary)).
14. A perusal of the deed makes it is clear what this whole transaction is really all about. In the 2<sup>nd</sup> preamble it is stated the Plaintiff was not a citizen of Fiji, could not operate a business in his own account and could not invest in Fiji, but had invested in Fiji through the Defendant for the Defendant to keep the property in trust for the Plaintiff. In the 3<sup>rd</sup> preamble it is crystal clear that it is the (native) lease which is being referred to as the Plaintiff has invested \$900,000 for the shop in Seaqaqa in buying the property, buying the stock, renovation of the building and service station. This is made even clearer by the Schedule which states "Native Land stated at Seaqaqa (operating supermarket as Seaqaqa Shopping Centre).
15. Any reference in the 4<sup>th</sup> preamble to another native lease is to my mind a red herring because the word "also" is disjunctive. In my view it does not refer to the lease.
16. I turn now to s.12 of the Act the heading of which is "Consent of Board required to any dealings with lease". Sub-section (i) reads as follows: "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 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”.

17. It is clear that the intention of the legislature is (and I am paraphrasing now) that it shall not be lawful for any lessee to deal with the land in any other manner whatsoever without the prior consent of the Board and any dealing effected without such consent shall be null and void.
18. The pivotal issue then is this trust a dealing with the lease?. The Defendant says in clause 1 of the Deed that he admits and declares that he is holding the said properties in trust for the Plaintiff. According to Osborn’s Concise Law Dictionary (Osborn) a trust is a relation or association between one person and another person “based on confidence, by which property is vested in or held by the one person on behalf of and for the benefit of another. The holder of the property is the trustee and the beneficial owner is the (beneficiary)” who has “an interest in the specific trust property and assets themselves...” To my mind this would mean that to all intents and purposes the beneficiary is the owner of the property though only not in name. Here this translates to the Plaintiff having become in effect the lessee without the consent of the Board.
19. Is a trust arrangement a dealing with the land comprised in the lease?. According to the Dictionary “dealing” means “business relations”, while “deal”

means “take part in commercial trading of a particular commodity” (Oxford Dictionary of English).

20. On the current state of the evidence before this court it is clear than the trust deed relating to the land was effected to facilitate the business or the business relations between the Plaintiff and Defendant, with regard to the supermarket operating on the land. This to my mind is dealing with the lease and dealing with the land. Thus it required the prior consent of the Board which consent has not been obtained. This is not denied by the parties.
21. Before I pronounce my decision I shall refer to the Board letter. If I may say so with respect it is not for the Board to interpret the law and decide that the trust deed does not fall within the ambit of s.12. That is for the Court to decide and as the custodian of the public interest it is my bounden duty to carry out the intention of the legislature that the sanctity of the indigenou ownership of the land is preserved and protected. And it is the bounden duty of the iTaukei Land Trust Board to be the gatekeeper to keep the land secure.
22. In the result, I find and I so hold that the oral agreement and the Deed of Trust referred to in the Statement of Claim are null and void as being in contravention of section 12 of the Act.
23. I have decided the questions of Law and the action should therefore proceed to trial. The costs of this summons shall be costs in the cause.

Delivered at Suva this 4<sup>th</sup> day of July 2018.



David Alfred

**JUDGE**

High Court of Fiji