

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 263 of 2012

BETWEEN : **HARLEY ALFRED JONES & MARIE EVELYNE JONES**, as
administratrix of the estate of **ARNOLD JAMES ROE** of ROE of 4
O'Neills Avenue, Takapuna, New Zealand, Businessman and Retired
respectively.

1st PLAINTIFF

AND : **ALEXANDER J H WITTEN-HANNAH** of Takapuna, New Zealand,
Solicitor.

2nd PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD** a body corporate established under
the ITaukei Land Trust Act Cap 134, of 361, Victoria Parade, Suva.

DEFENDANT

Counsel : **1st & 2nd Plaintiffs: Mr. R. Singh**
Defendant: Ms. Q. Vakanavalua

Date of Hearing : **21, 22 & 28 November 2019**

Date of Judgment : **21.02.20**

JUDGMENT

INTRODUCTION

1. First named Plaintiffs are mortgagees of Native Leases NL 25324 in terms of Mortgage No 6667 (the Mortgage). At the time of mortgage NL 25324 was not granted to the mortgagors by Defendant. They also hold Mortgage Debenture over the assets of Denham Island Limited (the mortgagors). Second Plaintiff is unpaid vendor who had sold shares of a company which owned the mortgagor to Mortgage No 6667. Defendant had granted consent to the Mortgage. NL 26629 is the second lease that was granted to Nagigia Island Limited. At the time of the Mortgage, Defendant had not granted two Native Leases to respective lessees, but this was done subsequently. Plaintiffs being the creditors had registered the Mortgage did not proceed with registering the Mortgage on the title, after it was granted by the Defendant. Two lessees of NL 25324 and NL 26629 are legal entities and due to commercial reasons an agreement was entered to transfer shares. Defendant contends that transfer of

shares of lessees of the two leases, where a dealing in terms of section 12 of the iTaukei Lands Trust Act 1940, share transfer was illegal. The Defendant was aware of the sale of the shares of the lessees and had that they do not wish to purchase any shares from the sale. There was a resort operational till 2008, but this was not profitable and Plaintiffs had sought new investor through a share transfer. Defendant later did not recognise share transfer recruiting the operators to leave resort and closure of it. Plaintiffs through their solicitor had informed Defendant that if there are any breaches of the lessees, creditors and mortgagees should be informed of the said breaches. Notices of breaches, in terms of Section 105 of Property Law Act were issued to lessee. The Mortgagee settled all unpaid rentals at the time of issuance of said notices and also attempted to take steps to operate the resort which had ceased operating. This was prevented by Defendant as they did not recognise the Mortgagor though it had consented the Mortgage.

FACTS

2. The Plaintiffs in the statement of claim seeks following orders:

1. *A Declaration that there are no more breaches on NL 25324 and NL26629.*
2. *A Declaration that the notices dated 8th August, 2012 are erroneous of are therefore null and void and of no effect.*
3. *An Order for relief against the forfeiture and termination of NL 25324 and L 26629.*
4. *An Order restraining the 1st Defendant from terminating NL 25324 and NL 26629 until the final determination of this matter.*
5. *Any other order that the Court may deem just and equitable.*
6. *Costs in this action.*

3. The Defendant sought following Orders:

1. *That the Plaintiff's Statement of Claim be struck out on the grounds that the Plaintiff has no reasonable cause of action against the Defendant and further the claim being frivolous and vexatious.*
2. *That the Plaintiff's Statement of Claim and the six prayers listed therein be dismissed.*
3. *That the Caveats on NL No. 25324 and Caveat No. 73240 on NL No. 26629 be removed forthwith.*
4. *That NL No. 25324 and NL No. 26629 be terminated.*
5. *The cost of this action on a solicitor client indemnity basis.*
6. *Any other relief that this Honourable Court may think just and expedient.*

4. The Plaintiffs called three witnesses. Two Plaintiffs and their previous solicitor gave evidence. Most of the facts are not disputed. The witness for the Defendant who is

their present Manager of Tourism Department, admitted most of the facts and the report of Defendant relating to two leases before termination was also not disputed.

5. Following Facts are agreed in the pre trial conference.

1. *"The 1st Plaintiffs are creditors of Denham Island Limited ("hereinafter referred to as DIL") and Nagigia Villas Limited (hereinafter referred to as "NVL") in the sum of \$1,839,749.49 secured under Mortgage No. 6667 and a caveat over NVL's Native Lease No. 26629. DIL issued a Mortgage Debenture to the First of the First Plaintiffs over its assets.*
2. *TLTB being the Defendant in the proceedings is a corporate body established under the Itaukei Land Trust Act Cap 134 that is vested with the control of all Native Land in Fiji and it administers all such land, in various ways including issuing Tourism Leases, for the benefit of its Itaukei owners.*
3. *The Defendant issued Native Lease No. 25324 (NLTB 4/05/2103) to DIL on 1st August, 2000 for tourism purposes for the term of 99 years.*
4. *The Defendant issued Native Lease No. 26629 (NLTB No. 4/05/2147) to NVL for tourism purposes for the term of 99 years.*
5. *DIL obtained loan from the 1st Plaintiff and gave mortgage over its Native Lease No. 25324 (NLTB 4/05/2103) being Mortgage No. 6667 to secure the said loan.*
6. *On 23rd February, 1999 the Defendant consented to the mortgage in favour of the 1st Plaintiff in the principal sum of \$206,000.00 together with any subsequent sum advance.*
7. *DIL took further loan from the 1st Plaintiff and a Variation of Mortgage was registered on Native Lease No. 25324 being Variation of Mortgage No. 23728 on 16th June, 2008.*
8. *The 1st Plaintiff being the mortgagee over NL No. 25324 lodged a caveat being Caveat No. 732406 to protect its interest as the mortgagee of the said land.*
9. *The 1st Plaintiff being the mortgagee over NL No. 26629 lodged a caveat being Caveat No. 732497 to protect its interest as the mortgagee of the said land.*
10. *The 1st Plaintiff to protect its interest over Native Lease Nos. 25324 and 26629 requested the Defendant to communicate and correspond with their*

solicitor, Nawaikula Esquire in respect of Native Lease Nos. 25324 and 26629.

11. In 2007, the 2nd Plaintiff acquired majority shares in Nagigia Island Properties Ltd. the company that had majority shares in DIL and NVL.
12. In 2008, the 2nd Plaintiff entered into a Sale and Purchase Agreement to sell his shares in Nagigia Island Properties Limited to Nagigia Development for the sum of \$12,975,984.00 and payment of the said sum was guaranteed by DIL and NVL.
13. The Defendant was aware of the sale of shares in DIL and by letter dated 18th January, 2006 the Defendant advised the 1st Plaintiff to facilitate the sale of shares to any third party.
14. The Defendant again on 19th February, 2007 advised the 1st Plaintiff that they do not intend to purchase the shares in DIL.
15. Both DIL and NVL remain indebted to the Plaintiffs under security of the 1st Plaintiffs Mortgage, Caveat over the Leases NL 25324 and 26629 and under the guarantee held by the 2nd Plaintiff as an unpaid vendor under the 2008 agreement.
16. The Defendant issued two notices dated 8th August, 2012 to DIL and NVL respectively, pursuant to Section 105 of the Property Law Act for various alleged breaches of the lease agreements by DIL and NVL.
17. On or about December, 2012 DIL and NVL, without informing the Defendant or the Plaintiffs, abandoned and deserted the resort.
18. DIL and NVL have abandoned and deserted the lease and left more than 20 employees without work and not paid their FNPF contributions.
19. The resort's condition has deteriorated and the lease rent was also not paid by DIL and NVL to the Defendant.
20. The 1st Plaintiff being the mortgagee of the said Leases paid the Defendant the costs of \$6,124.26 for Native Lease No. 26629 and \$7,735.39 for Native Lease No. 25324 being outstanding lease rent to remedy the breach caused by NVL and DIL.
21. The Plaintiffs after receiving notice of the breaches and in order to protect their interests and keep the resort and Native Leases 25324 and 26629

operational, paid all outstanding arrears, attended to a major clean-up of the subject resort, transported generators and equipment."

6. For the Defendant present Manager of Tourisms Department of the Defendant in his evidence admitted that Plaintiffs were willing to take over and operate the resort located in two Native Leases in question at the time of notices of breaches were issued. Plaintiffs were prevented from doing so by Defendant and it had nor recognized the mortgagees.
7. He said notices of breaches in terms of section 105 of Property Act 1971 were exhibited on the premises of the two leases, despite several letters of the solicitors informing their interest in the two leases and also prior discussions with Plaintiffs that had ended without final determination being informed to Plaintiffs.
8. He said that Plaintiffs were not informed of the said Notices of Breach in term of Section 105 of the Property Act 1971 as the Mortgage was not registered on the title of Native Leases. Defendant had not recognised sale of shares.
9. He admitted that there were communications from previous solicitor of the Plaintiff, where request was made to inform any breaches of conditions to the mortgagees in order to protect their interest.
10. These letters were neither acknowledged nor rejected. The Mortgagees had requested the status of the two leases through solicitor and to inform any breaches if any for them to act, but these letters were not replied.
11. He also stated that Plaintiffs had paid lease rental arrears, after notices of breaches issued to lessees. He also agreed that Plaintiffs had made efforts to start operations of the resort as the mortgagees but they were prevented by Defendants.

ANALYSIS

12. First Plaintiff is the Mortgagee in Mortgage No. 6667 dated 18.03.1999 and consent was obtained from the Defendant. Application for Consent to Mortgage was granted by the Defendant on the 23 2. 1999.
13. In the affidavit marked P20 , which was an affidavit submitted in this case at interlocutory stage, Plaintiffs affirmed

"We are mortgagees of the lease hold land ; one is registered under the Companies Act and the other under deeds. We are also Debenture holders over all assets of the lease holding companies and have a first ranking charge over all undertakings and a guarantee, as security for the debt owed to us, by those two lease holding companies Denham Island Limited , a limited liability company having its

registered office at Sherani & Co. Suva (.....) and Nagigia Villas Limited a limited liability company having its registered office at Sherani & Co. Suva (.....) ”

14. When the mortgage was entered there was no lease granted by Defendant to mortgagor, despite that Defendant had granted consent to mortgage.
15. The two Native Leases NL 25324 and NL 26629 were granted on 1.8.2000 and 2.10.2002 respectively. Former lease was registered with registrar of titles on 4.8.2000 and date of registration of title of the later is not clear on the title.
16. A mortgage debenture dated 15.03.1999 was filed in the Companies Office against DIL.
17. Plaintiffs’ solicitor at that time requested Defendant and Irrevocable Authority to Release lease so that the mortgage could be registered against it. These letters are marked as P7 A and B.
18. A resort was constructed in terms of the lease granted by Defendant, and it was operational till about 2008. It needed more investment to attract high end tourists to be a viable business. So new investors were sought, through sale of equity.
19. By mid-2007, a NZ company had purchased all the shares in the lessees namely DIL and NVL. There was a subsequent agreement made in 2008 marked at hearing as P9 between second Defendant and Nagigia Development Limited and Nagigia Island Properties Limited, DIL, NVL and Australian Properties Proprietary Limited and AWNIL Limited were the Guarantors to the said agreement for sale and purchase of shares of Nagigia Island Properties Limited.
20. Plaintiff said that there was an agreement for 2007 transaction and for 2008 transaction of shares .The 2008 Agreement was between second Plaintiff who sold shares in a NZ company that he owned to another NZ company and the purchasers were the NZ company Nagigia Development Limited and the Vendor was the second Plaintiff. The share transfer was explained in the evidence, through a diagram. There was no dispute as to these facts.
21. Nagigia Island Properties owned all shares in DIL and NVL. The main shareholder was the second Plaintiff who sold shares of this company via 2008 Agreement to another NZ company. He further explained that other share transfer was one share of DIL went to Nagigia Development and one share of NVL went to Nagigia Development.
22. The share transaction did not affect the two leases where lessees remained unchanged to DIL and NVL. Share transactions are graphically demonstrated in P8.

23. Defendant's contention is that share transfer was a dealing of the property that required consent.
24. There are conditions attached to the leases granted. In terms of clause 2(m) there is restriction not to alienate land. It reads
- "(m) Not to alienate or deal with the **land** or any part thereof whether by sale, transfer or sub-lease or in any other manner whatsoever without the consent in writing of the lessor first had and obtained and such consent shall not be unreasonably withheld."* (emphasis is mine)
25. The above clause which is found in both leases, restrict alienation and or dealing with "Land" as opposed to the equity/ shares of the lessee.
26. The applicable law is laws of Fiji as stipulated in the respective leases in terms of clause 2(h) and Defendant did not submit any law that recognizes sale of shares of a lessee as dealing or alienation of land owned by said company.
27. It is trite law that company is a distinct legal entity hence shares are transacted separately from the tangible and intangible assets of that entity. It is only a right to a part of share capital.
28. Text "Understanding Company Law"(19th Edition)¹ states
- "Nature of shares
[8.10] A share is an item of intangible property also known as a "chose in action". A share is a right to a specified proportion of the company's share capital. Ownership of a share gives the shareholder proprietary rights as defined by the company's constitution and the law. These rights include the right to participate in the payment of a dividend and right to vote at a general meeting. Share ownership may also impose obligations such as an obligation to pay calls on partly paid shares. A shareholder does not have any proprietary interest in the company's assets. Shares may be bought and sold bequeathed and given as security for loans."*
29. If Defendant wanted to restrict sale of shares of lessee it could have done it expressly by restricting sale of shares as it did to dealing in land terms of clause 2(m), quoted earlier, in the leases. This was not done hence there is no requirement to obtain consent for share transfer.
30. Defendant had included a clause in the two leases that dealt with sale and issuance of shares in clause 2(i) and it reads

¹ By Philip Lipton, Abe Herzberg, Michell Welsh. Publisher Thomson Reuters (2018) p216

“(i) The lessee shall issue its capital shares on the condition that if and when shareholder intends to sell such shares or , the lessee intends to issue further shares then, the lessee or the shareholder shall notify the lessor in writing of the price at which such shares are to be issued or sold and the lessor shall have three (3) months from receipt of such notice to purchase such shares at the said price which shall be payable within one (1) month after electing to purchase such shares and if the lessor does not so elect within the notice period, such shares may then be issued or sold at the offered price free of the lessors rights thereunder but subject thereto on any subsequent resale thereof; PROVIDED that even though the lessor does not elect to purchase, such shares may not thereafter be sold at a price lower than that offered to the lessor without referring them to the lessor a the lower price and PROVIDED FURTHER that the lessor shall have no such right entitlement or option under this Clause or in the manner set forth above to acquire those shares fo the lessee’s capital stock;

- (i) Which the lessee intends to issue to its then shareholders, directors or employees, or*
- (ii) Which a shareholder intends to sell to any of the lessees then shareholders, or*
- (iii) Which are transferrable by gift, testamentary disposition or intestacy.”*

31. The above clause deals with issue of shares and sale of them. There is no requirement under said clause to obtain written consent to sell shares. It required lessee to inform further issuance of share capital and this had been done and lessor had refused to purchase DIL shares. These refusals were communicated in writing and marked as P10 and P11.
32. On 18.01.2006 and on 19.02.2007, Defendant informed through two letters that they can sell shares to any outside party and they do not wish to purchase shares in the share sale. These letters of the Defendant are marked P10 and P11.
33. It is an agreed fact that Defendant was aware of sale of shares in DIL and had also indicated they do not intend to buy shares in the sale (see agreed fact 14 in the pre-trial conference minutes).
34. Despite being aware of the sale of share to third parties, and having consented to sale of shares to third parties , Defendant contended that share sale is a dealing with the two leases hence consent was required in terms of Section 12 of iTaukei Land Trust Act 1940.
35. This position was taken by Defendant later, and had resulted present stalemate with operators of the resort leaving while Defendant and Plaintiff battle as to the legality of the share sale agreement.

36. Both Plaintiffs stated in the evidence that they had a meeting with the officials of the Defendant regarding the legality of the share sale without the consent of Defendant in terms of Section 12 of iTaukei Lands Trust Act 1940.
37. First Plaintiff registered Caveat No 732406 on 23.06.2010 over NL 25324.
38. Second Plaintiff's name also appeared on the Caveat. He supported registration of Caveat by virtue of the 2008 Agreement for Sale and Purchase of shares of Nagigia Properties Limited. Caveats are marked as P12 and P13 and they refer to Caveat Nos 732407 and 732406 respectively.
39. Second Plaintiff had entered in to share sale agreement in 2008 in order to attract more invest needed to provide transportation and other services such as internet to the resort.
40. There was no dispute that at the time of the issue of notices in terms of Section 105 of the Property Law Act 1971 the resort was not operational. The resort stopped operations as the new owners were not willing to pay for the share transfer as Defendant insisted consent from them, in terms of Section 12 of iTaukei Land Trust Act 1940 while Plaintiffs denied such requirement.
41. This dispute between the Defendant and Plaintiffs mainly regarding share transfer had resulted this closure as the investors left as there was no resolution of the issue regarding share transfer. They have not paid for the shares, and did not want to get involved when the legality of share transaction was questioned.
42. Irrespective of that disagreement regarding share transfer, Defendants were informed of mortgagee rights of the Plaintiffs through letters marked P14, P15, P16, P17 on 3.3.2010, 18.3.2010, 20.4.2010 and 25.6.2010 respectively.
43. Despite these reminders to the Defendant, breach notices were not communicated to the Plaintiffs by Defendant and they were dated 8.8.2012.
44. Purpose of issuance of notices in terms of Section 105 of Property Law act 1971 is to allow party that is in breach of lease condition to rectify them. Section 105 of Property Law Act 1971 states,

"Restrictions on and relief against forfeiture of leases

105. -(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the

lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a barrister and solicitor or a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this section.

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as sub lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as sublessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case may think fit, but in

no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

(5) For the purposes of this section -

(a) "lease" includes an original or derivative sublease; also an agreement for a lease where the lessee has become entitled to have his lease granted;

(b) "lessee" includes an original or derivative sublessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

(c) "lessor" includes an original or derivative sublessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;

(d) "sublease" includes an agreement for a sublease where the sublessee has become entitled to have his sublease granted;

(e) "sublessee" includes any person deriving title under a sublessee.

(6) This section shall apply although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act.

(7) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(8) The provisions of this section shall not extend -

(a) to a covenant or condition against assigning, subletting, parting with the possession or disposing of the land leased; or

(b) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof; or

(c) to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest; or

(d) to a condition for forfeiture for breach of any liquor or distillation laws; or

(e) to any contract of tenancy of agricultural land which is subject to the provisions of the Agricultural Landlord and Tenant Act.

(9) This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(10) This section shall have effect notwithstanding any stipulation to the contrary."

45. Section 105 Notices were issued *inter alia*, due to non payment of rentals and non operation of the resort. This was done after an investigation and a report was filed. This report was marked as D4. This document prepared by the Defendant and its contents was not disputed.
46. Report marked D4 describe the status of it at that time and it was non operational and property was not deteriorating due to non-maintenance and securing.
47. Having considered said undisputed report there were breaches of leases for issuance of Notices in terms Section 105 of Property Law Act 1971.
48. In terms of the Clause 2(f) two leases notices were required to be served to registered office in NL25324 and to Nagigia Island in Kadavu for NL2669.
49. Neither party in evidence stated where those places were at that time. Plaintiffs said that there were notices exhibited on the property and a land owner had informed them. The burden of proof of due service was with the Defendant, they did not prove this at trial.
50. Service of notice to "Nagigia Island in Kadavu" without a specified place such as registered office can be interpreted as to the location of the lease or property situated on island.
51. I cannot see illegality as to not informing Plaintiffs as lease agreement stipulated where to serve notices of the lessees.
52. It would have been prudent to serve notices to Plaintiffs, but there was nothing legally obliged the Defendant to serve notices to Plaintiffs when respective leases had place of service of notices.
53. Before time given in those notices to rectification of breaches Plaintiffs were made aware of the notices and had acted swiftly to remedy breaches.

54. It is not disputed by the Defendant that they have granted consent to mortgage. The mortgage was registered with the Registrar of Deeds as the leases were not registered with registrar of titles.

55. Plaintiff requested the Defendant to forward the lease so that the mortgage can be registered but the Defendant failed to, do so.

56. Section 68 of the Property Law Act 1971 provides the Covenants implied in a Mortgage:

“In every mortgage of land there shall be implied the covenants by the mortgagor and the powers and conditions set forth in the Schedule, except in so far as the same are varied or negatived in the mortgage, and except also that clauses (9), (10) and (11) of that Schedule shall be implied only in mortgages subject to a prior mortgage or mortgages, and that clauses (12), (13) and (14) of that Schedule shall be implied only in mortgages of a lease.”

57. Clause 5 of the Schedule of Covenants, Conditions and Powers Implied in Mortgages, under Section 68 the Property Law Act 1971 provides the Mortgagee with the following rights:

“That is the mortgagor fails to insure or keep insured the said buildings erections, or to pay the said rates, taxes and charges, or to repair the said buildings and improvements, or to keep them in good and substantial repair and condition as aforesaid, then and in any such case, and as often as the same shall happen. it shall be lawful for but not obligatory, on the mortgagee, at the cost and expense in all things of the mortgagor, to insure the said buildings and erections or any of them in the amount of their full insurable value or in any less amount, or to pay any such premium, or to pay the said rates, taxes and charges, or to repair the said buildings and improvements and keep them in good and substantial repair and condition.”

58. First Plaintiff as the mortgagee had paid the outstanding rent and made attempts to clean the abandoned resort and start the operation of resort which was abandoned by the owners.

59. This work to refurbishing resort and make it operational was prevented by the Defendant due to non registration of the Mortgage on the title. Defendant did not recognize first Plaintiff as a mortgagee in terms of the Mortgage.

60. Defendants had consented to the Mortgage and they are estopped from denying first Plaintiff as the mortgagee. Defendant had not only given consent to first Plaintiff to execute mortgage but also was aware of share issuance and consented to sale to third parties.

61. Clause 5 of the Schedule of Covenants, Conditions and Powers Implied in Mortgages, contained in Property Law Act 1971, states that the Mortgagee has the powers to take over the operation of the business in part or in full if the Mortgagor fails to do so.

62. In UK Court of Appeal (Civil Division) decision Silven Properties Ltd -v- Royal Bank of Scotland, EWCA (2003) Civ. 1409 in which Justice Lightman while discussing the duties of the Mortgagee stated in paragraph 13

"A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realize his security. He is entitled to remain totally passive. If the mortgagee takes possession, he becomes the manager of the charged property: see Kendle v Meisom [1998] 139 CLR 46 at 64 (High Court of Australia). He thereby assumes a duty to take reasonable care of the property secured: see Downsview Nominees Ltd v. First City Corp[1993] AC 295 ("Downsview") at 315A per Lord Templeman; and this requires him to be active in protecting and exploiting the security, maximizing the return, but without taking undue risks: see Palk v. Mortgage Service Funding Plc [1993] Ch 330 at 338A per Nicholls V-C ("pal").

63. Plaintiffs had paid arrears of rent as at the date of issuance of said notices after inquiring the proper arrears. There was no dispute as to proper arrears as at the date of issuance of notices of breach. Plaintiffs said that amounts appeared in the notices were not correct and proper amount was paid. This is not disputed.
64. So, Plaintiffs had admitted that there was arrears of rent and had also admitted that the resort was not operational at that time. They had also tried to enter premises that was closed and had also made arrangements to operate it, but this was prevented by the Defendant. Plaintiffs said that they had even purchased certain items for immediate maintenance, but they were prevented from entering premises.
65. First Plaintiff in terms of the mortgagee of the Mortgage has a right to enter the premises. He should be allowed to enter the in terms of the mortgage. He also has a mortgage debenture.
66. Plaintiffs were prevented from taking steps to rectify breaches. Notices in terms of Section 105 are given for rectification of any breaches and first Plaintiff as mortgagee had made genuine effort to revive the resort and make it operational.
67. Defendant cannot claim for unpaid rent from the time period they prevented first Plaintiff from entering the premises.

68. Through the conduct of the Defendant in preventing rectification of breaches contained in the breach notices, it had created a situation for Plaintiffs to seek restraint of Defendant from proceeding further with forfeiture of the two leases.
69. Plaintiffs should be given a reasonable time to comply with the breaches. What is reasonable cannot be determined at this time as proper assessment of the situation at resort needs to be done.
70. Report marked D4 was obtained, about five years ago and present situation needs to be assessed. Plaintiffs should be restrained from entering the premises and commencing with the work to make the resort operation. This was recommended in D4, but had not happened.
71. Defendant is estopped from denying the Mortgage hence mortgagee rights cannot be denied. Court of Appeal in NLTB and Anor V Subramani (2010) FLR 24 held that when NLTB (predecessor to iTLTB) encouraged a party to take certain action equitable principles recognized in Chalmers v Pardoe [1963] 1 WLR 677 is applied to remedy the situation. In that case principle of estoppel is applied. By the same token here not only Defendant was aware of the Mortgage but also consented to it, before mortgagor was granted the lease of land by Defendant. This land was the subject matter of the mortgage.
72. Defendant had counter claimed inter alia for termination of NL 25324 and NL 26629 and for removal of caveats. Plaintiffs have caveatable interest on the above properties due to the conduct of the Defendant. Defendant had consented to Mortgage No 6667 and estopped from denying rights of the mortgagees.
73. Defendant had issues Notices of Breach in terms of Section 105 of the Property Law Act 1971, but had not allowed Plaintiffs to remedy breaches such as to refurbish resort and premises.
74. The purpose of Section 105 of the Property Law Act 1971 is to allow a party who is in breach notice of the specific breaches and also to remedy the same. In this case only breach that could be immediately remedy was the payment of arrears which they had done as soon as they were informed about the notices of breach.
75. It is also admitted fact that resort was not operational due to new owners leaving it high and dry, due to Defendant's insistence of consent to transfer shares. So the non operation of resort was inevitable in the circumstances. About nine years have passed and current status of the property is not known, hence a reasonable time period should be granted to the Plaintiffs to remedy other breaches, mainly operation of the resort.
76. Defendants are restrained from taking any step to terminate NL25324 and NL26629 in terms of the notices issued on 8.8.2012. After granting a reasonable time to start

operation of the resort, Defendant may issue fresh notices if there are continuous breaches.

CONCLUSION

77. Plaintiffs are having caveatable interests to the two leases. They had paid arrears of lease rentals, when they became aware of the notices. Defendant had prevented Plaintiffs from proceeding with rectification of other breaches. Defendant is estopped from denying the Mortgage. First Plaintiff is a mortgagee under the Mortgage, Defendant had consented to said transaction before mortgagor was granted the lease. The lease was subsequently granted hence first Plaintiff is a mortgagee. Defendant was aware of the mortgage as they were repeatedly notified of this. Defendant is restrained from taking action to terminate of NL25324 and 26629, without giving a reasonable time for the Plaintiffs to revive the resort. Defendant cannot claim for arrears of rentals from the two leases to the time period that they prevented Plaintiff from entering. Considering circumstances of the case, each party to bear their costs.

FINAL ORDERS

- a. There is no illegality in the issuance of breach notices dated 8.8.2012.
- b. Plaintiffs and their agents should be allowed to rectify the breaches stated in said notices.
- c. Defendant is directed to grant a reasonable time to remedy breaches considering time lapsed.
- d. Defendant is directed to allow Plaintiffs, and or their agents to enter the premises of two leases and take steps to take steps to rectify breaches including and not limiting to commencement of resort operational.
- e. Defendant is restrained from termination of NL 25324 and NL 26629 without granting Plaintiffs a reasonable time to operate the resort. If there are further breaches again notices may be issued in terms of the two leases, before termination.
- f. No costs.

Dated at Suva this 21st day of February, 2020.



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Justice Deepthi Amaratunga
High Court, Suva