IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 41 of 2019

IN THE MATTER of an application by the Plaintiff under section 169 of the Land Transfer Act (Cap 131) for an order for vacant possession.

BETWEEN : **SETEO RASAU CAKOBAU** of Waruka, Wainikeli, Cakaudrove, Fiji, Self employed.

PLAINTIFF

AND : **SANDJUNES MANAGEMENT GROUP LTD** trading as **"Waruka Bay Resort"** a limited liability company having its registered office at Waruka Bay Resort, Qamea, Fiji

DEFENDANT

Appearances : Sherani & Co. for the Plaintiff
: Munro Leys for the Defendant

Judgment : 18 February 2020

JUDGMENT

1. By an originating summons filed 30 August 2019, the Plaintiff seeks an order for the Defendant to give to him immediate vacant possession of the portion of the property occupied by the Defendant, comprised and described in iTaukei Lease No. 33821 situated at Waruka (Part of) Lot 1 on SO 7306, Tikina of Wainikeli in the Province of Cakaudrove, comprising an area of 29.1285 ha.

The law

2. The application is made pursuant to section 169 of the Land Transfer Act (the Act) which permits, inter alia, a registered proprietor to summon a person in possession of land to show cause why the person summoned should not give up possession to the applicant.

3. In proceedings under section 169 of the Act, the Plaintiff is first of all required to show it belongs to one of the classes of persons who may institute proceedings under this provision of the Act.

4. A failure to establish standing brings proceedings to an end. However, once the Plaintiff shows locus, the burden then shifts to the Defendant to show cause and this it may do by adducing evidence of the existence of a right, legal or equitable, to be in possession of the property. The standard is to the satisfaction of the Court. (Section 171 of the Act)

5. In support of this application, the Plaintiff deposes that he is the registered lessee of all that land comprised and described in the summons. A copy of the said lease is annexed. It is an iTaukei lease for 98 years commencing 1 January 2005, showing the Plaintiff as the registered lessee. I find that the Plaintiff is the registered proprietor of the property in question and therefore is qualified under section 169 of the Act to bring these proceedings against the Defendant.

6. The Defendant must now show it has a right to continue in occupation of the property. Mr. Andrew Jason Grenenger, director of the Defendant Company deposed the answering affidavit, opposing the application on grounds that I summarise as follows:

7. The Plaintiff and Mr. Grenenger were friends and had agreed to enter into a joint venture to construct, manage and operate a resort on the Plaintiff's leasehold property as then comprised in Native Lease 27425. They agreed to set up a limited liability company wherein they each would hold 50% shares, with the Plaintiff, Mr. Grenenger and Rebecca Grenenger as Directors. According to Mr. Grenenger, he was to finance the building and operation of the Resort while Mr. Cakobau was obliged, as 50% shareholder, to transfer the whole lease into the name of the Defendant Company. In the course of these discussions and efforts, it was discovered that the Tourism Lease issued by the then NLTB was done prematurely and without a surveyed boundary.

8. At a meeting with the iTLTB on 12 February 2015, the Plaintiff was advised that owing to the registered lease being issued without a legal title survey, the best way forward was to have the land surveyed for a fresh title with the same lease conditions; that a partial surrender would result in the surrendered portion being returned to the landowning unit (the LOU), and given the problematic relationship between the Plaintiff and members of the LOU, this might not be such a good idea; that the best option was to have the lease surveyed for a fresh title, and then transfer the whole lease to the joint company.

9. Mr. Grenenger says that on the basis of decisions reached at this meeting, he and his wife quit their jobs in Australia, sold their house and cars and moved to Fiji. It was the Plaintiff's responsibility to submit all documents for iTLTB approval. That to this end, the Plaintiff had engaged the services of Manoj K. Kumar, a development/planning consultant to undertake the boundary survey and also to advise them on all documents to be submitted to the relevant Government bodies.

10. In a letter dated 20 October 2015, the Plaintiff's planning consultant wrote to Director Town and Country Planning stating, amongst other things, that iTLTB had acknowledged that they would ultimately surrender the original lease upon registration of the new survey so the new Tourism Lease could be issued.

11. In November 2016, the Plaintiff informed Mr. Grenenger that he wanted to subdivide a portion of the land, committing only about 25 acres to SMG (Lot 2) and retaining about 50 acres (Lot 1) in his own name. Thereafter, on 5 December 2016, Mr. Grenenger was informed by iTLTB that the Plaintiff's planning consultant did not submit the Resort building plans to the iTLTB for consent. Mr. Grenenger avers this was intentionally done so as to deprive him and SMG of their investment.

12. Mr. Grenenger deposes to preferring to keep to the original agreement for the transfer of the whole lease to SGM whereas the Plaintiff, reneging from his initial position, subsequently chose to subdivide and only partially surrender the lease. Attempts to get the Plaintiff to sign off on the proposed memorandum of understanding designed to

reflect agreements between the parties proved futile, as the Plaintiff neither signed the memorandum nor submitted the same to the iTLTB when he lodged the signed subdivision plan.

13. Eventually, the parties agreed the only way forward was with a sublease agreement over Lot 2. The Plaintiff and his lawyers were to draw up the agreement and submit the same for Mr. Grenenger's perusal, with the agreement coming into effect following approval of the Plaintiff's subdivision and presentation of a revised head lease.

14. No agreement was reached on the terms of the proposed sublease by the Plaintiff and his lawyers in July 2018. At the request of the Plaintiff, the Defendant paid on 13 July 2018 $10,000 on the understanding it was for rental until 1 August 2019.

15. Unable to agree to the proposed sub lease agreement, the Plaintiff issued a notice to quit on the Defendant on 14 September 2018. Mr. Grenenger says the Plaintiff with the help of villagers from Qeleni thereafter tried to forcibly evict Mr. Grenenger's family while he was out of the country.

Has the Defendant shown a right to possession?

16. The Defendant submits that it has a right to remain on the land under the doctrine of promissory estoppel. The Defendant also says that the notice to quit served on it by the Plaintiff is defective for non-compliance with section 89 (2) (a) of the Property Law Act.

17. The land the subject of these proceedings is an iTaukei lease. Pursuant to section 4 of the iTaukei Land Trust Act, control of all iTaukei land vests with the iTaukei Land Trust Board (iTLTB) which administers all such land for the benefit of iTaukei owners. Section 12 of the iTaukei Land Trust Act requires the consent of the iTLTB to any dealings with iTaukei leases. It provides:

> (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 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:

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.

(Substituted by Ordinance 30 of 1945, s. 8; amended by 29 of 1948, s. 3.)

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.
(Inserted by Ordinance 35 of 1943, s. 2.)

18. In this case, the Plaintiff was the lessee of iTaukei lease No. 27425 subsequently surrendered, and issued with a new iTaukei lease no. 33821, both leases being for tourism purposes. It is not disputed that the Plaintiff is the registered proprietor of the property in question. Nor is it disputed that the Defendant has built a resort thereon, or that the consent of the iTLTB has not been obtained. The Defendant's main contention is that the Plaintiff is estopped by his promise to transfer his tourism lease to the Defendant, a promise upon which the Defendant had acted to its detriment, such that the Plaintiff cannot now back out.

19. Promissory estoppel is explained in *Halsbury's Laws of England* 4th ed. at 1514 as follows:

> When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced.

20. However, where, as in this case, estoppel is resorted to so as to make lawful that which the legislature has by statute deemed unlawful, the editors of *Halsbury's* (supra) at 1515 state thus:

> **Estoppel against statute.** The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.

21. Clearly, section 12 of the iTaukei Land Trust Act prohibits dealing with iTaukei land without the consent of the iTLTB, and any dealing effected without such consent is rendered null and void.

22. Additionally, the Defendant cannot invoke the doctrine of promissory estoppel to render valid a dealing with the land deemed invalid by statute, in this case, section 12 of the iTaukei Land Trust Act.

23. The circumstances in the oft cited case of *Chalmers v Pardoe* (1963) 3 A.E.R. 552 are somewhat similar to the instant case, of close friendships turning sour over business dealings and arrangements involving land. In *Chalmers* (supra), the Plaintiff had consented for the Defendant to occupy part of the Plaintiff's property, subject to the provisions of section 12 of the Native Lands Trust Ordinance, identical in terms to section 12 of the iTaukei Land Trust Act. Whatever the terms of the arrangement between the parties pertaining to the Defendant building on and occupying part of the Plaintiff's property, it was clear the Plaintiff had, prior to the falling out, always been willing to either apply to the Board for a sub-lease to the Defendant, or surrender to the Board that part of the property with the Defendant, allowing a direct lease from the Board to the Defendant. Before either of that could be done, the friends fell out and the Plaintiff refused to seek the consent of the Board.

24. Consequently, the Plaintiff filed an action for trespass against the Defendant. The Defendant for his part filed a separate action claiming an equitable charge or lien over the Plaintiff's land. At first instance, the learned trial judge rejected all claims and cross claims, holding, inter alia, that Mr. Chalmers "must be permitted to remove forthwith the buildings he had erected."

25. Both parties appealed to the Court of Appeal which held, inter alia:

> An equitable charge cannot be brought into being by an unlawful transaction and the Appellant's claim to such a charge must therefore fail.

26. A further appeal was made to the Privy Council where the Board held:

> But even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr. Chalmers and Mr. Pardoe well knew, of erecting a dwelling house and accessory buildings, it seems to their Lordships that, when this purpose was carried into effect, a " dealing " with the land took place. On this point their Lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained it follows that under the terms of Section 12 of the Ordinance No. 104 this dealing with the land was unlawful. It is true that in Harnain Singh and Backshish Singh v. Bawa Singh Civil Appeal No. 10 of 1957, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene Section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. But in the present case there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their Lordships that this is one of the things that Section 12 was designed to prevent. True it is that, con-fronted with the new buildings, the Board as lessor extracted additional rent from Mr. Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr. Pardoe under the lease, it cannot make lawful that which the Ordinance declares to be unlawful.

27. In *Murray Cockburn and Native Land Trust Board v Bilo Limited and Others*, Consolidated Civil Appeals Nos. 13 and 22 of 1984 at page 24, the Court of Appeal stated:

> The provisions of Section 12(1) are drastic and are very widely expressed. They have been considered and applied in a number of cases, perhaps the leading one being *Chalmers v. Pardoe* (1963) All ER 552 where the Judicial Committee accepted that there must necessarily be some prior agreement, so that the mere fact of its existence is not of itself a breach of the section. In *Jai Kissun v. Sumintra* (1970) 16 FLR 165,160 Gould V.P, said a signed agreement held inoperative and inchoate while consent is being sought is not caught by section 12. The problem lies in determining what acts done in relation to that agreement constitute it a "dealing" with the land rendering it illegal. The consensus of the majority in that case suggests that this would occur once it was acted upon as a valid agreement for sale (Tompkins J.A.) or implemented in any way touching the land (Gould V.P.)-."

28. In the instant case, there was not only an agreement to construct a resort and transfer the lease to the Defendant. There was, in the construction and operation of the resort, performance as well, amounting to a dealing with the land, which dealing is prohibited, null and void in the absence of consent of the iTLTB.

29. The Defendant cites *Asesela Sadole v Makitalena Vadrasola* Civil Action No. HBC 220 of 2017 and Singh Mishra Civil Action No. 26 of 2013 (Decision of 30 May 2013) where the respective Masters refused to make an order for vacant possession, having found that the defendants had shown an arguable case of promissory estoppel. Both cases are distinguishable on the basis that neither dealt with consent under section 12 of the iTaukei Land Trust Act, or even its equivalent, section 13 of the State Lands Act.

30. In addition to relying on promissory estoppel, the Defendant also submits that the Plaintiff's eviction notice is defective, being in breach of section 89 (2) (a) of the Property Law Act. That section provides:

> In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows:-
>
> (a) where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice expiring at the end of any year of the tenancy…

31. The Defendant says the 2 months period given in the notice for the Defendant to vacate is in breach of section 89 (2) (a) above. I consider that section 89 (2) (a) does not apply to a tenancy that is void ab initio for want of consent.

32. For all of the above reasons, I do not consider the Defendant has shown cause to the satisfaction of the Court.

33. The orders of the Court therefore will be:

    1. The Defendant and/or its servants and/or agents do give up and deliver to the Plaintiff that portion of the property occupied by it, which property is comprised and described in iTaukei Lease No. 33821 situated at Waruka (Part of) Lot 1 on SO 7306, Tikina of Wainikeli in the Province of Cakaudrove.

    2. I consider the Defendant is entitled to remove the buildings it had erected on the property and that it would need time to do so. I stay execution for 4 months, from the date of this order.

    3. In the circumstances of this case, I order for parties to bear their own costs.

S.F. Bull
Master