

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 252 & HBC 253 OF 2017

BETWEEN : **NADS HANDICRAFT LIMITED** a limited liability company having its registered office at Lot 3, Evans Place, Enamanu, Nadi.

INSPIRED PROPERTIES LIMITED a limited liability company having its registered office at Denarau, Nadi, Fiji.

PLAINTIFFS

AND : **EMEI CAPITAL** a limited liability company having its registered office at 176 Pacific Harbour, Navua, P. O. Box 16299, Suva, Fiji.

DEFENDANT

Appearances : Mr D. S. Naidu for the plaintiffs
Ms R. Lal for the defendant
Date of Hearing : 23 October 2019
Date of Judgment : 17 August 2020

J U D G M E N T

Introduction

[01] The plaintiffs brought these actions claiming:

(In HBC 252 of 2017, the plaintiff, (Nads Handicraft Limited) 1. A declaration that the agreement dated 27 April 2015 be rescinded under Clause 13; 2. Refund of \$1.4 million to the plaintiff; 3. Damages for non-performance of the agreement; and 4. Costs on indemnity basis.

(In HBC 253 of 2017, the plaintiff, Inspired Properties Ltd) 1. Judgment in the sum of \$1,119,262.14; 2. 13.5% interest on sum claimed from 15 September 2017 until payment; 3. Legal costs of \$1,500.00; and 4. Costs on indemnity basis.

- [02] The above actions were consolidated and the parties agreed that one judgment should bind both.
- [03] At the trial, both parties called a witness each and tendered their respective documents, and presented their respective written submission to the court. I am grateful to counsel represented both parties for their excellent work.

Background

- [04] The defendant, Emei Capital (*"the defendant"* or *"EC"*) is the registered proprietor of Certificate of Title No. 42136.
- [05] On or about 27 April 2015, the plaintiff, Nads Handicraft Ltd (*"the plaintiff"* or *"NHL"*) and defendant entered into a Sale and Purchase Agreement for Certificate of Title No. 42136, Freehold Property for a consideration sum of \$9,000,000.00 (*"SPA"*).
- [06] On 27 April 2015, Inspired Properties Ltd, the second plaintiff (*"the second plaintiff"* or *"IPL"*) and the defendant entered into a Development Lease Sale Agreement for the purchase of the property in the State Foreshore Development Lease LD Ref: 60/957, Denarau Island (the *"FDL"*) for reclamation works over the area covered under the FDL as well as the Freehold Property (*"project works"*) (*"DLSA"*). The DLSA was for an approximate area of 6 (six) hectares for the sum of FJD\$1,400,000.00 exclusive of Value Added Tax (the *"Purchase Price"*). The DLSA required that any land in excess of 20 acres (the *"Balance Land"*) remains with the plaintiff or be transferred to the plaintiff and/or its nominee.
- [07] In December 2016, NHL and the defendant entered into a memorandum of understanding (*"MoU"*) which supplemented and further clarified the terms and conditions of DLSA, and states that should any inconsistencies arise between the two agreements that the provisions of the MoU shall prevail.

- [08] On or about 3 October 2017, upon commencement of the survey reclamation and development works as provided under the DLSA, the plaintiff applied to the head lessor for the issuance of a ninety-nine (99)-year lease issued for the FDL, LD Ref 60/957 is now issued as State Lease No. 21242 to the plaintiff.
- [09] As the defendant is a non-resident of Fiji, the DLSA required the consent of the Minister for Lands pursuant to section 6 of the Land Sales Act ("*Ministerial Consent*") as a condition precedent under the agreement.
- [10] In relation to Civil Action No. 252 of 2017, the plaintiff alleges breach of agreement by the defendant for failure or negligence to subdivide and transfer any area in excess of 20 acres to NHL.
- [11] In relation to Civil Action No. 253 of 2017, the plaintiff alleges that the debt sum of \$1,119,262.14 was incurred as costs in carrying out reclamation works.

The Law

- [12] Section 6 of the Land Sales Act ("*LS Act*") provides (as far as relevant):

"Purchase of land by non-resident

6 (1) No non-resident or any person acting as his or her agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

..." [Emphasis supplied]

- [13] The LS Act, section 2 (interpretation section), defines the word "*dealing*" as follows:

" "dealing" means any transaction of whatsoever nature, including an option to purchase, by which land is affected under the provisions of the Land Transfer Act 1971 and shall include an agreement to enter into any such transaction, but shall not include the original grant of any lease or licence by the iTaukei Land Trust Board;" [Emphasis provided]

[14] In *Resort in Park and Garden Ltd v Naidu* [2012] FJHC 882 Calanchini J stated:

"It is, in my judgment beyond question that the requirement to obtain prior Ministerial consent is a condition precedent to the making of a binding contract to purchase. Whether the present agreement complies with that requirement is answered by ascertaining the true construction of the agreement".

He further stated:

"The point that is made by the Court of Appeal in Port Denarau Marina Limited v Tokomaru Limited [2006] FJCA 27 is that it is permissible for the parties, in the one document, to bind themselves to obtaining the consent of the Minister and upon that consent being obtained to set out the binding terms and conditions of the proposed sale and purchase contract...surely the issues does not depend upon the number of documents but rather whether on a true construction of the one document the Minister's consent is a condition precedent to the formation or making of a contract to purchase land".

Agreed facts

[15] The following facts were agreed between the parties at the pre-trial conference ("PTC"):

1. The defendant is a limited liability company and the registered proprietor of Certificate of Title No. 42136. At all material times the defendant was a company duly incorporated under the laws of Fiji and was liable to be sued in and by their corporate name and carried out the business of land acquisition for hotel as well as operated an inter-island cruise service.
2. On or about 27 April 2015, the plaintiff and defendant entered into a Sale and Purchase Agreement for Certificate of Title No. 42136 and a Foreshore Lease which was to be issued as a Development Lease (the "*Development Lease Sale Agreement*"). The Development Lease Sale Agreement was for an approximate area of 6 hectares for the sum of F\$1,400,000.00 (the "*Purchase Price*") exclusive of Value Added Tax.
3. Pursuant to the Development Lease Sale Agreement the defendant paid the sum of FJD\$1,400,000.00 into the plaintiff's solicitors trust account for the purchase of the Foreshore Development Lease LD Reference 60/957

which has now been issued as State Foreshore Lease No. 21242 (the "*Special Use Hotel Lease*").

4. On or about 25 March 2015, the plaintiff's principal director and shareholder entered into a Share Sale Agreement with the defendant for the sale of shares in the plaintiff company to the defendant for the purchase price of \$100,000.00.
5. The parties executed a registrable Share transfer which was held by the defendant's solicitors.
6. Pursuant to the Share Sale Agreement the shares being sold were only in relation to the issued shares in the capital of Nads in respect of only the floating assets of the company.
7. On 3 October 2017, upon commencement of the survey reclamation and development works as provided under the Sale and Purchase Agreement dated 27 April 2015, the plaintiff applied to the head lessor for the issuance of a ninety-nine (99) year lease issued for the Foreshore Lease LD Ref 60/957 now issued as State lease No. 21242 to itself.
8. That the plaintiff obtained the consent of the Director of Lands to institute legal proceedings against the defendant by letter dated 19 March 2018.

The issues

[16] The primary issues to be determined by the court include:

- i. *Whether or not the DLSA required ministerial consent under section 6 of the LS Act.*
- ii. *Whether the DLSA was illegal and null and void.*
- iii. *Whether the plaintiff breached clause 5 of the DLSA.*
- iv. *Whether or not the plaintiff is entitled to damages for non-performance of the DLSA by the defendant.*

The evidence

Plaintiff

[17] The plaintiffs called one witness namely Babu Ganesh ("PW"). PW1 states his evidence that:

- a) NHL entered into a Sale and Purchase Agreement with the defendant on or about 27 April 2015, for the sale of the Development Lease and the Freehold Property having an accumulated land area in excess of 20 acres. The agreement was for an area not exceeding 20 areas for the purchase price of \$1.4m.
- b) According to the Agreement, the location and boundaries of the Development Lease and Freehold Property would be defined by the defendant after the survey and reclamation works are completed.
- c) The approval for development lease was granted by the Director of Lands for a period of 5 years with an extension to the plaintiff. According to the Development Lease, NHL was required to carry out and meet the conditions contained in the lease in relation to, reclamation, survey, electricity, water and sewerage, within 5 years of the grant of the Development Lease.
- d) IPL had entered into an MoU with the defendant for survey and reclamation works, on 20 December 2015. IPL would deliver soil to the site where the defendant had only paid the invoice dated 1 June 2017, in the sum of \$449,651.16. The defendant had failed to pay any other invoices it had rendered

[18] Under cross examination PW states that:

- a) He could not show particulars of the invoices dated 13 July 2017, in the sum of \$682,599.42, and 27 July 2017, in the sum of \$436,701.96 which have not been paid by the defendant.

- b) He approached the defendant in relation to the unpaid works carried out by IPL but the defendant had failed to make payments, and said the MoU was required to assist in carrying out the development works where both IPL and the defendant had to work together to carry out certain aspects of the DLSA.
- c) On 16 November 2017, he instructed his solicitor to issue a letter to the defendant revealing that the defendant had defaulted in the DLSA as all development works have not been completed within 12 months.
- d) He confirmed that IPL had been sub-contracted by the defendant to carry out the soil filling.
- e) He said that the defendant had failed to continue with the survey and reclamation works and as a result he is seeking damages for non-performance against the defendant.
- f) All conditions in that approval notice to lease had not been complied with, but NHL had obtained State Lease No. 21242 over the said land.
- g) The aggregate land being the freehold and the State Lease had an area of more than 20 acres. He confirmed that the State Lease was capable of being transferred to the defendant and that the defendant was to transfer back to NHL or its nominee any land in excess of 20 acres.
- h) He said he did not transfer the State Lease to the Defendant as he was concerned that the defendant would not transfer back the land in excess of 20 acres to NHL or its nominee.
- i) The ministerial consent for the sale had not been applied for as the land area boundaries was not clear until the completion of the reclamation works.

- j) He agreed that he has not performed clause 5 of the DLSA where he agreed that all survey and reclamation works had to be completed by 27 April 2015, however it has not been completed.
- k) He agreed that pursuant to clause 5 of the DLSA, he was required to carry out the survey and reclamation works at the defendant's expense but he has not carried out his obligations under clause 5.
- l) He said the subdivision plan though completed was not lodged as the works were not completed.
- m) He obtained the lease from the Director for Lands, however he has not obtained the consent from the Minister of Lands to transfer the Development Lease to the defendant.
- n) He admitted that he has not registered the subdivision plan with the Director of Lands and Registrar of Titles but he did attend to such other necessary matters as may be required for the completion of the subdivision and reclamation works and registration of the subdivision plan as the reclamation and survey works were incomplete as the defendant had failed to pay him for the works done.
- o) He has not applied to the Lands Department for the consent from the Director of Lands to transfer the development Lease to the defendant.
- p) He also admitted that he has his personal interest in the property as he intends to have the land transferred to him in the event that the land is in excess of 20 acres.
- q) He admitted that he had to transfer the State Lease to the defendant, and the defendant would transfer 3 acres back to NHL.
- r) He said the invoices dated 13 July 2017 and 24 July 2017, remain unpaid by the defendant. However, he agreed that in accordance with clause 8 of

the MoU, he was required to provide the defendant with documentary evidence in relation to the invoices dated 13 July 2017 and 24 July 2017, and that till to date he has not provided the same to the defendant.

Defendant

[19] The defendant called Wu Xin Yu, (the General Manager for Jingye (Shanghai) Investment Co. Ltd which is the parent company of both the defendant company) (“DW”) to give evidence on behalf of the defendant. She testified that:

- a) She had known Babu Ganesh for a number of years upon her various trips to Fiji.
- b) She was first introduced to Babu Ganesh by her brother in 2016 in relation to the sale and purchase of the freehold property and Foreshore Development lease, and that the purchase price had been paid to the defendant’s lawyer’s trust account.
- c) Under the Foreshore Development Lease Agreement, Babu Ganesh was responsible to carry out the survey and reclamation works as well as obtain the Director of Lands’ consent and approval.
- d) It was Babu Ganesh’s duty to transfer the Foreshore Development Lease to the defendant, but he failed to complete reclamation works as there was a dispute over the invoices issued by IPL for the reclamation works.
- e) The parent company of the defendant had disputed invoices dated 13 July 2017 and 24 July 2017, and requested documentary evidence in relation to the delivery dockets of the soil from IPL. However, Babu Ganesh had failed to provide the delivery dockets to the defendant to date.
- f) Since Babu Ganesh had failed to provide the delivery dockets, the defendant did not pay the invoices dated 13 July 2017 and 24 July 2017.

[20] In cross examination, DW said:

- a) It was the responsibility of Babu Ganesh to carry out the survey and reclamation works.
- b) She agreed that the survey and reclamation works would be carried out at the defendant's cost.
- c) The defendant did not pay the invoices dated 13 July 2017 and 24 July 2017 because Babu Ganesh failed to provide the delivery dockets.

Discussion

[21] The plaintiff seeks specific performance of the DLSA against the defendant. In terms of the DLSA, the plaintiff agreed to sell an area not exceeding 20 acres ("*the property*") and the defendant agreed to purchase it. The parties expressly agreed that any land exceeding 20 acres would be transferred to the NHL. This would take place after the location and boundaries of the property were defined after the survey and reclamation works are completed. Under clause 5 of the DLSA, it was the plaintiff's responsibility to carry out the survey and reclamation at the defendant's expense.

Illegality issue

- [22] The primary issue before the court was illegality issue, i.e. whether the DLSA was null and void in the absence of ministerial consent as required in section 6 of the LS Act.
- [23] The LS Act, 6 (1) states that: "*No non-resident or any person acting as his or her agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land.*"
- [24] Basically, section 6 prohibits a non-resident from making any contract to purchase or to take on lease any land without the prior consent in writing of the Minister for Lands.
- [25] It was not in dispute that the defendant is a non-resident of Fiji, thus the DLSA required the consent of the Minister for Lands under section 6 of the LS Act as a condition precedent under the agreement.

- [26] "Dealing" includes an option to purchase and an agreement to enter into any such transaction (see section 2 (interpretation section) of the LS Act).
- [27] Undoubtedly, the DLSA has no ministerial consent as required by section 6.
- [28] Mr Singh who filed supplementary submission on behalf of the defendant contends that in this instance the consent of the Minister for Lands has never been obtained and it was the obligation of the plaintiff to do the same, which he failed to do the same on his part. The plaintiff was to first obtain the consent, thereafter transfer the property to the defendant. Upon transfer, if there was any land more than 20 acres then it were supposed to be transferred back to the plaintiff. However, he submits, the plaintiff failed to do anything on his part.
- [29] Conversely, Mr Naidu of counsel for the plaintiff argues that the parties were well aware of the requirement to obtain ministerial consent as evidenced by clause 1 of the DLSA. The reimbursement payments required for the project works were separate from and independent to the purchase price.
- [30] According to clause 5 of the DLSA, it was the plaintiff's responsibility to carry out the survey and reclamation at the defendant's expense. It means that the defendant had to reimburse expenses incurred in respect of the project works.
- [31] In *Resort in Park and Garden Ltd v Naidu* [2012] FJHC 882 the court held (Calanchini J (as he was then)) that the requirement to obtain prior ministerial consent is a condition precedent to the making of a binding contract to purchase. It was further held in that case that:

"The point that is made by the Court of Appeal in Port Denarau Marina Limited v Tokomaru Limited [2006] FJCA 27 is that it is permissible for the parties, in the one document, to bind themselves to obtaining the consent of the Minister and upon that consent being obtained to set out the binding terms and conditions of the proposed sale and purchase contract....surely the issues does not depend upon the number of documents but rather whether on a true construction of the one document the Minister's consent is a condition precedent to the formation or making of a contract to purchase land".
[Emphasis in bold supplied]

[32] The Fiji Court of Appeal in *Manda Yolande v Vinay Sandeep*, ABU 17.2015, where an agreement was entered prior to the grant of consent (s.12, iTaukei Land Trust Board) and payments were made and received prior to the issue of consent, observed [at para 18]:

"[18] In my judgment the making of payments pursuant to the schedule in the sale and purchase agreement and the acceptance by the appellant constituted a dealing with the land by sale and required the prior consent of the Board. (See Pralad –v- Sukh Raj (1978) 24 LR 170). The consent that is required under both section 12 and clause 2 (k) may be described as a condition precedent to performance of the agreement rather than a condition precedent to formation of the agreement."

[33] The agreement (DLSA) in question in this case is an agreement to sell the property (20 acres) in the Foreshore Development Lease to a non-resident company, the defendant. Any transaction of whatever nature including an option to purchase and an agreement to enter into any such transaction falls within the meaning of "dealing" in terms of section 2 of the LS Act. The agreement intends to transfer the property to a non-resident. Therefore, it is a dealing with a non-resident. Section 6 proclaims that no non-resident or any person acting as his or her agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land.

[34] Section 6 clearly says that a non-resident should not make any contract to purchase or to take on lease any land without prior consent in writing of the Minister for Lands.

[35] Not only the agreement to purchase the land has been made but also performed without the ministerial consent required under section 6.

[36] The plaintiff contended that the reimbursement payments required for the project works were separate from and independent to the purchase price. The question is why the defendant was to reimburse the plaintiff's expenses for the development works or the project works if it was not towards the purchase price. Under the agreement the defendant reimbursed the expenses incurred for the project works because it was, in my opinion, part of the purchase price. Therefore, the

agreement was not only made but also performed without the prior consent of the Minister for Lands.

- [37] The Supreme Court of Fiji in *Gonzalez v Akhtar* [2004] FJSC 2; CBV00011.2002S (21 May 2004) stated [at para 112]:

"In our opinion, the words of the subsection are clear and unambiguous. No non-resident shall, without the prior consent in writing by the Minister, make any contract to purchase land. Those words mean precisely what they say."

It further said [at 114]:

"114 If making or performing a particular contract is expressly prohibited by statute, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication, a contract the formation or performance of which is expressly prohibited by statute is illegal."

- [38] It follows that making any contract to purchase or to take on lease any land without prior consent of the Minister becomes illegal.
- [39] The agreement between the parties (where the purchaser is a non-resident) in respect of land has been made and performed contravening section 6 of the LS Act. Therefore, the contract is tainted with illegality, and the plaintiff is not entitled to seek specific performance or damages in lieu of specific performance of the agreement.
- [40] The plaintiffs' claim could be dismissed on the illegality ground alone. However, for the sake of completeness, I would consider other issues as well. For this purpose I need to assume the contract is a legal contract.

Failure to transfer aggregate area over 20 acres to NHL

- [41] The plaintiff claims the defendant had failed to transfer any land in excess of 20 acres to NHL. The agreement states that the defendant has to transfer any land in excess of 20 acres (the balance land) to NHL. This clause of the agreement appears to be conditional. For this to happen, the plaintiff had to carry out the survey and reclamation works in order to determine the location and boundary of the balance land. Further, the transfer of the balance land can only take place upon transfer of the property by the plaintiff to the defendant.

- [42] It was the plaintiff's primary obligation that he has to complete the reclamation and survey works, of course at the defendant's expenses, to allow the defendant to transfer the balance land to NHL. Babu Ganesh in cross examination said that he did not transfer the property to the defendant because he wanted to protect his interest in the land.
- [43] On the evidence, I find that the plaintiff had failed to complete the reclamation and survey works and to transfer the property to the defendant in terms of the agreement. This leads me to conclude that the plaintiff had failed to perform the agreement.
- Failure to pay invoices by the defendant*
- [44] The plaintiff also claims the unpaid invoices (the invoice dated 13 July 2017 for \$682,599.42 and the invoice dated 24 July 2017 for \$436,701.96) for the survey and reclamation works carried out.
- [45] There is nothing in the agreement in relation to the survey and reclamation works. However, it is the MoU that provides that the plaintiff would carry out all development works at the defendant's expense. The MoU also provides that the plaintiff is to provide the defendant with relevant invoices, vouchers, receipts or other documentary evidence for such expenses to be paid by the defendants.
- [46] The defendant's witness in evidence explained the reason why the defendant refused to pay for the invoices. She said the plaintiff did not supply documentary evidence in relation to the works it had carried out.
- [47] Importantly, the plaintiff in cross examination admitted that he had not provided any documentary evidence to the defendant.
- [48] On the evidence, I find that the plaintiff had failed to provide documents such as invoices, vouchers and receipts in respect of the unpaid invoices in breach of clause 8 of the MoU.
- [49] The plaintiff makes a claim for unpaid invoices to which it had failed to furnish the documentary evidence to the defendant for making the payment. The plaintiff had failed to perform the agreement and/or MoU.

Counterclaim

[50] The defendant counterclaims that the plaintiff transfer all that land contained in ninety-nine (99) year Development Lease issued for the Foreshore Lease LD Ref 60/957 now issued as State Lease No. 21242 to the defendant, general damages with interest and costs on indemnity basis.

[51] I would dismiss the defendant's counterclaim on the illegality ground.

Conclusion

[52] For the reasons I have given, I would proceed to dismiss the plaintiffs' claims with summarily assessed costs of \$4,500.00 payable to the defendant by the plaintiffs. I would also dismiss the defendant's counterclaims.

Result

1. Plaintiffs' claims dismissed.
2. Defendant's counterclaim also dismissed.
3. Plaintiffs shall pay summarily assessed costs of \$4,500.00 to the defendant.



M.H. Mohamed Ajmeer
17/8/20

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
17 August 2020

Solicitors:

Pillai Naidu & Associates for the plaintiffs

Patel & Sharma, Barristers & Solicitors for the defendant