

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 074 OF 2023**

**BETWEEN : SHAKUNTALA SINGH**

**Plaintiff**

**AND : DHARAM SINGH**

**Defendant**

**Counsel : Ms K Singh for the Plaintiff**

**Mr S Sharma for the Defendant**

**Hearing : 30 April 2024**

**Judgment : 14 June 2024**

**JUDGMENT**

**(Summons for Determination on a Preliminary Issue under Order 33, rule 3)**

[1] The Defendant seeks a determination on a preliminary issue under O.33, r.1 and 3 of the High Court Rules 1988. The Defendant contends that determination of the preliminary issue can quickly and expeditiously dispose of the proceeding.

[2] The narrow issue is whether the effect of the expiry of a consent by the iTaukei Land Trust Board (iTLTB) is fatal to the Plaintiff's claim.

**Background**

[3] The facts are as contained in the pleadings.

[4] The dispute pertains to a property in Labasa described as Crown Lease 12748 contained in Lot 1 in Vunitavola, Vanua Levu, Labasa, having an area of 2,582 square meters (the Labasa property). The Defendant is a co-owner of the Labasa property. The Plaintiff sought to purchase his interest.

- [5] According to the Statement of Claim, the parties entered into an agreement in 1997 for the Defendant to sell his 30% share in the Labasa property to the Plaintiff (for the amount of \$6,500) along with a 5% share in the Estate of Ram Kumari (for the amount of \$1,083) for the total amount of \$7,583. It was agreed that the Plaintiff would pay the Defendant's share of the ground rental and town rates for the Labasa property and these amounts would be deducted from the purchase price.
- [6] The next relevant development appears to have occurred on 15 March 2011, when the Defendant signed the Transfer of Title instrument transferring his rights and those of a Nitin Nilesh Singh to the Plaintiff, for the amount of \$3,500.
- [7] As the Labasa property is a former Schedule A land, the consent of iTLTB to the transfer was required and was granted to the Plaintiff on 16 January 2015, such transfer being valid to 15 April 2015. According to the Statement of Claim, the final requirement in order to effect the transfer was for the Defendant to obtain a Capital Gains Tax Clearance Certificate during the period of the consent.
- [8] The Defendant failed to do so and, therefore, the Plaintiff obtained an extension from iTLTB. However, the Defendant failed to arrange the Capital Gains Tax Clearance Certificate during the extended period.
- [9] In order to ensure no impediment to the transfer, the Plaintiff agreed to the Defendant's demand to pay \$10,000 plus interest. However, the Defendant still did not obtain the Capital Gains Tax Clearance Certificate and, therefore, the transfer has not yet been effected. The Plaintiff has, therefore, brought these proceedings seeking by way of relief:
- i. An order for specific performance of the transfer.
  - ii. In the alternative, or in addition, damages for breach or refusal to effect the agreement.
  - iii. Costs on a full indemnity basis.

[10] A Statement of Defence was filed for the Defendant on 25 September 2023.<sup>1</sup> The Defendant denies that there is any written contractual agreement between the parties, although does admit parts of the Plaintiff's pleadings. The defences raised by the Defendant include:

- i. The expiry of iTLTB's consent is fatal to the Plaintiff's claim as the transfer documents are consequently void. The same applies to the purported agreement, which, according to the Defendant, is unenforceable in the absence of iTLTB's consent.
- ii. The alleged breach is statute barred under s 16 of the Limitation Act.
- iii. The Plaintiff's cause of action has been filed without prior leave from the Court, as required under the Limitation Act, and should, therefore, be struck out.
- iv. The failure to record the agreement in writing, in respect to land, is fatal as per s 59 of the Indemnity, Guarantee and Bailment Act 1881.

[11] On 19 October 2023, the Defendant filed the present Summons, seeking a determination on a preliminary issue under O.33. The three issues identified in the Summons for which a preliminary determination is sought are:

- i. Whether the agreement between the parties is enforceable in the absence of consent from iTLTB under s 12 of the iTaukei Land Trust Board Act. The Defendant repeats the contention that the absence of consent from iTLTB means that the instrument of transfer is void and the agreement is unenforceable.
- ii. Relying on s 59 of the Indemnity, Guarantee and Bailment Act, the Defendant contends that the agreement for sale of land cannot be valid.
- iii. The Defendant seeks an order transferring the proceeding to the Labasa High Court.

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<sup>1</sup> The Plaintiff filed a Reply on 1 November 2023.

## Parties positions

[12] It became evident in the course of hearing argument that there is only one live issue in the Summons between the parties. The Defendant abandoned the second question while the Plaintiff consented to the transfer of the proceedings to Labasa. There remains only the first question for determination on the Summons pertaining to the requisite consent under s 12.

[13] The Defendant's case is relatively straightforward. Mr. Sharma argued:

- i. The statutory requirement under s 12 of the iTLTB Act imposes a mandatory obligation to obtain iTLTB's consent where a party wishes to transfer or alienate a lease on itaukei land.
- ii. There is no dispute that the Plaintiff obtained the requisite consent from iTLTB, as well as an extension, but that consent has now expired.
- iii. The expiry of the consent is fatal to the Plaintiff's claim as it invalidates any transfer instrument, making the same void. Similarly, any agreement is unenforceable as between the parties.
- iv. Mr. Sharma argues that the Plaintiff should have moved the Court for orders of specific performance before the consent from iTLTB expired.
- v. Mr. Sharma also argues that the Limitation Act bars the Plaintiff's claim, the same being required to be filed within six years. I enquired whether this is an issue raised in the Defendant's Summons. It is not.

[14] Ms. Singh made the following arguments in response:

- i. She accepted that the court has a discretion to hear and determine a preliminary issue but argued that the question for this court to consider is whether it should determine the preliminary issue at this point in time.
- ii. Ms Singh submitted that there was a valid agreement between the parties which could be made out in evidence presented at trial.

- iii. Ms Singh submitted that the Defendant's formulation of the issue regarding consent misconstrued the legal requirement. She stated that current absence of consent is irrelevant. Consent is only necessary when the transfer is being effected. If, and when, that occurs, the Plaintiff will apply to iTLTB for the consent as it did in 2015. The transfer was not effected in 2015 because the Defendant failed to obtain the necessary Capital Gains Tax Clearance Certificate, and not because of any failure to obtain the consent from iTLTB.

### **Relevant law and principles**

- [15] Order 33, r.3 of the High Court Rules 1988 reads:

*The Court may order any question or issue arising in a cause or matter, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*

- [16] In *Te Arawa Limited v One Hundred Sands Limited* [2019] FJCA 5 (5 February 2019) the Court of Appeal stated at [18]:

*...the court can order a preliminary issue to be tried separately and if the decision on the preliminary issue substantially disposes of the action the court may either (1) dismiss the cause, or (2) make such other order or (3) give such judgment as may be just...*

- [17] The Supreme Court stated in *Gurbachans Food Town Limited v the New India Assurance Company Limited* [2016] FJSC 45 (28 October 2016):

*17. Ordinarily, a preliminary issue is tried at the commencement of the hearing only when the Court is of the opinion that there is a possibility of disposing the entire case finally. It is done so, in order to minimise delay and for convenience and to curtail expenses and also to avoid duplicity. Though it is the discretion of*

*the Court to try a preliminary issue which may contain even facts, it is always better to take up all the matters in dispute in one trial particularly when the issues of facts are involved. Of course, clear questions of law that help disposing the matter finally, are always being tried as preliminary issues.*

18. In this regard, I wish to quote paragraph (483) from Halsbury's Laws of England (4<sup>th</sup> Edition).

### (3) TRIAL OF SEPERATE ISSUES

**483. Single Trial of all issues.** *The characteristic mode of trial takes the form of one continuous episode in which all the matters in dispute between the parties will be completely and finally determined, and all multiplicity of legal proceedings with respect to any of these matters will be avoided. Accordingly, the beneficial object of the law that all disputes should be tried together should be the normal practice of the court, and therefore an order for the separate trial of separate issues should be regarded as a departure from the norm, and generally speaking such an order should only be made in exceptional circumstances or on special grounds. Whether such an order should be made depends upon convenience and the saving of expense. An order for the separate trial of a preliminary point of law is not appropriate where the facts are in dispute, or where there are too many variables to admit of a clear-cut solution in advance, and especially where the law itself is unsettled or obscure. The court will not decide academic or hypothetical questions nor future questions.<sup>2</sup>*

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<sup>2</sup> My emphasis.

[18] Section 12(1) of the iTaukei Land Trust Act 1940 reads:

*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 or her 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...*

### **Decision**

[19] The Defendant seeks a preliminary determination on whether the agreement between the parties purporting to sell the Defendant's interest in the lease is null and void by virtue of the operation of s 12(1) of the iTaukei Land Transfer Act.

[20] Having considered the material available and the authorities cited by the parties I have decided that it is not appropriate to determine the preliminary issue at this stage of the proceedings. My reasons are as follows:

- i. Section 12(1) requires the consent of iTLTB with respect to alienation or dealing with itaukei land. The provision provides that any dealings with such land without consent is null and void. The Defendant's case is that there is currently no consent from iTLTB and, as such, any agreement between the parties to transfer the Defendant's interest in the itaukei lease is null and void.
- ii. The parties have each cited authorities to support their respective positions. It is clear that there is a body of case law available on the application of s 12 and that the outcome of a case will turn on the particular facts of that case.<sup>3</sup> I found the relatively recent decision of the Supreme Court in *Inspired Destinations (INC) Ltd v Graham & Ors* [2022] FJSC (28 October 2022) to be most helpful. Gates J noted at [4] that, '[t]he cases have stressed how the outcome will often depend on the

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<sup>3</sup> Beginning with the Privy Council decision of *Chalmers v Pardoe* [1963] 3 All E.R. 552.



*wording of the agreement itself,*' Keith J, providing the main decision of the Court, noted that the purchaser in that case argued that its failure to obtain the consent of iTLTB rendered its agreement with the vendor to be unlawful. Keith J described this approach as flawed, explaining at [43]:

*...The mere fact that the consent of the Board to the transfer had not been obtained could not on its own have rendered the transfer unlawful. As the Privy Council said in Chalmers v Pardoe [1963] 1 WLR 677, a decision of the Privy Council on appeal from the Court of Appeal of Fiji:*

*" ... 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."*

- iii. In *Inspired Destinations (INC) Ltd* the purchaser had entered into a formal agreement with the vendor to purchase a resort that was situated on leased itaukei land. A second agreement between the parties provided for the purchaser to manage the resort pending completion of the sale. The first agreement required the purchaser to obtain the Board's consent to the transfer as soon as reasonably practical. The purchaser failed to take any steps to obtain the consent and the vendor cancelled the agreement, retaining the deposits paid of \$900,000. It was in this context that the plaintiff-purchaser relied on s 12 to argue that the agreement was unlawful and it should receive the return of its deposits. The High Court accepted the argument. However, the Court of Appeal set aside the High Court's decision. The matter went on appeal to the Supreme Court, which upheld the Court of Appeal's decision but, as Keith J noted, '*by a very different route*'.<sup>4</sup> Keith J stated at [51]:

*The effect of the grant of the licence in this case. Having considered carefully the terms of the agreement in this case, I*

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<sup>4</sup> At [60].



*have concluded that it did not amount to an alienation of, or dealing with, land within the meaning of section 12. The agreement was, of course, for the transfer of the lease, but since the transfer was not going to take effect until the consent of the Board had been obtained, the fact that the agreement was for the transfer of the lease did not render the agreement unlawful. One of the two particular features of the agreement which is said to have rendered it unlawful was the fact that the resort was to be managed by the Purchaser in the Interim Period, and it was for that purpose that the Purchaser had been given access to the land.<sup>5</sup>*

- iv. Keith J emphasized that even if no consent was obtained before the agreement was entered into in respect to the itaukei land it does not automatically follow that the agreement is unlawful. Indeed, Keith J went further and indicated that even if s 12 operates, parts of the agreement between the parties may still be lawful. Keith J stated at [47]:

*What was rendered unlawful? The issue on which both the High Court and the Court of Appeal focused their attention was on one particular feature of the agreement – namely whether the access which the Purchaser had to the resort during the Interim Period, coupled with the payment by the Purchaser of the deposits, amounted to an alienation or dealing with the land for which the Board's consent was required. But there was, I think, another issue which arose. Let us assume that the trial judge had been right to hold that these things had amounted to an alienation of, or dealing with, the land for which the Board's consent had been required. What should the effect of that conclusion be? In other words, what was it that this alienation or dealing with the land should render unlawful? The whole of the agreement, or just that part of the agreement which related to the things for which the Board's consent had been required? So far as I can*

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<sup>5</sup> My emphasis.

*tell, that issue was never addressed. The trial judge just assumed that it rendered the whole of the agreement unlawful. It is a point which I would have had to return to if I had agreed with the trial judge's conclusion that there had been an alienation of, or dealing with, the land for which the Board's consent had been required.*<sup>6</sup>

- v. In the present matter, the issue as framed raises both factual and legal issues which cannot be determined ahead of a trial. More information is required as to the arrangements between the parties, the payments already made in reliance of the alleged agreement and the circumstances of the consents previously provided by the Board to the transfer. For this reason, it is premature to determine the consent issue.
- vi. Notwithstanding, I have some reservations regarding the Defendant's ability to rely on s 12 to avoid the alleged agreement with the Plaintiff. The Defendant contends that the absence of a current consent from the Board makes any agreement with the Plaintiff null and void. What then to make of the fact that the Board previously provided its consent to the transfer after the agreement had already been made as well as provided an extension of its consent? What basis is there to find that the Board will refuse consent if another application is made by the Plaintiff? Moreover, if I accept the Plaintiff's pleadings then the only reason the transfer did not occur was because of the Defendant's conduct. Why should the Court reward this behaviour where the Plaintiff had already obtained the necessary consent from the Board in 2015?
- vii. There is a further reason, in my view, not to embark on a determination of the preliminary issue. Even if I accept that s 12 applies on the facts of this case, I am not convinced that s 12 invalidates all contractual obligations between the parties. I note, in this context, that the Plaintiff seeks damages in the alternative against the Defendant; Keith J's point at [47] in *Inspired Destinations (INC) Ltd* is relevant here.

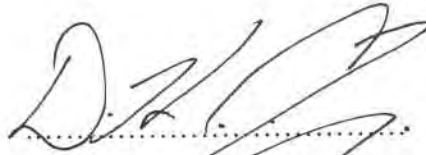
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<sup>6</sup> My emphasis.

[21] Accordingly, the following orders are made:

- i. By consent this proceeding is transferred to Labasa High Court.
- ii. The Defendant's Summons is, in all other respects, dismissed.
- iii. In terms of costs, the primary basis for the summons was the consent issue. The Defendant has been unsuccessful and, as such, the Plaintiff is entitled to costs. These are summarily assessed in the amount of \$2,000 payable by the Defendant within one (1) calendar month.



  
D. K. L. Tuiqereqere  
JUDGE

**Solicitors:**

Neel Shivam for the Plaintiff  
Sushil Sharma Lawyers for the Defendant