ATUNAISA TIVA v DIRECTOR OF LANDS and 3 Ors (ABU0015 of 2004S)

COURT OF APPEAL — CIVIL JURISDICTION

BAKER, KAPI JJA and SCOTT RJA

22 February, 4 March 2005

Administrative law — native land rights — ultra vires — 1974 provisional application to lease (PAN) issued without consideration — whether 1974 PAN illegal — whether severability doctrine applicable — Native Land Trust Act (Cap 134) ss 4(1), 6, 9, 12 — Native Land Trust (Leases and Licences) Regulations 1984 reg 23(1).

In 1964, the Native Land Trust Board (NLTB) (R2) issued a provisional application to lease (PAN) to the Director of Lands (R1) over land owned by three mataqali including the Appellant for 25 years for the establishment of a mahogany plantation. The PAN canceled an earlier tenancy at will. The Appellant claimed that the mataqali agreed only to a 25-year lease. R2 again issued four PANs to R1 for a 10-year period. The 1974 PAN, which was governed by the Native Land Trust (Leases and Licences) Regulations (the old Regulations), provided for a rental and survey fee and a term of 99 years. In 1999, R2 consented to the assignment of the 1974 PAN to the fourth Respondent (R4) for nil consideration. The assignment document referred to a term of 25 years (not 99 years). The assignment was not made subject to R2's approval which was given 15 months later. No land survey and no survey fee were paid in the 41 years since the first PAN.

The High Court ruled that a PAN could not legally have been granted for a lease with a term of 99 years. Instead, the High Court applied the doctrine of severability of illegal contracts by reducing the term of the lease to 50 years. The Appellant sought declarations that the 1974 PAN was illegal and that it was ultra vires for R2 to grant a lease for 99 years and that the doctrine of severability of illegal contracts should be used to reduce the term of the lease from 99 years to 50 years.

Held — (1) The 1974 PAN was clearly illegal. R2 exercised a statutory power to determine the maximum term for the lease of unplanned and isolated land and gave no thought as to whether the term should be the maximum permissible one, which was 50 years or less. R2 disregarded the boundaries imposed by the regulatios when it set the term to 99 years.

(2) Under s 4 (1) of the Native Land Trust Act (Cap 134), control of all native land is vested in NLTB. Native land is to be administered by NLTB for the benefit of the native owners. The doctrine of severability indicated the excision of an illegal part of the contract while it allowed a legal part to remain as a meaningful contract. This was not an ordinary contract. It was the exercise of a statutory power by R2 to alienate native land as the statutory agent for the owners. Hence, the doctrine of severability was not applicable. The promise to pay more rental after 1973 in accordance with new terms of forestry leases approved by government never eventuated. In any event, such a provision probably made the PAN void for uncertainty in the absence of any actual rental or any rent-fixing mechanism in the document.

Appeal allowed.

Cases referred to

Attwood v Lamont [1920] 3 KB 571; *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724; (1913) 29 TLR 727, considered.

Attorney-General v Barker Bros Ltd [1976] 2 NZLR 495; *Carey v Hastie* [1968] NZLR 276; *Chalmers v Pardoe* [1963] 3 All ER 552; [1963] 1 WLR 677; *Goldsoll v Goldman* [1914] 2 Ch 603; *Phalad v Sukh Raj* (1978) 24 FLR 170; *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; [1963] ALR 378, cited.

I. Fa for the Appellant

K. T. Keteca and *Sahu Khan* for the first Respondent

T. Bukarau for the second Appellant

K. T. Keteca for the third Respondent

G. Leung for the fourth Respondent

Baker, Kapi JJA and Scott RJA.

Introduction

[1] This appeal reveals a saga of bureaucratic ineptitude which occurred some over 30–40 years ago. The consequence of this ineptitude are far-reaching for the parties — particularly the Appellant, who is a representative of a mataqali which owns traditional land known as Koronovo in Serua province and for the fourth Respondent (R4), Fiji Hardwood Corporation Limited (Hardwood) as assignee of a questionable document issued by the Second Respondent (R2), the Native Land Trust Board (NLTB) purporting to agree to lease that land to the first Respondent (R1) the Director of Lands (the Director). The importance of the transaction evidenced by that document is clear when it is realised that the land comprises 2250 acres which are now planted in mahogany forest which is shortly to come to harvest.

[2] In a judgment delivered on 29 March 2004 in the High Court, Singh J. declined to make any of the declarations sought in an originating summons issued by the Appellant. If made, these declarations would have had the effect of nullifying the document referred to above which is known as a Provisional Application to Lease (PAN) and dated 6 December 1974. Instead, Singh J, acknowledged that a PAN could not legally have been granted for a lease with a term of 99 years. By purported application of the doctrine of severability of illegal contracts, he reduced the term of the lease to 50 years. The facts surrounding this rather surprising result can be summarised as follows:

Factual summary

[3] On 1 July 1964, a PAN was issued by NLTB to the Director over an area of 2250 acres at Koronovo owned by three mataqali (including the Appellant's) for a term of 25 years. This PAN was stated to cancel an earlier tenancy at will. Other PANS were to follow, as detailed later. The first PAN was agreed to by the relevant mataqali in 1964 for the purpose of establishing a mahogany plantation on the land by the government acting though the Director. Indigenous afforestation was destroyed to make way for the mahogany plantings. The Appellant claims that the mataqali then agreed only to a 25-year lease.

[4] Under s 4(1) of the Native Land Trust Act (Cap 134), control of all native land such as Koronovo, is vested in NLTB. Native land is to be administered by NLTB for the benefit of the native owners (such as the Appellant's mataqali and two other interested mataqali). Native land is not to be sold, leased or disposed of otherwise than accordance with the Act: s 6. Fijian landowners may not alienate or charge such land without NLTB's consent: s 4(1). No native land is to be leased or licensed unless the NLTB is satisfied that the land is not being beneficially occupied by the Fijian owners and is not likely during the currency of the lease or licence to be required by the Fijian owners for their use, maintenance and support: s 9. Any dealing in native land requires NLTB consent

which can be granted or refused in NLTB's absolute discretion. Any such alienation made without consent is void: s 12. Over the years, many transactions involving native land have fallen foul of s 12, the most notable being one involving the decision of the Privy Council, in *Chalmers v Pardoe* [1963] 3 All ER 552; [1963] 1 WLR 677 (*Chalmers*).

[5] No fewer than 4 PAN's were issued by NLTB to the Director, as described below over a 10-year period. All were in purported compliance with the Native Land Trust (Leases and Licences) Regulations (the old Regulations) found in the 1967 revised edition of the *Laws of Fiji* (Vol 8 Cap 115). These Regulations were repealed by the Native Land Trust (Leases and Licences) Regulations which came into force in 1984 (the new Regulations) (see 1985 revision of the *Laws of Fiji*, Cap 134 Subsidiary Legislation). The new Regulations do not retrospectively affect anything done or any rights conferred under the old Regulations. In reg 23(1) of the new Regulations, certain terms and conditions for various types of leases, licences or tenancies, laid down by the old Regulations, were specifically preserved.

[6] The 4 PAN's issued were:

(a) On 1 July 1964, a PAN was issued by NLTB to the Director for a period of 25 years with effect from 1 July 1964 over an area of 2400 acres. An earlier tenancy at will was cancelled on issue of the PAN.

(b) On 12 March 1969, the first PAN was cancelled and a fresh one issued for the same period. The area was reduced to 2250 acres.

(c) On 17 August 1970, the PAN issued on 12 March 1969 was cancelled and another one issued by NLTB in favour of the Director. The term of lease was increased to 99 years, commencing 1 July 1964. The area was 2250 acres.

(d) On 6 December 1974, the PAN issued on 17 August 1970 was cancelled and a fresh one issued by NLTB to the Director for the same period of 99 years from 1 July 1964. The area was 2250 acres. The changes from (c) are noted in paragraph 8 below.

[7] Some historical correspondence was produced at the trial which is irrelevant to the legal issues to be determined. Some letters from various officials suggest that a 99-year lease was suitable for a mahogany forest because of the long time needed for the crop to mature. Other letters suggest that the landowners and the Conservator of Forests had sought a term of 25 years only, as provided for in the first two PAN's.

[8] The relevant PAN for the purposes of this appeal is that of 6 December 1974. The copy of the PAN annexed to the Appellant's affidavit differs from that annexed to the affidavit of the Deputy Director. In the former:

(a) There is typed across the top of the form "Approval Notice dated 7 August 1970 is hereby cancelled".

(b) To a typed clause 8 — "Subject to the terms and conditions of the new Forestry leases approved by Government" is added in brackets the words (see attached Appendix) and

(c) A stamp "PAID, 19 December 1974" and the words "Part of cheque NO 30493" appear near the reference to the rental provision.

These features are not found in the latter copy.

[9] The PAN refers to a term of 99 years from 1 July 1964 at a rental payable half-yearly of "5 cents per annum until 31.12.73 and thereafter" in accordance with terms of forestry leases approved by government "with rental to be paid" on

account pending survey of land $562.50 per annum. There was provision for the statement of an estimated survey fee, but this was left blank. The three mataqali were mentioned as owners.

[10] Other relevant provision of the 1974 PAN are as follows: These largely followed certain requirements of the old Regulations.

> (1) The lease will be subject to the conditions set out in the Native Land (Leases and Licences) Regulations, and where applicable the Agricultural Landlord and Tenant Ordinance, a summary of which conditions appears on the back hereof.
>
> (2) You are requested to pay the estimated survey fee, together with the rent assessed on the estimated area of the land of the first period of six months from the date of the Board's provisional approval of lease without delay to the Native Land Trust Board in Suva.
>
> (3) You will receive final notice of approval nor may you occupy the land provisionally approved for lease until the first six months rent and that estimated survey fee have been paid.
>
> (4) If you do not pay the rent and the estimated survey fee within six months rent from the date of this notice, the Board will consider the provisional approval of the lease cancelled without further notice.
>
> (5) In the event of it being shown by survey that the land provisionally approved for lease forms part of any land the subject of an existing freehold or leasehold title, this notice of approval of lease shall be deemed to be cancelled, without prejudice or loss to the Board.

[11] The 1970 PAN differed principally from the 1974 PAN in that:

(a) It provided for an annual rental of $112.50 pending survey;

(b) It provided for a rental of 5 cents per acre for the first 10 years, 15 cents for the next 10 years, 30 cents for the next 10 years rental to be reassessed at 10 year intervals thereafter. No mechanism for conducting rental reviews was apparent on the face of the document.

[12] On 8 October 1999, the NLTB consented to an assignment of the 1974 PAN to Hardwood for nil consideration. The assignment was dated 4 August 1998.

Curiously, the assignment document:

(a) referred to a term of 25 years (not 99 years) at a rent of 20 cents per acre; and

(b) more significantly, the assignment was not made subject to NLTB approval which was given 15 months later. The *Chalmers* line of cases hold that an alienation of an interest in native land, not made subject to NLTB consent, is illegal. It is doubtful whether an *ex post facto* consent can redeem the transaction. However, it is not necessary to rule on that point. See *Phalad v Sukh Raj* (1978) 24 FLR 170.

[13] In the 41 years since the first PAN, the NLTB has not called on the Director or his purported assignee to pay any estimated survey fee. No attempt has been made by either to survey the land. Consequently, the scenario envisaged by the PAN, has not culminated in the execution and registration of a formal lease. That scenario was, in summary: demand for the survey fee by the NLTB from the Director, payment of same by the Director, completion of the survey, preparation of lease by NLTB, notice by NLTB to the Director to execute the lease within 6 months (reg 17 of old Regulations), execution and registration of the lease.

[14] Regulation 12(3) of the new Regulations entitles the NLTB to require a lessee/licensee, upon notice, to have the land surveyed. If the notice is not obeyed, the agreement shall cease to be of effect.

[15] Regulation 12(3) cannot assist the Appellant. Even if it did apply to the 1974 PAN, there has been no requirement by the NLTB to the Director for survey to be undertaken. The courts is of the view, that whatever rights the parties may have under the 1974 PAN, they are governed by the old Regulations. The new Regulations were not stated to have retrospective operation. In the absence of such a provision, such rights as were acquired by the parties or any assignee of any party, are governed by the 1974 PAN.

[16] Thus it can be seen that, on the face of the 1974 PAN, this large piece of land has been let for 99 years from 1964 at a nominal rental. Over the course of 41 years, the mataqali have received virtually nothing for the use of their land as a mahogany forest. No doubt the forest will give substantial returns to those responsible for the huge investment involved in its planting and harvesting. The 1974 PAN made no mention of anything like a market rental for the land or for royalties, as is common in forestry leases elsewhere. Possibly, the rather vague reference to forestry leases in the document envisaged some better return to the NLTB. But it was not precise enough. Until the survey will have been conducted, only $512 per annum rental seems payable.

[17] On behalf of the mataqali, Mr Fa expressed considerable dismay at this situation. He criticised the NLTB and the Director over the 1964–74 period for entering into such an arrangement which for 99 years would clearly disadvantage several generations of owners. Such a transaction, in counsel's submission, was clearly contrary to the NLTB's mission of managing native land to the best advantage of the owners. Counsel also spoke of there being a reserve within the boundaries of the 2250 acres, but no land has ever been gazetted as such, let alone surveyed.

[18] It was common ground among all parties that the NLTB had power only to grant a 50 years lease for this particular land and not to grant a 99-year lease. The reasons based on the provisions in the old Regulations, were set out by Singh J in his judgment and do not need to be repeated. Accordingly, a lease of 99 years and a PAN for such a lease was *ultra vires* the NLTB. It is apposite to note that neither the old nor the new Regulations contain specific provisions for forestry leases, despite elaborate provisions for a variety of other leases such as commercial, residential, tramway, grazing, gardening and dairying. Perhaps the unexplained reference in the 1974 PAN to "new forestry leases approved by Government" referred to regulations that have yet to see the light of day — 31 years on.

[19] Singh J relying upon reg 20 of the old Regulations, categorised the lease as one of an "unplanned rural area" for which the maximum permitted lease term is 50 years. No counsel challenged this categorisation which seems the only appropriate one available, given the lack of any regulations governing the terms of forestry leases.

[20] The judge purported to apply the doctrine of severance of illegal contracts. He read down the 99-year term to one of 50 years. It is clear that neither the NLTB nor the Director had turned their minds in 1970 and 1974 to the statutory restriction of lease term to one of 50 years. That period of time formed no part of the discussions. Only 25-year and 99-year terms were ever mentioned in the correspondence.

[21] A PAN can give rise to an interest in land on the part of the grantee. That was decided in this court in *Prasad v Singh* (Appeal 8 of 1977, 22 March 1977).

Issues

[22] From the above scenario, the following issues emerge:

(a) was the 1974 PAN illegal in that it was *ultra vires* the NLTB to grant a lease for 99 years?

(b) if the answer is "Yes", can the doctrine of severability of illegal contracts be used to reduce the term of the lease from 99 years to 50 years?

[23] The answer to the first question must be "yes". The NLTB was exercising a statutory power to determine the maximum term for a lease of this type of land-unplanned and isolated. It clearly give no thought to whether the term should be the maximum permissible one of the 50 years or less. It appears to have disregarded the boundaries imposed by the Regulations when it set 99 years as a term. The 1974 PAN was clearly *ultra vires* and illegal.

[24] Singh J's approach to remedying the situation was more like that on an application for the equitable doctrine of rectification of a contract, as opposed to an application for severing an objectionable term from a contract which could still exist as a viable contract after the severance. Rectification can occur when the court alters a contract to reflect the parties' true intentions. They had never considered a 50-year lease as an option.

[25] The doctrine of severability, as the name suggest indicates the excision of an illegal part of the contract, while allowing a legal part to remain as a meaningful contract. The doctrine has been referred to as a "blue pencil" exercise. There are many cases where restraints of trade have had unduly wide and illegal elements cut off, leaving a viable and unobjectionable contract. For example, in *Goldsoll v Goldman* [1914] 2 Ch 603, a vendor of a business agreed not to complete with the purchaser as a dealer in "real or imitation jewellery" in the United Kingdom and several other countries. The court held that the words "real or" and the list of countries outside the United Kingdom could be severed, leaving an enforceable covenant.

[26] To similar effect is an authority cited by counsel for NLTB, *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; [1963] ALR 378. There, a contract to hold gold and gems in safe custody was able to be severed, the contract to hold gold was illegal but the contract to hold gems was legal and survived the severance of the contract to hold gold.

[27] *Chitty on Contract*, 26th ed, para 1283 notes that the court will not make a fresh contract for the parties, either by rewriting an existing contract or by basically altering its nature.

[28] Other texts in line with *Chitty, Treitel*, 5th ed, at pp 381–3 opines that three tests must be satisfied before a court will sever. These are:

(a) The promise must be of kind that can be severed.

(b) The "blue pencil" test which can only be taken by cutting words out of the contract and

(c) Severance must not alter the nature of the original contract.

[29] *Cheshire, Fifoot and Furmston*, 13th ed is of the same view. The learned author at p 436, notes that the court will not rewrite the promise as expressed by the parties. It will not add or alter words which the promissor might well have made but did not. The parties themselves must have sewn the seeds of

severability in the sense that it is possible to construe the promise drafted by them as divisible into a number of separate and independent parts. As was said by Younger LJ in *Attwood v Lamont* [1920] 3 KB 571 at 593.

> The learned judges of the divisional court I think took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.
>
> Now, here I think, there is in truth but one covenant for the protection of the respondent's entire business, and not several covenants for the protection of his several businesses. The respondent is, on the evidence, not carrying on several businesses but one business, and, in any opinion this covenant must stand or fall in its unaltered form.

[30] An example of a high authority, refusing to substitute words, is the House of Lords case, *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724; (1913) 29 TLR 727. In a restraint of trade clause, the court refused to strike out the words "within 25 miles of London" which was an unreasonable area of restraint and substitute that wide area with one that was reasonable. Lord Shaw said at AC 742:

> This is no occasion for the framing in this instance, of a limited injunction, the contract not being in separate and clearly defined divisions. It stands a whole, and in my opinion, is not enforceable by law.

[31] The authorities supplied by counsel for NLTB after the hearing and without giving counsel for the Appellant the chance to comment on them, do not alter the force or the well-known authorities outlined above.

[32] Singh J appeared to approach the severability issue as if he was considering a normal commercial contract between ordinary citizens. This was no ordinary contract. It was the exercise of a statutory power by the NLTB to alienate native land, as the statutory agent for the owners. Its duty was to obtain the best available deal for them. Forestry can be a good investment for both the landowners who does not have the resources to develop land and for an investor who does have the resources but not the land. It is not unusual for in forestry leases for a landowner to obtain a return from rent and royalties which obviously increase as the forest grows and is harvested. However, the 1974 PAN purported to restrict the owners' return to $512 per annum until NLTB and the lessee got around to a survey which has been waiting 41 years to be undertaken. There is no evidence as to when it will be done. The promise to pay more rental after 1973 in accordance with new terms of forestry leases approved by government never eventuated. In any event, such a provision probably made the PAN void for uncertainty in the absence of any actual rental or any rent-fixing mechanism in the document. See *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495.

[33] The harshness of the doctrine of illegality has been commented upon often. One such case was the decision of the New Zealand Court of Appeal in *Carey v Hastie* [1968] NZLR 276. The injustice of the doctrine, as evidenced in that case, was one of the catalysts for the enactment of New Zealand illegal Contracts Act 1970. This Act gives the court wide power to grant relief in a illegal contract situation. A similar Act would be appropriate in Fiji and could relieve the harshness of the operation of the common law on illegality.

[34] The appeal will be allowed and declarations as noted below are made. It is unnecessary to grant the whole range of declarations sought by the Appellant.

[35] Unsuitable prayers in the originating summons include requests for injunctions to stop logging operation and for NLTB to not issue any further leases. The effect of this court's order will be to return the land to the NLTB. The parties will all then need to consider their respective positions.

[36] The declarations made are:

(a) The NLTB is not permitted by law to issue a lease over Native land know as *KOROVONO*, part of which is owned and registered by law in the name of the Mataqali Naua, for a term of 99 years.

(b) The Director did not hold a valid agreement to lease or PAN in respect of the Native Land known as *KOROVONO* (part of which land is owned by the Mataqali Naua) for a term of 99 years.

(c) A purported assignment of lease between the Director and Hardwood dated the 13 October 1998 and registered with the Registrar of Deeds on the 14 December 1998 under dealing number 20637, does not transfer any rights in the land known as *KOROVONO* and is of no effect.

[37] It is not difficult to foresee further litigation as a result of the court's order. All of that could have been avoided if the relevant officials in the 1964–74 period had exercised reasonable diligence and checked on NLTB's powers to issue a lease for 99 years.

[38] The Appellant is entitled to costs which are fixed at $2000 plus reasonable disbursement. It is proper that these be paid by the NLTB.

Result

[39]

(1) Appeal allowed.

(2) Declarations made as per para 36.

(3) NLTB to pay $2000 costs plus disbursements to Appellant.

Appeal allowed.