IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0003 of 2020
[Court of Appeal Nos. ABU 0123 and ABU 0126 of 2018]

BETWEEN	:	**INSPIRED DESTINATIONS (INC) LIMITED**
		Petitioner
AND	:	(1) **GRANT ROBERT GRAHAM & BRENDON JAMES GIBSON**
		(2) **BANK OF SOUTH PACIFIC**
		Respondents
Coram	:	**The Hon. Mr. Justice Anthony Gates** **Judge of the Supreme Court**
		The Hon. Mr. Justice Brian Keith **Judge of the Supreme Court**
		The Hon. Mr. Justice Priyantha Jayawardena **Judge of the Supreme Court**
Counsel	:	**Ms. N. Khan for the Petitioner**
		Mr. W. Clark, Ms. R. Pranjivan and Ms. L. Lodhia for the First Respondents
		Ms. S. Devan for the Second Respondent
Date of Hearing	:	**14 October, 2022**
Date of Judgment	:	**28 October, 2022**

JUDGMENT

Gates J

[1] I have read the judgment of Keith J which follows, and I am in full agreement with its reasons and orders. I would like to add a few observations of my own.

[2] The 1st Respondents were Receivers appointed by the 2nd Respondents, a bank. The bank had a mortgage over an iTaukei lease. The mortgagor of the lease was Aanuca Island Resort Limited (the Vendor) which had gone into liquidation. The Petitioner, as prospective purchaser, entered into a Sale and Purchase Agreement with the Vendor. There was a second agreement entered into which provided for the purchaser to manage the resort, pending completion of the sale.

[3] The issues for decision were whether the Management Agreement was to be treated as a step in the implementation of the Sale and Purchase agreement without consent and thus amounting to a breach of Section 12(1) of the iTLT Act, and whether monies paid by the purchasers as a deposit could be re-claimed by the purchasers when the sale fell through.

[4] Most of the law governing the situation that arose here has already been well covered by case authority. The cases have stressed how the outcome will often depend on the wording of the agreement itself.

Who should apply for consent?

[5] Section 12(1) of the Act provides for the Board's prior consent to be obtained for transfers or dealings in iTaukei Land:

> *"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 ..."

[6] Keith J is right to state that the section does not identify who has to obtain the consent of the Board to the transfer. In **Chalmers v. Pardoe** [1963] 3 All E.R. 552 at 554, the Privy Council considered "*the Board could act only on application made in proper form by Mr Pardoe (the lessor) or someone acting on his behalf.*" This may have been because exactly what Mr Pardoe intended to give away, before the quarrel, was too vague. Gould VP in **D.B. Waite (Overseas) Ltd v. Wallath** [1972] 18 Fiji LR 141 at 145A said:

> *"It was clearly in contemplation that the appellant company was to lodge the application with the Board but did not. That it lay upon the appellant company to make the application is shown by this course of conduct, by the wording of section 12 where it says, "it shall not be lawful for any lessee to alienate . . . without the consent," and by the general law applicable to the assignment of private leaseholds to which the consent of the landlord is required."*

[7] Marsack JA whilst concurring with Gould VP added "*that it was competent for the respondent (i.e. the Purchaser) himself to apply for consent.*" His Lordship continued [at 147F]:

> *"The primary responsibility for applying for the Board's consent undoubtedly lies on the vendor. But, as I see it, there is no definite rule that in no circumstances is the Board entitled to grant its consent to a dealing in land except upon the application of the vendor. In **Court Brothers Limited v. Sunbeam Transport Limited** (1969) 15 F.L.R. 206 and in **Fong Lee v. Mitlal** (1966) 12 F.L.R. the consent of the Board to the sale was granted upon the application of the purchaser, and the legality of the contract was confirmed by this Court."*

[8] Over the years, the courts and the Board have accepted that applications for consent can be lodged either by the vendor or by the purchaser. The Board does not insist on a strict interpretation as to the applicant for consent. So nothing turns on the long standing practice that has been followed in Fiji.

[9] Here the agreement itself had placed the burden of applying for consent, as well as its cost, upon the purchaser. Ultimately, after extensions granted for the time set for compliance, the purchaser failed to lodge the consent form with the Board.

Had the agreement been partially implemented in breach of Section 12(1)?

[10] The courts approach has been one that presumes the parties intend to pursue a legal course of proceeding. **Kulamma v Manadan** [Privy Council Appeal No.7 of 1966].

[11] In **Chalmers** (supra) their Lordships had to consider whether the arrangement had been a licence to occupy coupled with possession or whether it was an agreement for a lease or sub-lease to Chalmers granted by Pardoe. However when Chalmers had erected six buildings on the land, a '*dealing*' with the land had undoubtedly taken place, and without consent it was an unlawful dealing. Their Lordships found therefore that Equity could not lend its aid to Mr Chalmers.

[12] Upon execution of the agreement the Petitioner paid a deposit of 10% amounting to $850,000.00. After deferment of the settlement date a further $50,000 was agreed to be paid as additional deposit pursuant to clause 5.1.

[13] In **Ihaka v Prakash** ABU 17 of 2015, 15 April 2016 Calanchini J in an enlargement of time application in the Court of Appeal held the making of payments pursuant to the schedule in the Sales and Purchase Agreement and the acceptance of those payments by the Appellant constituted a dealing with the land by sale and required the prior consent of the Board. This was a different situation from the instant case. In the present case there was only one payment made, an initial deposit, and that was in connection with an agreement which acknowledged the need to obtain consent before the sale could proceed further. This was not a schedule for the payment of regular sums towards the settlement of the full purchase price as in **Ihaka**.

[14] It is well accepted that without a preliminary agreement by the parties there would be nothing to put forward to the Board on which to seek its consent: **Jai Kissun Singh v Sumintra** (1970) 16 Fiji LR 165; **Chalmers** (supra). **Harnam Singh & Another v. Bawa Singh** [1958] 6 Fiji LR 31.

[15] In **Jai Kissun Singh**, Henry JA referred to the remarks of Hutchison JA in **Court Brothers (Furnishers) limited v Sunbeam Transport Limited** (1968) 15 Fiji LR 206:

> *"Surely, with an agreement for sale and purchase, intended to be followed by a transfer, it is after the agreement has been entered into and before the transfer is made that the Director has to consider the matter and grant or withhold his consent."*

But he qualified that, in parenthesis, in the following sentence, by saying:-

> *"Of course, it would be different if possession were to be given on the agreement for sale and purchase and the agreement were to be relied on as the purchaser's title to the land so to speak."*

[16] Once it was plain the purchaser was not proceeding with the purchase, and had failed after notice to lodge the consent application, the vendor followed the procedure laid down in the agreement for termination.

[17] The occupation of the resort carried no rights to possession or title. The Receivers were faced with a resort in liquidation with limited finances. The property had to be kept running and deterioration of its facilities had to be avoided. The resort had to be sufficiently well maintained to remain marketable. The petitioners were permitted to have access to carry out these tasks. Such prudent measures did not involve in themselves an alienation of the land: **Kulamma** (supra).

[18] There were 2 agreements, the sale and purchase agreement and the management agreement. These were separate documents with separate termination clauses.

The return of the deposit

[19] Once the purchase was not going ahead, and no illegality had been entered upon, the position of the parties was to be governed by the contractual agreement to which each had subscribed.

[20] It was this contractual agreement that provided for forfeiture of the deposit. The relevant clause was unremarkable. Accordingly the deposit was to be forfeited and retained by the proposed vendor.

[21] The petition accordingly must fail.

[22] One final point on a matter raised by Keith J, and this with regard to the amendment to Section 12 (made in 2021) though not affecting this case.

[23] In **Phalad v Sukh Raj** [1978] 24 Fiji LR 170 at p.176F Henry JA referred to the role of the Board in protecting the interests of iTaukei landowners:

> *"In the present case the Board would find respondent completely dispossessed and appellant in full possession and control of the land without having an opportunity of considering whether he was a desirable tenant in the exercise of its statutory duty to administer for the benefit of the Fijian owners."*

[24] The new Section 12(3) has reduced the powers of the Board in its ability to refuse consent. There remain only two grounds for refusal now:

1. (upon renewals) where there has been a breach of any lease condition;
2. or where such application to deal with land is not in accordance with any law.

[25] The unsuitability of the proposed sub-lessor, transferor or like is no longer a permissible reason for refusal. Another court will have to consider how that affects *"the absolute discretion"* of the Board remaining in Section 12(1).

Keith J

Introduction

[26] iTaukei land is rightly regarded as very important in Fiji. Its misuse is something which is widely deplored. For that reason, there are controls on the way it is dealt with. One of those controls is to prevent the land from being dealt with without the consent of the iTaukei Land Trust Board ('the Board"), though as we shall see the circumstances in which such consent can be withheld are now very limited. However, this case is not about the circumstances in which such consent can be withheld. It is about the circumstances in which such consent has to be obtained. The facts of the case are not in dispute, and I take them from the unchallenged evidence and the documents which were produced at trial.

The facts

[27] The Mamanuca Islands are a volcanic archipelago lying to the west of Nadi. It is iTaukei land within the meaning of that term in the iTaukei Land Trust Act 1940 ("the Act"). The Act vests control and administration of iTaukei land in the Board. One of the islands within the Mamanuca Islands is Makanibeto. There is a resort on that island called the Amunuka Island Resort and Spa. A lease of the land on which the resort was situated had been granted by the Board to Aanuka Island Resort Ltd ("the Vendor"), but there came a time when it went into liquidation. The Receivers were Grant Robert Graham and Brendon James Gibson ("the Receivers"). They are the First Respondents to this appeal. The mortgagees were the Bank of South Pacific Ltd ("the mortgagees"). They are the Second Respondent to this appeal.

[28] The Receivers wished to dispose of the resort. Estate agents were instructed to market it. In due course, a buyer for the resort was found. That was Inspired Destinations (Inc) Ltd, an Australian company ("the Purchaser"). They are the Petitioners in this appeal. By an agreement dated 4 March 2010 between the Vendor and the Purchaser, the Purchaser agreed to buy the resort. Since the land on which the resort had been built was leasehold land, the agreement provided for the transfer of the lease to the Purchaser. Importantly for present purposes, it also provided for the Purchaser to obtain the Board's consent to the transfer of the lease. The relevant clause of the agreement was clause 4.1(a), which provided, so far as is material:

> *"As soon as reasonably practicable following the entry into this Agreement, the Purchaser shall, at the Purchaser's cost in all respects ... (a) obtain the consent of the ... Board ... to the transfer of the Lease to the Purchaser ...*
> "

Clause 4.1(b) of the agreement required the Purchaser to obtain liquor licenses. By clause 4.4 the Vendor agreed "to provide reasonable assistance to enable the Purchaser to obtain the consents and licences specified under clause 4.1".

[29] The requirement to obtain the Board's consent to the transfer of the lease was contained in section 12(1) of the Act, which provides:

> *"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 ..."*

There then followed a proviso which is not material for present purposes. Section 12(1) does not identify who has to obtain the consent of the Board to the transfer. At first blush, therefore, it can be obtained either by the transferor or the transferee, though as I have said in this case the agreement required the Purchaser to obtain it.

[30] However, the circumstances in which the Board can *now* refuse consent are limited. Section 12(3) of the Act provides:

> *"For the purposes of this section, any such consent can only be refused where there is a breach of any lease condition or where such application to deal with the land is not in accordance with any law."*

The effect of section 12(3) is that many of the things which you might expect the Board to want to take into account are in effect no-go areas. The Board cannot take into account, for example, any adverse view it may hold about the suitability or otherwise of the proposed transferee or about the use to which the transferee intends to put the land if it conflicts with such use, if any, contained in the lease. However, I said that the circumstances in which the Board can *now* refuse consent are limited advisedly. Section 12(3) is a recent addition to the section. It was added with effect from 1 August 2021. I have no idea why it was

thought appropriate to curtail the Board's powers so drastically, but this is neither the time nor the place for that to be debated. Since section 12(3) was not in operation at any time relevant to the current dispute, it can be put to one side. All that needs to be said is that at the relevant time there was no fetter on the criteria which the Board could take into account when deciding whether to give its consent to an alienation of, or dealing with, land coming within section 12(1)

[31] The completion of the agreement, ie when the balance of the purchase price was to be paid and the transfer of the lease to the Purchaser would take effect, was to be deferred to 6 months after the date of the agreement, ie to 4 September 2010, though there were provisions in the agreement for that time to be extended. The date for the completion of the agreement and for the payment of the balance of the purchase price was called the Settlement Date. However, the plan was for the Purchaser to manage the resort as soon as possible. Accordingly, the agreement provided for the Purchaser to have access to the resort in order to manage it. The date on which the Purchaser was to be given access to the resort to manage it was called the Access Date, and the period between the Access Date and the Settlement Date was called the Interim Period. Thus, in clauses 3.1 and 10.1 of the agreement it was acknowledged that the Purchaser was entitled to be in possession of the resort and its assets and would be responsible for running the resort during the Interim Period. An annexure to the agreement contained a document headed "Management Arrangements" which set out in detail the Purchaser's rights and obligations relating to its management of the resort during the Interim Period. It will be necessary to refer to those arrangements later.

[32] As for when the Access Date was, clause 9.1 of the agreement provided:

> *"The Access Date shall be on 1 April 2010 or earlier by mutual agreement, provided that the Purchaser must obtain the consents in clause 4.1(b) prior to the Access Date if such consents are required for the Purchaser to operate the Business."*

It will be noted that it was only the liquor licence as required by clause 4.1(b) of the agreement which had to be obtained prior to the Access Date. The Purchaser did not have to obtain the consent of the Board for the transfer of the lease as required by clause 4.1(a)

of the lease prior to the Access Date. The Purchaser's only obligation under clause 4.1(a) of the agreement was to obtain the Board's consent to the transfer of the lease *as soon as reasonably practicable*. However, since section 12(1) of the Act made it unlawful for the lease to be transferred without the Board's consent, the Purchaser had to have obtained the Board's consent at the latest by the Settlement Date when the transfer of the lease would take effect. And since the form used to apply to the Board for its consent states that any consent granted by the Board will only last for three months, it would not have been sensible for the Purchaser to obtain that consent more than three months before the Settlement Date.

[33] The purchase price was $8,500,000. A deposit of 10% was payable on the execution of the agreement, and that sum was paid to the estate agents. In due course, the Purchaser wished to defer the Settlement Date by 6 months. The reason for that is not material to the issues which arise on the appeal, but it looks as if the Purchaser was having difficulty finding the necessary finance to complete the transaction. As it was, clause 5.1 of the agreement entitled the Purchaser to defer the Settlement Date for 6 months (a) on payment of an additional deposit of $50,000 and (b) on the purchase price being increased to $9,000,000. The Purchaser purported to exercise that option, even though it had not given the Vendor the notice of its intention to do so as required by clause 5.1. The Vendor was nevertheless prepared to treat the option as having been exercised, and on the payment of the further $50,000 to the estate agents, the Settlement Date was deferred to 4 March 2011.

[34] By the time the deferred Settlement Date approached, the Purchaser had not applied to the Board for its consent to the transfer of the lease. In view of the Vendor's obligation under clause 4.4 of the agreement to give the Purchaser "reasonable assistance" to enable it to obtain the Board's consent, the Vendor's solicitors wrote to the Purchaser's solicitors on 22 February 2011, ie shortly before the deferred Settlement Date, enclosing copies of (a) the transfer of the lease in draft and (b) a completed application to the Board in triplicate for its consent to the transfer of the lease. In the event, neither the Vendor nor the Purchaser were ready to complete the transaction by the deferred Settlement Date, and that date passed without either of the parties objecting. That triggered clause 7.11 of the agreement, which provided:

> *"If neither party is ready, willing and able to settle on the Settlement Date, the Settlement Date shall be deferred to the next Working Day following the date on which one of the parties gives notice that it has become ready, willing and able to settle."*

Pursuant to this clause, the Settlement Date was further deferred.

[35] Although the Vendor's solicitors had sent to the Purchaser's solicitors a completed application to the Board for its consent to the transfer of the lease, the Purchaser did nothing about that. It had still not obtained the consent of the Board to the transfer. Accordingly, by a letter dated 29 April 2011, the Vendor's solicitors required the Purchaser to remedy its breach of clause 4.1(a) of the agreement by obtaining the Board's consent within 10 working days. In doing that, it was invoking clause 7.7 of the agreement, which provided (so far as is material):

> *"If the Purchaser defaults ... in the performance or observance of any ... condition in the Agreement, the Vendor may serve a settlement notice on the Purchaser requiring the said default to be remedied and if the Purchaser has not remedied the said breach within 10 Working Days from the date of service of the settlement notice, the Vendor, without prejudice to the Vendor's other remedies, may:*
>
> > *(a) sue the Purchaser for specific performance; or*
> > *(b) cancel the Agreement and pursue all or any of the remedies under clause 7.8 or at law."*

The remedies available to the Vendor under clause 7.8 included the right to "forfeit and retain for the Vendor's own benefit the deposit paid by the Purchaser".

[36] The Purchaser still did not obtain the consent of the Board to the transfer of the lease. Accordingly, by a letter dated 17 November 2011, the Vendor's solicitors (a) noted that this consent had not been obtained, (b) stated that that amounted to a breach of clause 4.1(a) of the agreement, (c) pursuant to clause 7.11 of the agreement, appointed the following day as the new Settlement Date, and (d) gave the Purchaser's solicitors notice that if the Purchaser failed to complete settlement on the following day, a notice of default would be served and the Vendor would exercise such remedies as it was entitled to under the agreement. Settlement was not effected on the following day, and pursuant to clause 7.7 of the agreement the Purchaser had a further 10 working days to obtain the consent of the

Board and to pay the balance of the purchase price. Neither of those two things were done, and by letter dated 2 December 2011, the Vendor cancelled the agreement. The deposits, now totaling $900,000, were not repaid to the Purchaser. They were paid by the estate agent to the Receivers, who paid them in due course to the mortgagees.

[37] There is a real irony at the heart of this case. The agreement actually provided what could happen if the Purchaser had not obtained the Board's consent to the transfer by the deferred Settlement Date. The relevant clause was clause 4.5. It provided that both parties could cancel the agreement by giving to the other party notice in writing to that effect, and if the agreement was indeed cancelled pursuant to that clause, the Vendor was obliged to refund to the Purchaser the deposit which the Purchaser had paid. This clause was obviously inserted to provide for what was to happen if the Board refused to give it consent, but it looks as if the language of the clause was such that it could be invoked even if the Board's consent had not been sought. So if the Purchaser had cancelled the agreement after the deferred Settlement Date of 18 November 2011 under clause 4.5 but before 2 December 2011 when the Vendor cancelled the agreement under clause 7.7, it looks to me as if the Vendor would have been obliged to return the initial deposit of $850,000 (and perhaps the additional deposit of $50,000 as well) to the purchaser. However, since the Purchaser did not purport to exercise its right of cancellation under clause 4.5, nothing more needs to be said on the topic.

The proceedings

[38] The Purchaser issued proceedings in the High Court against the estate agents, the Receivers and the mortgagees. It withdrew its claim against the estate agents, and proceeded only against the Receivers and the mortgagees. It sought, among other things, the return of the deposits it had paid. At first blush, it is not easy to see how such a claim could get off the ground. The Purchaser had not complied with its contractual duty to obtain the Board's consent to the transfer, and the Vendor had meticulously followed the provisions in the agreement which triggered its power to cancel the agreement. The forfeiture of the deposits had been specifically provided for in the agreement as one of the Vendor's remedies for the cancellation of the agreement for the Purchaser's non-performance of its contractual obligations.

[39] That left the Purchaser with just one line of attack. If the Vendor had acted at all times in accordance with the agreement, it was the legality of the transfer of the lease itself which had to be challenged. Its case, therefore, was that section 12(1) of the Act itself rendered the transfer unlawful. Section 12(1) prohibited any alienation of, or dealing with, iTaukei land without the consent of the Board, and the consent of the Board had not been obtained. Unfortunately, the Amended Statement of Claim did not identify the alienation of, or dealing with, the land which was said to have rendered the transfer of the lease unlawful. Nor was there a pre-trial conference at which that could have been clarified. It was only in the written submissions filed on behalf of the Purchaser at the conclusion of the evidence that the Purchaser's case emerged. The transfer of the lease had been unlawful for no reason other than that the consent of the Board to the transfer had not been obtained. Accordingly, the agreement for the transfer had been null and void, and the Purchaser was entitled to the return of the deposits. The basis upon which in these circumstances the Purchaser was entitled to the return of the deposits was never spelled out, either in the Amended Statement of Claim or in the Purchaser's written submissions, but presumably this was a claim for the return moneys had and received when the consideration for those payments, namely the transfer to the Purchaser of the lease, had wholly failed.

[40] The trial judge, Nanayakkara J, approached the question whether the transfer had been unlawful on a wholly different basis. He treated the Purchaser's case as if the alienation of, or dealing with, the land which rendered the transfer unlawful was (a) the payment of the deposits by the Purchaser and (b) the access to the resort which the Purchaser had been given from the Access Date. In his opinion, the payment of the deposits and the grant of such access to the resort meant that the Vendor had alienated or dealt with the land within the meaning of section 12(1). Since the consent of the Board had not been obtained for the payment of the deposits or for the Purchaser to have that access to the resort, the transfer of the lease had been unlawful. The agreement had therefore been null and void, and the court could not enforce what was in essence an illegal agreement.

[41] Of course, the usual consequence of an agreement being held to be illegal is that neither party to the agreement can recover anything paid under it. But the judge took the view that the normal consequence of an agreement being held to be unlawful should not apply to this

case. That was because he took the view that in this case it had been the Vendor's responsibility to apply for the Board's consent, not the Purchaser's. It was their failure to do that which had rendered the agreement unlawful, and the Purchaser should therefore not be penalized for that. He therefore gave judgment for the Purchaser against the Receivers and the mortgagees, and ordered them to return the deposits to the Purchaser.

[42] The Receivers and the mortgagees appealed to the Court of Appeal. The Court of Appeal (Basnayake, Lecamwasam and Dayaratne JJA) allowed the appeal, and set aside the order of the High Court. The Purchaser now applies for leave to appeal to the Supreme Court.

Discussion

[43] *Three preliminary points*. There are three preliminary points I wish to make. The first focuses on the Purchaser's case at the trial. I have no doubt that it was flawed. 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."*

In any event, it is important to remember that the agreement did not provide for the transfer of the lease to take effect on the signing of the agreement. The transfer of the lease would only take effect on the Settlement Date by when the balance of the purchase price had to be paid. Clause 4.1(a) of the agreement contemplated that the Board's consent to the transfer would have been obtained by then because otherwise the transfer would have been unlawful. In other words, the transfer would only have been unlawful if it took effect on the Settlement Date without the Board's consent having been obtained. In *Kulamma v Manadan* [1968] AC 1062, the Privy Council said that the parties "should be presumed to contemplate a legal course of proceeding rather than an illegal [one]". Since it was never contemplated that the transfer of the lease would take effect without the Board's consent, there was no question of the proposed transfer being unlawful simply because the Board's consent to the transfer had not been obtained earlier. That is the effect of a series of cases

including the decision of the Court of Appeal in *Jai Kissun Singh v Sumintra* (1970) 16 FLR 165, the decision of the Court of Appeal in *D B Waite (Overseas) Ltd v Wallath* (1972) 18 FLR 141, and the decision of the Supreme Court in *Reggiero v Kashiwa* [1998] FJSC 8.

[44] Secondly, the trial judge thought that "the primary responsibility" for applying to the Board for its consent to the transfer of the lease lay with the Vendor. That was despite clause 4.1(a) of the agreement which provided that it was for the Purchaser to obtain the Board's consent. The judge came to the view he did because section 12 said that it was unlawful for the *lessee* to deal with the land without the Board's consent. Indeed, that was one of the reasons which led Gould VP in *Waite* to conclude that it was for the transferor to obtain the Board's consent. I do not agree. Section 12 was focusing on the consequences of an alienation of, or dealing with, land without the Board's consent: it would render the transfer unlawful. Since it was the lessee who was alienating or dealing with the land, it was inevitable that section 12 would be drafted in such a way as to make the lessee's alienation or dealing with the land unlawful. Section 12 was not purporting to lay down who should apply for that consent. If the parties wanted to provide for who was to apply for consent, that was entirely up to them. In this case, they decided to do that by agreeing in clause 4.1(a) of the agreement that it was the Purchaser who had to apply for the Board's consent.

[45] Having said that, who had the responsibility for applying for the Board's consent was, in my respectful opinion, irrelevant to whether there had been an alienation of, or dealing with, the land within the meaning of section 12. Whoever had the responsibility of applying for the Board's consent, the critical issue was whether there had been an alienation of, or dealing with, the land which came within section 12. If there had not been, the question of the Board's consent fell away: the Board's consent was not required. If there had been, the Board's consent was required, whoever had the responsibility for applying for it. Who had the responsibility for applying for the Board's consent was highly relevant to whether the Purchaser had been in breach of the agreement, but not to whether there had been an alienation of, or dealing with, the land within the meaning of section 12.

[46] Thirdly, section 12 did not seek to identify what might constitute an alienation of, or dealing with, the land which would trigger the requirement to obtain the Board's consent.

However, it was intended to cover the many forms which such an alienation of, or dealing with, the land can take by saying that it would be unlawful whether the alienation of, or dealing with, the land was "by sale, transfer or sublease or in any other manner whatsoever". The Court of Appeal did not think that the words "or in any other manner whatsoever" added anything. They referred to the *eiusdem generis* rule, namely that when a list of specific items belonging to the same class is followed by general words, the general words are to be treated as confined to other items of the same class. That led the Court of Appeal to ask whether the agreement in this case could be categorized as a sale, transfer or sub-lease[1]. That was the wrong approach. It gives no effect to the words "or in any other manner whatsoever". The application of the *eiusdem generis* rule to these words merely limits the alienation of, or dealing with, the land contemplated by section 12 to any other forms of alienating or dealing with land. As we shall see, the courts have often considered whether particular arrangements other than a sale, transfer or sublease of land amount to the sort of alienation of, or dealing with, land contemplated by section 12. If the Court of Appeal's approach were correct, the approach of those courts (which include the Privy Council and the Supreme Court of Fiji) would have been wrong.

[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 tell, that issue was never addressed.

[1] The Court of Appeal also asked whether the agreement could be categorized as a mortgage since a mortgage was was one of the prohibited ways of dealing with land in reg 9 of the iTaukei Land Trust (Leases and Licences) Regulations 1984. They should not have done that. Reg 9 was not concerned at all with the circumstances in which an arrangement involving iTaukei land needed the Board's consent. It provided that land in an iTaukei reserve should not be dealt with or passed to someone other than an iTaukei.

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.

[48] *The nature of a licence*. Against this background, I turn to the access which the Purchaser was given to the resort in the Interim Period, that being one of the two things which the Purchaser now says, and which the judge found, constituted an alienation of, or dealing with, the land for which the Board's consent was required. Such access in law amounts to the grant of a licence. At the risk of being accused of going back to first principles, I want to say something about the nature of a licence. There is in Fiji no general right to go onto someone else's land. You need the owner of the land's permission to do that. Otherwise, you would be committing the tort of trespass. If you get the owner's permission to go onto their land, you are said to have been granted a licence to do that. A licence legitimises what would otherwise be a trespass.

[49] *The effect of the grant of a licence: generally*. In legal orthodoxy a licence which merely entitles someone to go onto someone else's land does not create any proprietary interest in the land. Obvious examples are the postman or the window-cleaner, who have permission to go onto someone's land to deliver letters or clean their windows. No-one would say that they have acquired an interest in land of the type contemplated by section 12. At the other end of the spectrum, there is the case of someone who is allowed onto someone else's land to build houses there. That was the position in *Chalmers*, as well as in *Imam Hussain v Shiu Narayan* [1978] FCA 23 (Court of Appeal), *Logessa v Pachamma* [1980] FCA 2 (Court of Appeal) and *Ram Swamy Adi Narayan v Padma Wadi* [1998] FJSC 5 (the Supreme Court). The Privy Council in *Chalmers* held that such a licence was close to a lease, but it was at the very least a dealing with the land within the meaning of section 12. The licence in the present case falls between these two extremes, and as the Privy Council said in *Kulamma*:

> *" ... the term licence covers the whole range between one which confers such extensive rights over the land as almost to amount to a lease and one which merely confers permission to enter without liability to an action for*

trespass: the question is where, on the scale, the rights conferred by the [agreement in question] are to be found."

The fact of the matter is, as the Privy Council made clear in Kulamma, merely because an agreement can amount to a licence, it is not necessarily to be described as a dealing in land. It all depends on a proper analysis of the agreement in question.

[50] I have looked at all the cases referred to in the parties' written submissions to see if any of them lay down any principles for determining on which side of the dividing line a particular transaction falls, or if the facts of any of them are so close to the present case that the conclusion in that case is a guide to the right conclusion in the present case. I have not found one where the facts are sufficiently close to the present case to be a helpful guide, but it is plain that a licence of a purely contractual and personal nature is very likely not to amount to a dealing in land. For that reason, in Kulamma itself, the grant of a licence to farm land could not be said to be a dealing in land. Nor could a purely personal right arising from promissory or equitable estoppel, whereby a separated *de facto* wife was entitled as against her *de facto* husband to live permanently on land: see Maharaj v Chand [1986] AC 898.

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

[52] The background here was that the lease which the agreement purported to transfer contemplated that the land would be run as a tourist resort throughout the duration of the lease. That was why the Vendor agreed in clause 2(g) of the lease "to keep the ... Resort open for Business and manage and conduct it in an efficient, orderly and lawful manner". At all times, there had to some body in place to manage it. But since the Vendor was in

receivership, it was, no doubt, unable to finance the management of the resort itself. It needed another company to come in and manage the resort for it. Ms Khan for the Purchaser realistically accepted that if the owners of a resort want to engage a management company to manage the resort, and give the management company access to the resort to do that, the grant of access to the resort for that purpose would not amount to an alienation of, or dealing with, the land within the meaning of section 12. She contended that what made all the difference in this case was that these were no ordinary management arrangements. The arrangements amounted to a management agreement which was part and parcel of the sale and purchase agreement. The purchasers under the sale and purchase agreement were also to be the managers of the resort in the Interim Period. The Purchaser, in other words, was a purchaser in possession. It was that which made the management arrangements in this case an alienation of, or dealing with, land within the meaning of section 12. This refinement of the Purchaser's argument is a new one.

[53] The flaw in this argument is that it wrongly conflates the Purchaser's two roles. On the one hand, it was buying the resort as purchaser and on the other during the Interim Period it would be managing the resort. These were separate roles governed by separate arrangements, even if the management arrangements were annexed to the sale and purchase agreement. Indeed, we were told by Mr Clark for the Receivers that the management arrangements had been cancelled for the Purchaser's failure to obtain the necessary insurance, but we have seen no evidence of that. The point remains, though, that the cancellation of the sale and purchase agreement did not necessarily bring the management arrangements to an end. In short, the Purchaser was not given access to the resort because it was buying the resort. It was given access to the resort in order to manage it. It was not therefore a purchaser in possession. It was in possession as the manager of the resort and not as its prospective purchaser.

[54] Ms Khan sought to overcome that hurdle by relying on clause 14 of the sale and purchase agreement and paras 6, 7 and 13 of the management arrangements. She argued that they were not terms which you would find in a conventional management agreement, and they show that something more than a management agreement was in play here. These provisions provided that the Purchaser assumed the risk of destruction or damage to the

resort from the Access Date (clause 14.2), that no fees would be payable to the Purchaser for its management of the resort (para 6), that the Purchaser would be entitled from the Access Date to all the revenue received by the resort, and would be liable for all the expenses incurred in running the resort (para 7), and that the Purchaser would comply with all the Vendor's obligations under the lease (para 13).

[55] This is a powerful argument. It is a pity that it was deployed for the first time in the Supreme Court. The management arrangements were unquestionably not a conventional management agreement. Managers do not usually assume the risk of damage to the business or keep the profits of the business they are managing and bear its losses instead of earning fees. But in the final analysis, these unusual provisions simply reflected the fact that the resort was to be managed during the Interim Period by the prospective purchaser of the resort. These were benefits which the Purchaser was given and burdens which it assumed because it was going to be the owner of the resort after the Settlement Date. But it was not in the capacity as prospective purchaser of the resort that the Purchaser agreed the management arrangements. It did so in its capacity as manager of the resort during the Interim Period. That was why the Purchaser was described throughout the management arrangements as the Manager, and not as the Purchaser which was how it was described in the sale and purchase agreement. Just as it was in possession of the resort in its capacity as manager and not as prospective purchaser, so too it was in the capacity of manager that it managed the resort and not in its capacity as prospective purchaser, even though some of the terms of the management arrangements reflected the fact that when the Settlement Date arrived it would be the owner of the resort.

[56] It is important to note that the Purchaser did not have a completely free hand in how it managed the resort. The management arrangements defined what the Purchaser could not do when managing the resort, just as much as it defined what the Purchaser could do. Indeed, the Purchaser did not even have the exclusive right to occupy the resort. Para 11 of the arrangements stipulated that, although the Vendor had to allow the Purchaser to manage the resort without interruption by the Vendor, the Vendor was entitled to inspect the resort at any time while doing its best to avoid disruption to the resort. The Purchaser's permission to occupy the land was for the limited purpose of enabling it to manage the

resort. Nor was there to be any change in the use of the land. The land was to continue to be a holiday resort just as it had been prior to the making of the agreement. Indeed, all the provisions in the management arrangements related to the management of the resort; none had anything to do with an interest in land. Once you take the transfer of the lease out of the equation, as you have to because it was not the transfer of the lease which was going to take effect without the Board's consent, all that had happened was that there had been a change in the personnel running the resort.

[57] The fact that the Purchaser had access to the resort to manage it during the Interim Period was not the only possible reason for holding that there had been an alienation of, or dealing with, the land within the meaning of section 12. There was also the payment of the initial deposit of $850,000 and the further deposit of $50,000. As I have said, the trial judge bracketed the part-payment of the purchase price and the entry upon the land to manage the resort as together amounting to the alienation of, or dealing with, the land within the meaning of section 12. I do not agree. The payment of the deposits was attributable to that part of the agreement which related to the transfer of the lease. Since the transfer of the lease was not going to take effect without the consent of the Board, payments made in connection with that transfer could not be taken to be objectionable, whether on their own or with the management arrangements.

[58] *Other issues*. Both sides of the dispute raised a number of issues which were designed to persuade the judge that finding for the other party would be unfair – as if that was relevant to the technical issue which the judge had to decide, which it was not. First, there was much talk at the trial about unjust enrichment. Was it fair for the deposits to be forfeited when the agreement had been cancelled? It was said that this was no more than a completely unacceptable windfall for the Receivers and the mortgagees. I do not agree. If consent to the transfer was obtained, and the transfer had gone ahead as originally intended, the payment of the deposits would have reduced the balance of the purchase price. If the transfer did not take place – either because the consent of the Board had not been sought or because the agreement was cancelled for one reason or another – what would happen to the deposits would depend on the terms of the agreement. If the Purchaser had to forfeit

its deposits that was not unjust: it was simply what the agreement to which the Purchaser was a party had provided for.

[59] Secondly, in the course of the cross-examination of the Vendor's solicitor, it was suggested to her that the Vendor's solicitors had been disingenuous on 17 November 2011 when they informed the Purchaser's solicitors that if they failed to complete settlement on the following day, a notice of default would be served. The criticism was that it would have been quite impossible for the Purchaser to apply for, and obtain, the Board's consent to the transfer of the lease in 24 hours. That criticism was unfair. The agreement had provided for the Purchaser to obtain the Board's consent as soon as reasonably practicable, and it had done nothing for over 18 months, despite the assistance it had received from the Vendor's solicitors. In any event, the Vendor's solicitors were merely taking the steps which the agreement required them to take before the Vendor could exercise its right of cancellation under clause 7.7 of the agreement. The letter of 17 November 2011 was not therefore purporting to give the Purchaser additional time to apply for, and obtain, the Board's consent to the transfer of the lease. The Vendor had by then decided to cancel the agreement and forfeit the deposits, and this was the way in which the agreement provided for that to be done.

Conclusion

[60] For these reasons, I agree with the Court of Appeal – albeit by a very different route – that there was no alienation of, or dealing with, the land without the consent of the Board. It follows that the agreement was not null and void, and the premise on which the trial judge ordered the Receivers and the mortgagees to return the deposit to the Purchaser was incorrect. I do not think that the proposed appeal raises a far-reaching question of law. The issue was whether on the application of well-established principles, the agreement in question amounted to an alienation of, or dealing with, land without the Board's consent. I would therefore refuse leave to appeal, and I would order the Petitioner to pay $5,000 to the Respondents towards their costs of resisting the application for leave to appeal. This is half the sum I would otherwise have ordered: the mortgagees' interests on this appeal were identical to those of the Receivers, and I see no reason why the Purchaser should have

to contribute to both of their costs. Both the Receivers and the mortgagees could have been represented on the appeal by one set of lawyers.

Postscript

[61] The written submissions filed by the parties for the appeal referred to a number of authorities. However, copies of those authorities did not accompany the written submissions. Copies of the authorities to be relied on by the Receivers and the mortgagees reached us only the day before the hearing of the appeal. We were only provided with copies of the authorities to be relied on by the Purchaser during the hearing of the appeal. That was a serious failure to comply with rule 22(3) of the Rules of the Supreme Court which requires copies of the authorities to be relied upon to accompany the written submissions. There is good reason for copies of the authorities to be provided: it saves the members of the court having to spend what might be quite a lot of time gathering the authorities for themselves, or finding them online, and then copying them for use in their preparation for the hearing, at the hearing itself, and in writing their judgments. And there is good reason for copies of the authorities to be provided well before the hearing. Hearings in the Supreme Court are short: there are limits on the time allowed for oral argument. That is because the members of the court will have read the papers in the case beforehand. Their preparation for the hearing will be hampered if they do not have copies of the authorities to hand. I trust that rule 22(3) will be complied with in the future.

[62] There is, of course, the danger, that many of the authorities will be copied more than once if they are to be relied on by more than one party to the appeal. But that danger can be avoided. Rules 22(1) and (2) provide for the sequential filing of written submissions: the Petitioner's written submissions 42 days before the hearing, and the Respondent's 21 days before the hearing. If the Respondent wishes to rely on any of the authorities relied on by the Petitioner, copies of those authorities do not need to accompany their written submissions – provided, of course, that the Petitioner has complied with Rule 22(3) and attached copies of the authorities to their written submissions.

Jayawardena J

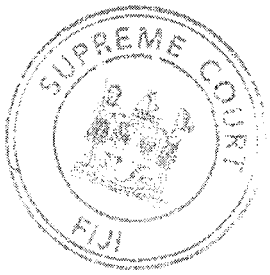
[63] I had the privilege of reading the draft judgment of Justice Brian Keith and I am in agreement with the reasoning and conclusion.

Order:

(1) Leave to appeal refused

(2) Petitioner to pay $5,000 to the Respondents towards their costs

The Hon. Mr. Justice Anthony Gates
JUDGE OF THE SUPREME COURT



The Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Priyantha Jayawardena
JUDGE OF THE SUPREME COURT