IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal Nos. 13 & 22 of 1984

Between:

1. MURRAY COCKBURN
2. NATIVE LAND TRUST BOARD — Appellants

- and -

1. BILO LIMITED
2. CORK BUILDERS LIMITED
3. LOTUS ELLEN HALL
4. MURRAY JOHN COCKBURN — Respondents

J.R. Reddy for 1st Appellant and 4th Respondent
Sir John Falvey Q.C. & A. Qetaki for 2nd Appellant
B. Sweetman for 1st Respondent
P. Knight for 2nd Respondent
H. Lateef for 3rd Respondent

Date of Hearing : 19th November, 1984
Delivery of Judgment : 24th November, 1984

JUDGMENT OF THE COURT

Casey, J.A.

These appeals, heard together, are against the judgment of the Supreme Court at Suva delivered on the 14th March, 1984 the result of which was an order for specific performance of an agreement by Mrs. Hall to sell her leasehold interest in a small section of Native Land (Lot 6) at Lami to Bilo Limited. The Court also declared that the Board's refusal to consent to this transaction was invalid, and found that its consent had been given.

Mrs. Hall obtained a Memorandum of Lease from the Board in 1955 and the land then comprised 24 perches. The frontage was on Queens Road and the back boundary was the sea shore. There appears to have been at one stage a bure erected on it but this was subsequently destroyed and plays no part in the events giving rise to this litigation. Clause 18 of the lease provided that the lessee should apply such measures to check soil erosion as might be required by the lessor in writing. Although this was a "Clause B - Residential" lease the normal building covenant was deleted, the reason being found in a report from the Board's secretary to the effect that on the destruction or demolition of the cottages in this subdivision, the appropriate authorities might wish to prohibit building and a covenant would conflict with such a policy. The trial judge noted that 24 perches would be about the minimum permissible area for a residential section in any event.

In April 1977 Mrs. Hall applied for consent to transfer this lot to Mr. D.R. Cork who was a director of the respondent, Cork Builders Limited, but it was refused on the grounds that there were no improvements on the land. The Board took action to repossess the lease but this was discontinued in November 1979 after Mrs. Hall sought an injunction, the Board admitting that no notice of any breach had been given to her. In February 1980 there was a further application for consent to transfer to Mr. Cork for $6,000, his solicitors stating that he would take steps to prevent erosion which had apparently made substantial inroads into the section, and they indicated their client intended to erect a dwelling.

This prompted a letter dated 11th April 1980 from the Board's Divisional Estate Manager (Mr. G.C. McKirdy)

to Mrs. Hall's solicitors headed "Notice of breach of lease conditions". After stating that an inspection disclosed the lot was vacant and affected by erosion, he gave notice of non-compliance with the term requiring the lessee to maintain and keep in good repair all buildings erected on the land. Notice was also given requiring erection of a sea wall and the replacement of eroded land. A penal rent of $600 was imposed and the Board expressed its intention to enter upon and to take possession of the land if the breach was not remedied within one year. Consent to the sale to Mr. Cork was again refused. There was further correspondence between the solicitors and Mr. McKirdy, and in November 1980 (when nothing had been done to comply with the condition Mr. Cork informed Mrs. Hall that he had a buyer for Lot 6 for $10,000 and proposed that she and his company should share equally the extra $4,000 over and above what he had been prepared to pay her.

This new transaction arose as a result of Cork Builders Limited advertising the adjoining Lots 4 and 5 for sale in early November through a land agent, and Bilo Limited became interested. That company already held Lot 3 and on learning that Lot 6 might also be available it offered $80,000 for the three as a package deal. The commercial potential is obvious. Mr. Philp, the Director of Bilo Limited, had inspected Lot 6 and said about 40% had been lost to the sea; it was completely overgrown and generally an eyesore. He rang Mr. McKirdy to ascertain the Board's reaction to a transfer to his company and said he was told there was no reason why the Board would not agree, provided the breaches of the lease were remedied. He said Mr. McKirdy advised him to insert in the letter supporting the application words to the following effect :

"Bilo Limited will immediately on transfer or advised on agreement to transfer, re-build sea wall, fill, clean and grade land and grass and fence property in a manner that will enable the said lot to be used by the tenants of Lots 4 and 5 Nukuwatu Subdivision until a development scheme is warranted."

It is accepted that Mr. McKirdy, as the Estate Officer, was vested by the Board with the power to consent to this transfer.

The firm of Messrs. Mitchell Keil & Associates acted for all parties in this transaction, although Mrs. Hall's usual solicitors were Messrs. Lateef and Lateef. On 26th November 1980 two agreements were prepared by the land agents, expressed to be made between Cork Builders Limited and Bilo Limited or nominees, one covering the sale of Lots 4 and 5 with improvements (understood to be a dwelling and contents) for $71,000, and the other Lot 6 at $10,000. The former agreement was signed by Mr. Cork as governing director of his company. The other agreement was simply signed by him personally. After payment of a deposit of $1,000 on signature, (duly paid to the land agent), it provided for payment of the balance of $9,000 in cash "upon production of an assignment of lease to Bilo Limited by Lotus Hall, current lessee, or a transfer of such lease". The agreement was expressed to be subject to all necessary consents, and settlement was to take place not later than the assignment of the current lease by Mrs. Hall to Bilo Limited, "with the latter at risk to obtain consent to transfer of lease from N.L.T.B".

An application for consent to assign on the Board's standard printed form was completed by Mrs. Hall and Mr. Philp on the 1st December 1980 and sent with a covering

letter from Mitchell Keil & Associates on the same day, along with the similar application for Lots 4 and 5. This letter contained in quotation marks the words suggested by Mr. McKirdy which I have already cited. However, Mr. McKirdy replied on the 5th December 1980 stating that the Board was not prepared to give consideration to the transfer of Lot 6 until the "requirements imposed on the lessee for breach of lease conditions had been fulfilled to the entire satisfaction of the Board". He also referred to the fact that Bilo Limited had no intention of building "until a development scheme is warranted" this being, according to Mr. Philp's recollection, the very term that he had been advised to put in the letter of application. Mr. McKirdy pointed out in his letter that such a delay constituted a breach of the lease conditions and was precisely the reason for the Board taking action against Mrs. Hall. He requested the assignee to disclose his plans so that the Board could give whatever consideration was warranted to such a scheme, adding "clearly, the present breaches would need to be remedied prior to such consideration being given". He indicated that the transfer of Lots 4 and 5 was in order, but as the transaction appeared to be a "package deal" the applications would be held pending reply.

From the tenor of this letter it is quite clear that Mr. McKirdy was under the misapprehension that the lease contained a building covenant and this appears to have affected his view throughout his handling of the Bilo application. Certainly the latter accepted that there was an obligation on the lessee to satisfy the Board's requirements about building on the section and this is borne out by Mr. Philp's letter to Mr. McKirdy of the 8th December 1980, in which he referred to the above reply of the 5th. He made it clear that he was in the process of remedying the erosion

problem, and intended to do a commercial development of the three lots when permitted by the Council's zoning, which he expected to be within 3 years. He said that in the meantime they would grass and grade lots and swing the dividing fence across to the Queens Road frontage to keep out unauthorised people and drinking parties and "so make it possible to let premises on Lots 4 and 5, pending development". He added that if the commercial development was unduly delayed they would build apartments on Lot 6, for which they had paid in full. This refers to payment of the balance of $9,000 to the solicitors, who had also prepared a memorandum of transfer of Lot 6 and obtained Mrs. Hall's signature thereto about the 1st December 1980. On that date they paid Mrs. Hall $5,000 and credited $4,000 to the trust account of Cork Builders Limited. A further sum of $750.00 from the land agents was also paid into that account.

Mr. McKirdy replied to Mr. Philp's letter on the 18th December pointing out that there seemed to be confusion as to the grounds upon which the Board would consent to the transfer and the type of land use allowed, and he referred to the contents of his letter of 5th December to the solicitors. He then detailed the notice of breach served on Mrs. Hall's solicitors in April 1980 and its requirements, together with the Board's intention to retake possession if they were not remedied within one year. He concluded by saying the Board was not prepared to give consideration to the proposed transfer until the breaches were remedied to its satisfaction and enquired whether the company wished to proceed with the transfer of the lease over Lots 4 and 5.

The next development was a letter from a firm of engineers to the Board on 6th January 1981 certifying that they had inspected work in progress on Lot 6 and

described the erection of an adequate sea wall and progress on land reclamation. This was followed by a letter from Bilo Limited of 16th January 1981 advising completion of this work and expressing the hope that the planning formalities would be concluded within the year, enabling them to proceed with the commercial development across the front of the three lots in accordance with a sketch plan enclosed. They advised that should the commercial undertaking be unduly delayed, they would proceed to develop Lot 6 for residential purposes within two years. The letter concluded with the statement that as the whole project for lots 4, 5 and 6 was to enable the development of a sensible commercial property, "they sought the Board's assistance and indulgence of the Board to allow the transfer of the three lots to proceed now".

This letter was followed by one from Messrs. Mitchell Keil & Associates of 26th February 1981 pointing out that the breaches had been attended to and building proposals put to the Board, which they hoped would lead to the transfer of the three lots together. If not, they asked that approval to transfer Lots 4 and 5 be given at that stage and that the Board advise if anything further was required to be done before Lot 6 could be transferred. To this Mr. McKirdy replied on the 10th March with consent to transfer Lots 4 and 5, and stated that the other points raised in the letter would be answered separately. However, on 31st March 1981 he wrote directly to Mrs. Hall telling her that consent to the transfer of Lot 6 had been refused on the ground that the proposed assignee had no intention of building on the land for at least 2 years. He added :

> "We have reviewed your case and are now prepared to consider any assignment application so long as the assignee makes subs-

tantial progress toward improving the land within six months from the date of the assignment."

As will become apparent later in this narrative, this paragraph was added as a result of a proposal for the transfer of Lot 6 to Mr. Cockburn, with whom Mr. McKirdy had also been dealing over the period the transfer to Bilo Limited was under consideration. On 3rd April 1981 he received an application signed by Mrs. Hall and Mr. Cockburn for consent to this at a consideration of $10,000 and approved it the same day. He then wrote on the 7th April 1981 to Messrs. Mitchell Keil & Associates advising that he had informed Mrs. Hall consent had been refused to Bilo Limited's transfer on the grounds that it had no intention of building for at least 2 years. He said this was not acceptable to the Board, in view of the past history of the tenancy. Reference to that company's letter of 16th January 1981 demonstrates that he was wrong in making this statement. It said that in the event of delay with the commercial project, it would develop Lot 6 for residential purposes within 2 years.

It is now appropriate to deal with Mr. Cockburn's involvement. According to the record (correspondence having been admitted in the Supreme Court by consent) Mr. Cockburn first wrote to the Board on the 24th October 1980 stating that he wished to purchase Lot 6 from Mrs. Hall and that he intended rebuilding the sea wall and constructing a residence. This letter was marked for the attention of Mr. McKirdy and indicates that it followed discussions with him. He asked for confirmation that the lease would be assigned after the sea wall and the foundations of the house had been inspected. There is on the Board's file a reply by Mr. McKirdy of the 6th November 1980 pointing out that in April 1980 Mrs. Hall

was served with notice of breach of the lease terms requiring her to maintain buildings on the land. In respect of her failure to check the erosion the erection of a sea wall was required, together with replacement of land to be carried out under engineering supervision. He also referred to the Board's intention to repossess failing remedy of the breach within one year. He went on to say that it would be prepared to grant consent subject to the conditions being complied with to its full satisfaction, detailing what was needed for the erosion problem and specifying completion to the foundation stage of the residence Mr. Cockburn intended to construct.

The next item on the record is a letter of the same date (24th October) as that written to the Board, addressed to Mr. Cork and purporting to confirm Mr. Cockburn's intention to have Mrs. Hall's lot assigned to him at the total purchase price of $12,000, comprising an initial deposit of $500, a further payment of $5,500 payable within seven days of assignment of the lease, and the balance to be provided by architectural services (Mr. Cockburn was a member of an architectural partnership) to the value of $7,500, with a cash adjustment if necessary. The letter went on to say the Board had agreed the assignment could occur after the sea wall and the foundation of the residence had been completed, followed by the words "in this respect find enclosed a copy of their letter". We mention at this stage the only letter this could relate to is that we have just referred to from Mr. McKirdy of 6th November, and this casts grave doubts on the date of 24th October attributed to this letter, and on its authenticity. It concluded that the offer was subject to the approval of the Board and the Lami Town Council and was signed by Mr. Cockburn, with the word "Accepted" typed at the bottom followed by a space for signature. However, this was blank.

To compound the confusion over dates, Mr. Cockburn wrote a letter of the 5th December 1980 to Mr. Cook stating that he had been in Singapore and that during his absence a letter was received from the Board confirming its approval of the assignment of Mrs. Hall's lease to him after reinstating a sea wall and constructing the house foundations and he referred to it as being enclosed. (Again this could only be Mr. McKirdy's letter of 6th November). He then went on to say discussions with the Town Council and Planning Authorities indicated no obstacles to the erection of the house, and forwarded his choque for "$500 in accordance with our agreement dated 24th October 1980". He accepted that the lease transfer should go through in about three or four months after he had submitted a planning application in the near future.

There was another letter on the record dated 7th November 1980 from him to Mr. Cork, stating that he was aware Mr. Philp was filling the site and it was understood he had bought both Mr. Cork's house and Lot 6. He pointed out that he had an agreement with Mr. Cork, as Mrs. Hall's agent, to buy the lease subject to the Board and Council's "comment" (? "consent"); and that after indications of planning approval and receipt of the Board's letter which arrived during his absence, he had written enclosing the deposit of $500 as agreed. He expressed disappointment and asked Mr. Cork to clarify the matter. When read in conjunction with Mr. McKirdy's letter of the 6th November and the letter of the 5th December from Mr. Cockburn to Mr. Cork (to which I have just referred) the date of the 7th November on this letter can be seen as a mistake; it should have been dated 7th December.

This is not the end of the matter, however, because there is another letter from Mr. Cockburn to the

Board dated 8th November 1980, acknowledging Mr. McKirdy's letter of the 6th November and apologising for the delay in replying because he had only recently returned to Fiji after three weeks away. He referred to a telephone conversation of the same date expressing his concern about Mr. Cork's breach of the agreement by selling Lot 6 to someone else who was currently on the site carrying out earthworks. (It is clear that Mr. Philp did not start work until early in December). He then referred to his letter of 24th October indicating his intentions about this land, and stated that he had already cleared the site and had taken some engineering advice; and that he had discussed the problem with Mrs. Hall. He said she was not really involved and that while Mr. Cork mentioned his interest to her initially, he had to sell her site as a condition requested by the purchaser of his own property, and she was only interested in getting something for the transfer of her lease. He asked for any comments that the Board might have. This letter bears the Board's date stamp of 15th December. We are again satisfied that the November date must be a mistake and it should have been dated the 8th December 1980.

The cheque of $500 sent to Mr. Cork was returned to Mr. Cockburn by Messrs. Mitchell Keil & Associates in a letter dated 24th December 1980. They said his letters of 7th November and 5th December addressed to Mr. Cork had been referred to them, and as he was overseas the matter must await his return towards the end of January. A photocopy of the cheque annexed to this letter shows that it is dated 4th November 1980, which hardly seems to fit in with any of the dates discussed.

There is nothing on the admitted record between the last letter sent by Mr. Cockburn to the Board and the

consent granted on the 3rd April 1981 to the application signed by him and Mrs. Hall. It bears a note to the effect that the original was handed to Mrs. Cockburn on that date. After this came a letter from Messrs. Lateef & Lateef of the 6th April to Messrs. Mitchell Keil & Associates stating that the Board had refused consent to the transfer from Mrs. Hall to Bilo and they were accordingly instructed to refund the sum of $5,000 paid to her. A trust account cheque was enclosed, but it was returned in a brief note stating that it was not accepted.

On 7th April 1981 Mr. McKirdy wrote to Mr. Cockburn stating that consent to the assignment had been granted subject to reasonable progress being made for improving the land within six months from the date of transfer. We note there were no conditions endorsed on the consent to the signed application. He went on to say that the Board would be satisfied with completion to foundation stage by 1st October 1981 of a dwelling having a minimum floor area of 800 square feet with final completion expected within a reasonable period thereafter, and Mr. Cockburn confirmed this, subject to any matter outside his control.

Bilo Limited came back into the picture with a letter of 27th April 1981 from its solicitors to the Board referring to further representations, as a result of which they understood it would grant consent to the transfer from Mrs. Hall if building works were commenced and reached foundation stage by October 1981, a condition which would be acceptable to that company. It asked if the matter could be treated as a reconsideration of the original application.

In his evidence (which was unreservedly accepted by the Judge) Mr. Philp said that he spoke to Mr. McKirdy

on the 23rd April and queried why the same condition applicable to Mr. Cockburn was not imposed on Bilo Limited. He was advised that if his company resubmitted the application the Board would approve on the same grounds, and that there seemed to be no reason why more than one consent could not be given. This prompted his solicitors' letter of 27th April, to which Mr. McKirdy replied on the 1st May indicating that a fresh application would be needed. He pointed out that because of the consent granted to Mr. Cockburn, the Board would be reluctant to grant a consent to Bilo Limited while the other was still current. There was some further correspondence between these solicitors and the firm acting for Mrs. Hall in which they sought in vain to have her sign a fresh application. She had already previously returned her cheque for $1,000 to Mr. Cork, who wrote to Mr. Keil on the 8th May reporting on a discussion with Mrs. Hall, in which he tried to get her to sign another transfer to Bilo Limited. He was at some pains to point out there could be no claim against him because the property was sold without the Board's approval.

Evidence generally supplementing the contents of this correspondence was given by Mr. Philp at the hearing. He said that before signing the agreement to buy Lot 6 from Mrs. Hall he had spoken to Mr. McKirdy, who advised him that provided the breaches were remedied he saw no reason why the Board would not consent and on that assurance the company entered into the agreement. He added that Mr. McKirdy mentioned Mr. Cockburn's interest in Lot 6 and that he had given him similar advice. Mr. Cork told Mr. Philp he was acting as Mrs. Hall's agent, and that there might be some trouble from the Board, and he was also told of the refusal of the previous application. That was given as the reason why the clause was added to the agreement about consent

being at risk of Bilo Limited. He took on the responsibility of obtaining this. The possibility that it might not be given did not cross his mind because of the assurance he received from Mr. McKirdy.

He moved in promptly to start the remedial work, being "reasonably confident" of getting consent and said he did not know that Mr. Cockburn was then ready to purchase. Counsel accepted that he spent $5,000 in dealing with the erosion and restoring the land, and Mr. Philp said the work was carried out in December and January and the land was fenced to prevent the public using it. He said there were many calls to the Board in February 1981, and in early March he was informed that Mr. Cockburn had lodged a caveat against the lease. This followed an earlier one lodged on behalf of his company. He was told by Mr. Railoa (an officer of the Board) about the end of February that the work was in order and he understood that eventually his solicitors had the Cockburn caveat removed.

Mr. Keil gave evidence about the discussions and correspondence with Mr. Cockburn's solicitors (Chauhan & Company) about this caveat. It was based on the sale note of the 24th October alleged to have been signed by Mr. Cork, this being the letter to which I have already referred to as of doubtful authenticity. Mr. Keil wrote stating that Mr. Cork was not aware of having signed any sale note, leading to an accusation through Mr. Chauhan that the latter was telling "blatant lies". He described how Mr. Cork had assisted in its preparation; that it was signed by Mr. Cockburn and handed to the former, who then took it away to sign, intending to return it. As counsel said, this was a very curious way to complete the signing of an apparently straightforward agreement. Mr. Chauhan wrote to Mr. McKirdy

on the 18th March asking him not to grant consent until the caveat issue had been determined. In spite of his assertion that the request for its withdrawal would be contested, it was in fact removed shortly after without any further action being necessary.

Mr. Philp knew nothing about consent being given to Mr. Cockburn's transaction until told by his solicitors and he did not know anything about the payments of the purchase price made or credited by time to Mrs. Hall or Cork Builders Limited. To complete this narrative: Mr. Chauhan prepared a sale agreement for the transaction between Mrs. Hall and Mr. Cockburn and sent it to her solicitors for approval and signature on the 8th April. She signed on the 9th with minor amendments inserted by agreement. The caveat lodged by Bilo Limited is still effective; no transfer has been completed and she is still registered as the lessee. It is not clear from the record whether the Board's consent to Mr. Cockburn's transfer is still operative, as it appears to have been extended only to 3rd October 1981.

The Pleadings and Judgment:

As a result of these transactions Bilo Limited issued proceedings in the Supreme Court against Mrs. Hall, Cork Builders Limited, the Native Land Trust Board and Mr. Cockburn. In its statement of claim, after alleging the agreement for sale and purchase between it and Cork Builders Limited as agent for Mrs. Hall, Bilo Limited recited the application for consent to the Board "which advised it would consider the same on compliance by the first defendant (Mrs. Hall) with certain requisitions in respect of the said land". It goes on to deal with the payment of the purchase price, the work done by the plaintiff and its

advice to the Board of building plans, and alleges that the Board's Officers informed it the application was being processed and indicated that it would be favourably considered; that it then refused consent for the reasons stated in its letter of 7th April 1981; thereafter Mrs. Hall forthwith contracted to sell the land to Mr. Cockburn and applied to the Board for consent which was given immediately, subject to the conditions we have mentioned above. It alleges the defendants "collectively and severally" colluded and/or conspired to prevent the plaintiff from obtaining the land and that either all or some of them had defrauded the plaintiff, or in the alternative did not act in good faith.

The plaintiff prayed a declaration that the Board's refusal to consent to the sale of the land was invalid in that it acted fraudulently or in bad faith with an improper purpose, and asked that such refusal be set aside. If further sought an order that Mrs. Hall join in an application for the Board's consent. There was a claim against Cork Builders Limited and Mrs. Hall for damages for breach of contract and in respect of the plaintiff's losses arising out of the other actions. Alternatively it asked that they refund the $10,000 paid together with interest and compensation for the value of all improvements carried out, and finally that its caveat be extended pending the hearing. There was also a claim for other relief.

We do not propose detailing the matters raised in the statements of defence; where relevant, they will be referred to in this judgment. Generally they denied the allegations of fraud and conspiracy and make the point that Bilo Limited's agreement was subject to the consent of the Board which was never granted and accordingly there was no liability in the circumstances to compensate it for the

money spent in meeting the Board's conditions. Mr. Cockburn raised the point that any agreement entered into by the plaintiff without consent would be illegal and void. At the hearing, the correspondence and other documents in the record were admitted by consent and evidence was given for Bilo by Mr. Philp, Mr. Keil and several members of the Board's staff. Mr. McKirdy was not called, the explanation being that he was no longer in Fiji, but the Board made available to the Court the whole of its file without any claim of privilege. No evidence was given by any of the other parties. In a lengthy reserved decision the trial Judge expressed a very adverse opinion of certain conduct and we quote this extract from page 16 of his judgment :

> "A very detailed study of all documents, admissions in pleadings and evidence given in Court leads me to only one conclusion and that is that Mr. Cockburn and Mr. McKirdy did collude and conspire to prevent Bilo from obtaining the land. Their conspiracy was intended to block Bilo's purchase of Lot 6 and to ensure that Mr. Cockburn obtained the land without having to pay for the reclamation work which he had earlier indicated in a letter to the Board he was prepared to carry out at his own expense. In the final stages it appears likely that Mrs. Hall was persuaded to join in the conspiracy. Mr. Cockburn also appears to have been aided and abetted by his solicitors Messrs. Chauhan & Company."

In what must necessarily be a brief analysis of the detailed reasons he gave for this conclusion, we refer to the contrast he was between Bilo's treatment and the prompt consent given to Mr. Cockburn's application and the building conditions imposed, which seemed a mere formality. He saw a change of attitude in Mr. McKirdy's letter of 5th December 1980 to Mitchell Keil & Associates and his failure to disclose Mr. Cockburn's application to them as

an indication that by then he was working hand in glove with him, especially in the light of Mr. Railoa's evidence that the Board did not in practice entertain two applications at one time and would deal first with the earlier. He acknowledged Mr. Philp's evidence that he was informed about Mr. Cockburn's interest, but pointed out that he was not told conditional consent would be given to the latter's application

The Judge saw sinister overtones in the correspondence between Mr. Cockburn and Mr. McKirdy during October and November. He thought the former's letter of 24th October to the Board would not have been necessary in the light of the previous discussions with Mr. McKirdy, and found the latter's reply of the 6th November 1980 an "astounding document", indicating such a departure from the usual practice of the Board as to raise serious doubts at that early date about his conduct. With respect, we can find nothing extraordinary about this correspondence which follows much the same pattern as the initial enquiries made by Mr. Philp and the advice he received. While an assurance of consent was given to Mr. Cockburn, this could well be due to his commitment to build a house, whereas Bilo Limited was still planning a development.

He then turned to the other letter of the 24th October to Mr. David Cork and found that date to be false, and we think this conclusion was fully justified for the reasons we have already stated. As both letters had been typed on the same day, he was surprised Mr. Cockburn did not point out to the Board that he already had an agreement to purchase Lot 6, instead of indicating merely a wish to buy that land from Mrs. Hall. He then went on to discuss the discrepancies in the dates of the other letters sent by Mr. Cockburn in November, to which we have already

referred. We have reached the conclusion that they fit into a logical pattern enabling us to accept the innocent explanation that the November dates were typed in error for December. However, the Judge decided that all this correspondence had been deliberately back-dated by Mr. Cockburn with Mr. McKirdy's connivance, in order to make it appear that he had been first on the scene with his enquiry. With the greatest respect to the Judge, we think this overlooks Mr. Philp's clear evidence that when he first enquired of Mr. McKirdy, he was told of Mr. Cockburn's interest. It clearly supports the genuineness of his letter of the 24th October and Mr. McKirdy's reply of the 6th November.

We think the Judge had stronger grounds for the conclusions he reached about the October letter to Mr. Cork and the way Mr. Cockburn and his solicitors used it to support the claim to register a caveat against the lease. The Judge saw complicity by Mr. Chauhan because it must have been apparent to him that this document was not a sale note, as verified in the supporting declaration which he would have prepared for his client; it was merely an offer. Mr. Reddy (who appeared in this Court for Mr. Cockburn) found himself in the embarrassing position of having to offer explanations from the Bar for conduct which Mr. Cockburn could have explained himself at the trial, but did not see fit to. We hasten to add that he was represented there by other counsel.

In the circumstances the trial Judge can hardly be criticised for drawing the unfabourable inferences, he did about Mr. Cockburn's intentions and conduct. The allegation of fraud made against him in the statement of claim and the plaintiff's evidence clearly signalled the risks he ran by remaining silent. The circumstances surrounding the

registration of the caveat and the Board's grant of consent pointed to his complicity and bad faith. Added to those was the obvious advantage of acquiring this property adjoining the other three lots, all ripe for commercial development, on which so much had been spent in good faith by Bilo. If Mr. Cockburn's conduct was as irreproachable as Mr. Reddy submitted to us, it is indeed surprising that neither he nor his counsel (on whose advice he was no doubt relying) felt that he should give evidence in rebuttal of the obvious inferences which could be drawn against him. His silence in these circumstances could only strengthen them.

Findings of Fraud:

Mr. Reddy informed us that Mr. Cockburn's main interest in prosecuting his appeal was to clear his character of the very serious reflections cast on it by the Judge. We are of the opinion that the latter went beyond what could properly be inferred from the evidence in concluding that he had resolved with Mr. McKirdy as far back as late October or early November to perpetrate a fraud on Mr. Philp's company. Nor do we think that it supported a conclusion that he had deliberately back-dated all the letters to achieve this purpose. The references in those dated in November to events which all concerned knew were taking place in early December make it obvious they were written then, and we cannot see what Mr. Cockburn could think he would achieve by such a transparent attempt at deception if he back-dated these. As we have already indicated, we think the circumstances point to honest mistake, rather than the more sinister view reached by the Judge.

On the other hand we find a cloud of suspicion surrounding the letter dated 24th October 1980 to Mr. Cork,

the caveat based upon it and the assertive letters written by Mr. Chauhan. In the absence of any explanation of the unsatisfactory features, the conclusion was very much open to be drawn that this letter had been written at a later date in order to support a claim to a written agreement with Mr. Cork, upon which a caveat could be based.

We also share the concern felt by the Judge over the circumstances leading to Mr. McKirdy's immediate grant of consent to Mr. Cockburn's application on the 3rd April with an insignificant building condition, followed by his intimation to Mrs. Hall only (and not, as one would expect, to the solicitors who forwarded the application) that consent had been declined, and notifying her of a condition which Bilo would have been prepared to comply with. Like the Judge, we see sinister implication in Mr. McKirdy's delay in writing to the solicitors until after consent had been given to Mr. Cockburn in spite of his earlier promise to do so; and in his failure to tell them of the less onerous conditions the Board was then ready to impose, and which he had intimated to Mrs. Hall. As we have said earlier, his letter to her suggests that he was simply clearing a way for the application which he knew was going to come in from Mr. Cockburn. Coupled with this is the evidence from Mr. Philp of the apparent conflict between the verbal advice and the letters being received from Mr. McKirdy. In all the circumstances the Judge had ample reason to reach the conclusions he did about the latter's conduct over these later stages, and about Mr. Cockburn's complicity with him.

The Judge accepted that the Board had no knowledge of Mr. McKirdy's misconduct and was not prepared to make a declaration that it had acted dishonestly. He felt that in the final stages Mrs. Hall was persuaded to join

in the conspiracy, and her failure to give evidence did not assist her case. However we think such an inference was more than the circumstances justified for such a serious reflection on her character. Mrs. Hall was, of course, in the position of getting a far better bargain if the sale to Bilo Limited fell through because she did not have to remedy the breaches or share the proceeds of the Cockburn sale. There is little to suggest that she knew anything about the Company's work on the property or the arrangements it made with Mr. Cork. She seems to have left the Bilo matter entirely to him and the solicitors, who were acting for all parties, and her own solicitors advised her in the sale to Cockburn. There is nothing to suggest she knew of his dealing with Mr. McKirdy.

Mr. Chauhan came in for strong criticism for aiding and abetting Mr. Cockburn in the conspiracy which he found existed and certainly his conduct over the caveat may not bear close scrutiny into his professional competence. But we must point out that he was apparently given no indication that such a finding might be made against him, nor any opportunity to explain the situation. It may well be that he simply accepted Mr. Cockburn's advice that there was a signed sale note of 24th October 1980 and although this might have been unwise, it does not necessarily suggest collusion to produce a false document based on a false declaration. We now know the Judge was mistaken in criticising him for the way he prepared the final sale agreement between Mrs. Hall and Mr. Cockburn signed on the 9th April 1981. Correspondence produced to us by consent, to which we have referred, makes it clear that he dealt with Mrs. Hall through her own solicitors over this transaction and thereby acted with propriety. We must therefore conclude that the criticism of him and his firm may

not have been justified and in the circumstances should not have been made.

The Board's Consent:

After holding that the Board's refusal to consent was not final in the circumstances, and that Mrs. Hall should have given Bilo Limited the opportunity to comply with the new conditions, the Judge went on to deal with the effect of the transactions between Mr. Philp, his solicitors and Mr. McKirdy in considering whether he could hold that consent had in fact been given by the Board. This was never pleaded by the plaintiff, nor was it apparently relied on at the trial He pointed out that Section 12(1) of the Native Land Trust Act (which deals with consents to assignments) does not require consent to be in writing. It simply recited that it must be first had and obtained. He concluded that the Board did consent or must be deemed to have consented to the transfer, and in these circumstances the purported refusal of 31st March must be considered a nullity. In support of this he decided there was no breach by Mrs. Hall of any of the conditions of the lease at the relevant time. Mr. McKirdy simply failed to appreciate that there was no building covenant. He discussed the application of clause 14 which we read as requiring the tenant to maintain and repair buildings already erected on the land. He also felt that there had been no breach of clause 18 dealing with soil erosion, but in any event the work specified had been duly completed by Bilo Limited. Accordingly he held that the Board's consent must be deemed to have been given to the proposed transaction because it could not seek to enforce the non-existent building covenant and nothing further needed to be done by Bilo Limited. Alternatively he thought that Mr. McKirdy had specified its requirements and committed the Board to grant consent when they were met; or in fact it consented subject to them being met.

Attractive though these conclusions may be, we regret that we are unable to accept them. First, although the Act does not require a written consent, it is clear from the printed form used by the Board (which, incidentally, does not accord with Form 3 in the Regulations) that is contemplates consent will be in writing, and this points away from any intention by Mr. McKirdy to give an oral consent. Secondly, the letters from him consistently maintained that the Board required the breaches to be remedied before it would consider the application and we cannot read anything further into the assurances by Mr. McKirdy and other officers beyond their own view that any application would then be favourably regarded. This is nothing more than an indication, and is all that enquirers would normally be seeking in these circumstances. Thirdly, we are quite satisfied that this is how Mr. Philp understood these assurances. The correspondence from him and his solicitors - as well as their pleadings - clearly demonstrate that they knew consent had not been granted.

The provisions of section 12(1) (which we set out later) make it quite clear that the Board has an absolute discretion whether or not to consent to a transaction. We agree with Sir John Falvey's submission that the conditions which it sought to impose in this instance were within its competence, even though they may have been the result of a misunderstanding of the lease by some of its officers. He referred us to Gibson v. Manchester City Council (1979) 1 All E.R. 972 in support of his submission that a statement the Board will give consideration to the application following fulfilment of its requirements does not mean that it will give its consent. This accords with the views we have just expressed.

Illegality:

Having concluded that there was no consent, we now turn to the question of illegality. Section 12(1) of the Act reads :-

> "12.-(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

Only Mr. Cockburn raised illegality in his pleadings, and during the course of the trial counsel for Mrs. Hall and Cork Builders Limited raised the issue for the first time in their final addresses. It was considered at some length by the Judge who took the view that Bilo Limited did not go into possession of Lot 6, reclamation work having been done as required by the Board before it would grant its consent, and not under any provision of the agreement. It paid the balance of the purchase price to the solicitor who was also acting for Mrs. Hall and the Judge said it was difficult to understand why he prepared and obtained execution of the transfer and thereafter paid her $5,000 and credited $4,000 to Mr. Cork. He referred to Mr. Keil's explanation that such payment was pursuant to the agreement which provided that the balance was payable in cash on production of a transfer of the lease. With respect we find no difficulty in understanding why Mr. Keil made these payments. His evidence demonstrates that he did so in performance of the agreement and furthermore that this

was done in his capacity as solicitor for Bilo Limited.

The Judge went on to say that the agreement was inoperative until the Board's consent to the proposed transaction was obtained and Mr. Keil should not have paid out any trust moneys until then, and had no authority to do so. In such circumstances the payment could not be considered an implementation of the agreement by Bilo Limited and irrecoverable on the grounds that it was illegal. In support he referred to D.B. Waite (Overseas) Ltd. v. Sidney Leslie Wallath 18 F.L.R. 141 citing a passage on p. 145 by Gould V.P. to the effect that payment of a deposit under an agreement which was made subject to the Board's consent did not render it unlawful. However, the circumstances of that case are very different from this situation, where the whole of the purchase price was paid.

The provisions of Section 12(1) are drastic and are very widely expressed. They have been considered and applied in a number of cases, perhaps the leading one being Chalmers v. Pardoe (1963) 3 All E.R. 552 where the Judicial Committee accepted that there must necessarily be some prior agreement, so that the mere fact of its existence is not of itself a breach of the section. In Jai Kissun Singh v. Sumintra (1970) 16 F.L.R. 165, 170 Gould V.P. said a signed agreement, held inoperative and inchoate while consent is being sought, is not caught by section 12. The problem lies in determining what acts done in relation to that agreement constitute it a "dealing" with the land, rendering it illegal. The consensus of the majority in that case suggests that this would occur once it was acted upon as a valid agreement for sale (Tompkins J.A) or implemented in any way touching the land (Gould V.P.)

Mr. Reddy referred us to the judgment of Henry J.A. in Phalad v. Sukh Raj C.A. 43 of 1978 of 8th December 1978. At page 9 he said :-

> "The words 'alienate' and 'deal with' as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the information of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof."

We agree that if Bilo Limited had confined its actions to remedying the breaches on behalf of Mrs. Hall for which she was responsible, they would not be regarded as performance of the agreement amounting to a "dealing with the land". But from the correspondence, confirmed by Mr. Philp's evidence, the company did more than this; it cleared the land and moved the dividing fence to the Queens Road frontage, thereby keeping out the public and taking over possession so that it could be used in conjunction with the other two lots (4 and 5) acquired from Cork Builders Limited. Even though this was done at Mr. McKirdy's suggestion it must be regarded as an act of possession pursuant to the agreement. Taken in conjunction with payment and crediting of the full purchase price by the company's solicitors to Mrs. Hall and Cork Builders respectively - also done in terms of the agreement - the situation was reached where the only matter remaining to be done by the purchaser was obtaining the consent and the legal formality of receiving and registering the transfer, already signed.

These actions take the case for beyond the situation where the agreement was merely held inoperative and inchoate while consent was being sought, and we must come regretfully to the conclusion that they converted it into a "dealing" with the land, rendered it illegal, null and void by the Section. We say "regretfully" because of the Judge's assessment that Mr. Philp acted throughout in good faith in his dealings with the other parties. However, he must be bound by his solicitors' conduct in carrying out the terms of the agreement; in paying over the money Mr. Keil was clearly acting within the scope of his general authority from Bilo Limited. Both of them knew that the Board's consent was needed and that it had not been obtained when their respective acts of performance took place. Mr. Keil acknowledged this.

The Judge took a robust view of the equitable remedies available to Bilo Limited. We are satisfied that had it not been for the illegality, relief of the type discussed in Chalmers v. Pardoe could have been given, but the case also recognised that equitable rights cannot be brought into being by an unlawful transaction. That company is also unable to enforce any rights arising under the agreement itself, or dependent upon its existence.

Mr. Reddy submitted that the illegality in this transaction stemmed from the previous dealings between Mr. Cork and his company and Mrs. Hall, which he said were also in contravention of Section 12; and that on this occasion Mr. Cork was dealing with Bilo Limited as principal, by way of a sub-sale on his own behalf. Apart from the fact that the parties immediately involved admitted Bilo's pleading of his agency, all the evidence points to this fact and we

are satisfied the Judge was correct in his finding to this effect. Accordingly, the only material relevant to illegality is to be found in relation to the agreement of 26th November 1980.

Mr. Knight appeared for Cork Builders Limited in the appeal but took no part in the argument as his client was not affected by the Supreme Court judgment. However, he was concerned lest any question should arise which might involve that company, especially in view of Mr. Reddy's claim of previous illegality, which was only made in his additional grounds of appeal. We told Mr. Knight we would call on him only if it appeared his client might be faced with liability. As this judgment indicates no finding adverse to it, we do not need to hear from him.

He was unable to give any indication of his client's attitude to the question of refunding the money credited to it by Mr. Keil. On the other hand, Mr. Lateef told us that Mrs. Hall is prepared to pay Bilo Limited the $5,000 which she earlier attempted to refund if that Company is held not to be entitled to the land. While we do not take this as a binding undertaking or assurance, this attitude serves to confirm the view of Mrs. Hall's good faith which we arrived at earlier in this judgment.

In the result both appeals must succeed; the declaration made in the court below in respect of the Board's (third defendant's) refusal of consent, and the finding that it had already consented to the transfer of the lease, are set aside, as are the orders decreeing specific performance by Mrs. Hall (first defendant) of the agreement and the execution by her of a registerable transfer. It also follows

that the order that Caveat No. 18336 remain in full force must be set aside, since there was no valid agreement to support it. Similarly, the orders for costs must be set aside.

We consider this to be one of the rare situations in which the Court should exercise its discretion not to award costs to the successful appellants. The issue of illegality on which they have now succeeded was raised only by Mr. Cockburn in the pleadings, and was apparently not relied on at the trial by the other defendants until closing submissions. In view of the conclusions we have reached about Mr. Cockburn's conduct (which to a significant extent support the findings of the trial Judge) we think it would be unjust to award him costs when he has avoided the consequences that a judgment on the merits would have involved only by the finding of illegality. Bilo Limited acted in good faith and did not set out deliberately to breach Section 12(1), as happens in so many cases. It is a heavy loser. Because of Mr. McKirdy's complicity we also think it would be unjust to award costs to the Board. Indeed, after considering the matters brought to light by this litigation, the Board may find itself able to remedy the harm done by its own officer to Bilo Limited, should it be asked to consent to another application. We understand the one given to the Cockburn transaction may now have lapsed.

While the judgment did not implicate Cork Builders Limited we find its apparent willingness to retain the money it received from Bilo Limited a factor which must influence us against awarding costs to it. Mrs. Hall's attitude (expressed through her counsel) is consistent with

the fair dealing which we would have expected all the defendants in this unfortunate episode to have displayed. Costs in relation to Cork Builders Limited and Mrs. Hall are reserved and we will consider further submissions from counsel, which may be in writing if desired. There will be no order for costs for Mr. Cockburn or the Board, either in the Supreme Court or on this appeal.

Sgd. G.D. Speight
Vice-President

Sgd. B. O'Regan
Judge of Appeal

Sgd. M.E. Casey
Judge of Appeal