IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 6 OF 2012
(High Court HBC 172 OF 2004)

BETWEEN	:	**iTAUKEI LAND TRUST BOARD**
		Appellant
AND	:	**SHAINAZ BEGUM BIRGES aka SHAINAZ BEGUM as Executrix and Trustee of the Estate of JAFAR ALI (deceased)**
		First Respondent
AND	:	**ELO RAUGA**
		Second Respondent
Coram	:	**Calanchini P** **Basnayake JA** **Corea JA**
Counsel	:	**Mr I Lutumailagi for the Appellant** **Mr P Chaudhary for the First Respondent** **Mr K Qoro for the Second Respondent**
Date of Hearing	:	**13 September 2013**
Date of Judgment	:	**3 October 2013**

JUDGMENT

Calanchini P

[1]. This is an appeal against the decision of the High Court at Lautoka delivered on 15 December 2011. The Court ordered the Appellant to pay to the First Respondent

compensation in the sum of $50,000.00 together with interest calculated at $19,500.00. The Appellant was also ordered to pay costs in the sum of $2000.00 to each of the Respondents within 21 days.

[2]. The First Respondent commenced proceedings in the High Court at Lautoka by writ of summons dated 21 June 2004. In a lengthy Statement of Claim the First Respondent claimed a declaration that the Appellant breached an agreement made between the First Respondent and the Appellant, a declaration that the issuance of a lease to the Second Respondent was fraudulent, an order that the registration of that lease issued to the Second Respondent be cancelled or alternatively that the Appellant and the Second Respondent pay to the First Respondent a sum equivalent to the current market value of the property, injunctions restraining the transfer and mortgaging of the lease, damages for loss of use and rental income, general damages, interest and costs.

[3]. The background facts to the claim were conveniently stated in the minutes of the pre-trial conference. Jafar Ali (deceased) was the lessee of Crown Lease number 57462. The lease was for a term of 44 years, 2 months and 30 days commencing on 1 October 1954 and expiring on 31 December 1998. Jafar Ali died on 12 July 1989 and probate of his will was granted to his wife Shamshad Begum on 24 January 1990 in accordance with the provisions of the deceased's will dated 24 January 1984. The First Respondent became the executrix and trustee of the estate of Jafar Ali deceased by Deed dated 11 August 2004 (the year is presumably a misprint since this fact is pleaded in the Statement of Claim dated 10 June 2004). During the course of his life Jafar Ali had constructed a concrete dwelling house on the said leased land. After the expiry of the Crown Lease on 31 December 1998 the said lease was to revert to a native lease under the control of the Appellant. By letter dated 24 August 1998 the Appellant wrote to Shamshad Begum (the wife of the deceased as trustee of the estate) in Sydney offering a new lease over the Crown Lease for a period of 99 years upon payment of $22,212.20 which included a premium of $20,500.00. In about September 1998 many tenants whose Crown Leases were expiring on 31 December 1998 in the area formed the Waiyavi Stage 1 Leaseholders Association to negotiate with the Appellant on behalf of all the members the terms and conditions of the new leases and costs payable for the new leases. The Association reached an agreement

with the Appellant on behalf of all its members. However the Appellant offered a lease over the land in the now expired Crown Lease to the Second Respondent and registered him as lessee in native lease number 24797 on 27 May 1999.

[4]. For reasons that are not relevant to the appeal, the learned trial Judge concluded that there was no fraud on the part of the Appellant and the Second Respondent. He also concluded that there was no binding agreement made by the Appellant to issue a lease after the 31 December 1998 to the estate of the deceased. The trial Judge also accepted that it was only after there had been no reply to its letter dated 24 August 1998 that the Appellant offered a lease to the Second Respondent.

[5]. The learned trial Judge dealt with the remaining issue of damages as a claim for compensation based on unjust enrichment. The Judge accepted the evidence that when a sitting tenant's lease is not renewed, the Appellant arranges for an inspection and pays compensation for improvements that were built on the land by the sitting tenant. The learned trial Judge rejected a defence raised by the Second Respondent that the building was not constructed with the necessary approvals and consent. The issue had not been raised by the Appellant in its Defence and the learned Judge noted that if accepted the Second Respondent would have been required to demolish the building as it stood. The learned Judge also rejected the Appellant's claim that it was the State (i.e. the Crown) that should pay any compensation due to the First Respondent.

[6]. Treating the claim as one of compensation for the value of the improvements left on the land as at the date the lease expired on 31 December 1998, the learned trial Judge concluded, for reasons that are again not relevant to this appeal, that the value of the improvements should be fixed at $50,000.00 and ordered that the Appellant pay that amount to the First Respondent. As noted interest in the sum of $19,500.00 was awarded and costs were ordered to be paid to both the First and Second Respondents in the sum of $2,000.00 each.

[7]. It is against that judgment that the Appellant now appeals to this Court seeking an order that the judgment be set aside in its entirety on the following grounds:

'1. That the learned trial Judge _ _ _ erred in fact and in law and/or mixed law and fact in:

(i) Failing to take due consideration of the fact that the 1st Respondent/original Plaintiff as holder of lease No.57464 and as such a sub-lessee of native land did not obtain the approval of the Appellant/original 1st Defendant for the construction of a permanent dwelling structure on the subject land; and

(ii) Failing to take due consideration of the fact that the consent granted to the 1st Respondent/original Plaintiff by the Director of Lands to build a permanent dwelling structure on the said land did not amount to such a consent being granted by the Appellant/original 1st Defendant."

[8]. From the grounds of appeal that have been set out above it is clear that the only issue in the appeal raised by the Appellant is consent. In effect, the Appellant's grounds of appeal imply that the First Respondent was required to obtain the consent of the iTaukei Land Trust Board to construct a dwelling house on the land leased by the First Respondent (as trustee of her father's estate) from the Director of Lands. The grounds further imply that although the First Respondent had obtained the consent of the Director of Lands there had been no consent sought at any time nor any consent given at any time by the iTaukei Land Trust Board for the First Respondent to construct a dwelling house on the leased land.

[9]. Before considering the merit of the grounds of appeal, there is a preliminary matter that must first be determined. The preliminary issue concerns the fact that the Appellant's grounds of appeal raise only one issue which issue was not pleaded by the Appellant in its Defence. The claims that the First Respondent should have obtained the consent of the iTaukei Land Trust Board to construct a dwelling house on the leased land and that such consent had not been sought nor obtained were not pleaded. The Appellant did not file any written closing submissions. So far as the Appellant was concerned, the issue was not before the Court below.

[10]. Somewhat surprisingly and in my judgment unnecessarily, to the point of being irrelevant and prolix, the Second Respondent as Second Defendant raised the issue in his Defence in paragraph 14. That paragraph stated:

> *"14. Paragraph 14 is admitted. The 2nd Defendant states that at the expiry of the Plaintiff's Crown Lease on 31 December 1998 and that it being reverted back to the 1st Defendant for its control and administration, the Plaintiff's property being a fixture became part of the land. Any compensation thereof has to be paid by the Director of Lands if it consented to the property being built. No consent was obtained by the 1st Defendant for such building to be built on the said lease let alone not being removable."*

[11]. In her reply the First Respondent pleaded that the consent of the Director of Lands had been obtained. The claim made by the First Respondent in paragraph 14 of her Statement of Claim was to the effect that no contribution to the property had been made by either the Appellant or the Second Respondent.

[12]. The only substantive allegation made by the First Respondent in the Statement of Claim against the Second Respondent was to the effect that the registration of his lease had been achieved through fraud. It must of necessity be a claim that the Second Respondent's indefeasible title through registration was obtained by fraud on the part of the Second Respondent. Whether the First Respondent did or did not have consent from either the Director of Lands or the iTaukei Land Trust Board to erect a dwelling house on the leased land had nothing to do with the allegation of fraud that was made by the First Respondent against the Second Respondent.

[13]. It should be noted that although raised by the Second Respondent in his Defence, the matter of consent to construct a house was not addressed in the closing written submissions filed by Counsel for the Second Respondent. The learned trial Judge had not allowed the Second Respondent to raise the issue during the course of the trial (para. 14 of the judgment). At page 250 of the Record there is recorded the comments of the learned trial Judge that he would not allow Counsel for the Second Respondent to ask questions on illegibility of the buildings being constructed because *"issue was not raised in the pleadings."* On the same page the learned trial Judge has noted that the Court disallowed question on *"whether approval was obtained by NLTB."*

[14]. The preliminary issue is whether the Appellant can raise the issue of consent as a ground of appeal under those circumstances. Ordinarily a party to an appeal will not be allowed to raise for the first time a point which was not taken in the court below.

As a starting point it needs to be re-stated that the issue was not raised by the Appellant in its pleadings (i.e. its Defence). In my judgment there is a distinction between this Court deciding an appeal on a ground although not raised as a ground of appeal, was raised at trial, and this Court deciding an appeal on a ground of appeal which was not raised in the pleadings nor *"thrashed out"* at the trial. The former is permitted under Rule 22(4) of the Court of Appeal Rules. The question is whether the latter is permitted under section 17 of the Court of Appeal Act which states:

> *"Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal under the provision of this Part (Part III Appeals in Civil Case) on any terms which it thinks just."*

[15]. Assuming for the present that there was a requirement imposed on the First Respondent by written law to obtain the consent of the Appellant (iTaukei Land Trust Board) to construct a dwelling house on the leased land, whether such consent was or was not obtained is a question of fact. If the Appellant intended to rely on this requirement and intended to establish by evidence that no such consent had been obtained, it was incumbent upon the Appellant to plead that fact in its Defence.

[16]. In **Smith –v- Cammel Laird and Company, Limited** [1938] 2 KB 700 Greer LJ at page 717 quoted the House of Lords decision in **The Tasmanian** (1890) 15 App. Cas. 223 at page 225:

> *"a point _ _ _ not taken at the trial and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized _ _ _ a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation, could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."*

[17]. Although the decision of the Court of Appeal in **Smith** (supra) was reversed by the House of Lords, the passage quoted by Greer LJ above was not impugned in any of the speeches in the subsequent decision.

[18]. The point was discussed by the High Court of Australia in **Suttor –v- Gundowda Proprietary Limited** (1950) 81 C.L.R. 418 at page 438:

> *"The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."*

[19]. In the same decision the Court quoted (at page 438) with approval from the judgment of the Privy Council delivered by Lord Hobhouse in **Grey –v- Manitoba and North Western Railway Co. of Canada** [1897] A.C. 254 at page 267:

> *"The questions now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the courts below. As the matter stands they have not been touched by the courts below _ _ _ they (their Lordships) confine themselves to deciding the issues which the court below was invited by the Plaintiffs to decide."*

[20]. In the High Court the Appellant had not raised in its Defence the First Respondent's failure to obtain the consent of the iTaukei Land Trust Board to construct the dwelling house. As a result the First Respondent was not called upon to deal with the issue in its reply nor was it called upon as between the First Respondent and the Appellant to lead evidence on the point. Had the First Respondent attempted to do so or had the Appellant attempted to do so, such evidence would have fallen outside of issues raised by the pleadings and ruled inadmissible.

[21]. The issue was raised by the Second Respondent in its Defence. The First Appellant in her Reply stated that the First Respondent did have the consent of the Director of Lands to construct the dwelling house. The Second Respondent did not address the issue in his closing submissions. The learned trial Judge, in my judgment, correctly disallowed questions being asked on the issue of consent from the iTaukei Land Trust Board. It was not a relevant issue as between the First and Second Respondents. The Appellant had not seen fit to raise the issue in its Defence.

[22]. As a result the learned trial Judge had not been called upon to decide (1) whether the consent of the iTaukei Land Trust Board was required for the First Respondent to construct a dwelling house on his leased land and (2) whether such consent had been obtained by the First Respondent. Neither of these matters was properly before the learned trial Judge.

[23]. It cannot reasonably be claimed that this Court has before it the material in the form of documents and recorded evidence that would be necessary to decide the issue. There is no documentary evidence in the form of any instrument of assignment to show how land described on the lease given by the Director of Lands to Jafar Ali way back in 1954 had been assigned as native land to the Director of Lands. There was no documentary evidence as to the consent given by the Director of Lands to Jafar Ali. It would be necessary for a court to determine whether the written consent of the Director of Lands was sufficient or whether by its terms there remained a requirement to obtain the consent of the Appellant.

[24]. The lease given by the Director of Lands to Jafar Ali was approved by the Board of the NLTB (the Appellant) in 1955. Clause 3 of that lease required Jafar Ali to erect within two years a residential building on the leased land to the satisfaction of the Director of Lands. This was complied with.

[25]. In my judgment there is no basis for this Court to conclude that it would be just to allow the Appellant to seek to overturn the judgment of the Court below on a ground that raises mixed issues of law and fact when the matter was not pleaded by the Appellant, was not *"thrashed out at trial"* and upon which neither the Appellant nor the Second Respondent chose to make any closing submissions.

[26]. Even if I was prepared to allow the appeal to proceed on this ground, I am not satisfied that the submissions filed by the Appellant provide a basis in law for concluding that the First Respondent was required to obtain the Appellant's consent to construct the dwelling house on his leased land.

[27]. The provision upon which the Appellant principally relies is section 12 of the iTaukei Land Trust Act Cap 134. That section requires a lessee to first obtain the consent of

the Board as lessor or head lessor in order to alienate or deal with the leased land whether by sale, transfer or sub lease or in any other manner whatsoever. The Board has a discretion whether to grant consent and non-compliance with the section by the lessee will render the transaction null and void. It is the submission of the Appellant that section 12 required Jafar Ali (the lessee) to obtain the Board's approval prior to erecting the residential house on his leased land. In other words, the construction of a dwelling house on the land constitutes some form of alienation or dealing with the leased land. The Appellant relies on the decision in **Lee –v- Mitlal and Another** (1966) 12 FLR 4. However the facts in that case can be distinguished from the present. In **Lee's** case (supra) there was an alienation of leased land which was subject to the consent of either the Director or the Board. The case did not involve the question whether consent is required for a lessee to construct a dwelling house on his leased land.

[28]. The decision of the Privy Council in **Chalmers –v- Pardoe** [1963] 3 All ER 552 can also, in my judgment, be distinguished. In **Chalmers –v- Pardoe** (supra) the Privy Council concluded that when a licence to occupy together with possession was given by the lessee to another person for the purpose of erecting a dwelling house and accessory buildings then a dealing of the land took place. Section 12 of the iTaukei Land Trust Act was activated and the prior consent of the Board required because there had been (1) a licence to occupy given to a third person, (2) possession given to that third person and (3) an intention by that third person to construct buildings on the leased land. All three elements together constituted a dealing of the leased land *"in any other manner whatsoever."* In my judgment these words are to be interpreted in a manner that is consistent with the words *"sale, transfer or sub-lease."* However in the present case, it was the lessee himself, not some third person, who constructed the dwelling house on his leased land. Furthermore he did so in compliance with a clause in his lease which expressly required him to do so. Finally the Appellant had given its approval to the lease and hence to the clause and its obligations.

[29]. In my view there are no other legislative provisions and no further material to which reference was made by the Appellant in the submissions filed in this Court that are of any assistance to the Appellant. If the appeal had proceeded, I would have concluded

that the Appellant had failed to establish any legal basis to support his grounds of appeal.

[30]. For all of the above reasons I would dismiss the appeal and award costs in the sum of $3000.00 to the First Respondent and $2000.00 to the Second Respondent.

Basnayake JA

[31]. I agree that the appeal should be dismissed and I also agree with the orders proposed by Calanchini P.

Corea JA

[32]. I have read the draft judgment of Calanchini P and agree with his reasons and the proposed orders.

Orders:

1. *Appeal dismissed.*

2. *Appellant to pay costs to the First Respondent in the sum of $3000.00 and to the Second Respondent in the sum of $2000.00 within 28 days from the date of this judgment.*

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HON. MR JUSTICE CALANCHINI
PRESIDENT

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HON. MR JUSTICE BASNAYAKE
JUSTICE OF APPEAL

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HON. MR JUSTICE COREA
JUSTICE OF APPEAL